

# EQUITY NOTES

## Table of Contents

<b>1. INTRODUCTION</b> .....	<b>3</b>
<b>[1.1] EQUITY AS AN ELEMENT OF THE AUSTRALIAN LEGAL SYSTEM</b> .....	<b>3</b>
[1.1.1] Equity.....	3
[1.1.2] A brief history of equity.....	4
[1.1.3] A map of equity.....	6
[1.1.4] The maxims of equity .....	6
<b>[1.2] THE RELATIONSHIP BETWEEN EQUITY AND COMMON LAW</b> .....	<b>7</b>
<b>2. BREACH OF CONFIDENCE</b> .....	<b>11</b>
<b>[2.1] INTRODUCTION</b> .....	<b>11</b>
<b>[2.2] ELEMENTS</b> .....	<b>12</b>
[2.2.1] Specificity.....	12
[2.2.2] Quality of confidence .....	14
[2.2.3] Circumstances importing the duty.....	29
[2.2.4] Breach of duty.....	33
<b>[2.3] DEFENCES</b> .....	<b>38</b>
[2.3.1] UK position on public interest and iniquities defences.....	38
[2.3.2] Australian position on public interest and iniquities defences .....	38
<b>[2.4] REMEDIES</b> .....	<b>43</b>
<b>3. FIDUCIARY RELATIONSHIPS, BREACH OF FIDUCIARY DUTY</b> .....	<b>43</b>
<b>[3.1] INTRODUCTION</b> .....	<b>43</b>
<b>[3.2] EXISTENCE AND SCOPE OF FIDUCIARY RELATIONSHIPS</b> .....	<b>44</b>
[3.2.1] Accepted categories.....	44
[3.2.2] 'Factual' or non-standard categories .....	45
[3.2.3] Scope of fiduciary relationships.....	52
<b>[3.3] BREACH OF FIDUCIARY DUTY</b> .....	<b>55</b>
[3.3.1] The conflict rule .....	59
[3.3.2] The profits rule.....	66
[3.3.3] Defences to breach of fiduciary duty .....	71
<b>[3.4] THIRD PARTY LIABILITY</b> .....	<b>74</b>
[3.4.1] Knowing assistance .....	76
[3.4.2] Knowing receipt .....	84
<b>[3.5] REMEDIES FOR BREACH OF FIDUCIARY DUTY</b> .....	<b>88</b>
<b>4. EQUITABLE REMEDIES</b> .....	<b>88</b>
<b>[4.1] PERSONAL REMEDIES</b> .....	<b>89</b>
[4.1.1] Specific performance.....	89
[4.1.2] Injunction.....	91
[4.1.3] Declaration .....	97
[4.1.4] Equitable rescission .....	98
[4.1.5] Account of profits.....	103
[4.1.6] Equitable compensation.....	105
[4.1.7] Election.....	116
[4.1.8] Damages in lieu of injunction or specific performance.....	117
[4.1.9] Common law principles and equitable remedies .....	121
<b>[4.2] PROPRIETARY REMEDIES</b> .....	<b>127</b>
[4.2.1] Introduction .....	127
[4.2.2] Equitable proprietary entitlements as a precondition to proprietary remedies.....	130
[4.2.3] Bankruptcy considerations .....	138

[4.2.4] Tracing .....	138
<b>[4.3] BARS TO RELIEF .....</b>	<b>150</b>
<b>5. ASSIGNMENT OF PROPERTY RIGHTS IN EQUITY .....</b>	<b>153</b>
<b>[5.1] VOLUNTARY ASSIGNMENTS OF LEGAL PROPERTY THAT ARE INCOMPLETE AT LAW .....</b>	<b>154</b>
[5.1.1] Equity and incomplete gifts of property.....	154
[5.1.2] The relevance of consideration .....	164
<b>[5.2] ASSIGNMENTS OF PROPERTY THAT ARE RECOGNISED ONLY IN EQUITY .....</b>	<b>164</b>
<b>[5.3] ASSIGNMENTS OF FUTURE PROPERTY.....</b>	<b>166</b>

considerations of mutuality, which require a fiduciary to voluntarily assume its burden.

- The *McInerney* decision was at odds with equity's fundamental respect for property rights. The records were the property of D, and P had not bargained to be given the records on request.

*On exemplary damages for breach of fiduciary duty (see Digital Pulse)*

- The conscience of equity is against the idea of inflicting punishment for its own sake. The fact that the punishment of miscreants may be in the public interest is beside the point, because equity is concerned with the conscience of both parties and doing justice between both parties.
- Because equity is concerned with balancing what is just between parties, it goes against the conscience of equity to impose any disproportionate burden on a defaulting fiduciary or to see that a beneficiary receives a windfall.
- Equity intervenes to prevent the enforcement of contractual provisions for the making of punitive payments in the case of breach. It would be strange, then, if breach of fiduciary duty could result in an award of exemplary damages.
- The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of the CL DOC.
- Accordingly, the decision of the majority of the NSWCA in *Digital Pulse* was correct.

*On Farah*

- The ethical concerns embodied in equitable doctrines may not be able to be shoehorned into the CL categories collected under the rubric of the law of restitution.
- It would be 'offensive to notions of equity and common sense to hold [a defendant] liable for a supposed breach of trust as trustee for [the plaintiff] at a time when it had never undertaken and was not aware that any such obligation existed.'

*The legitimacy of self-interested behaviour and the expansion of equity:* 'A question-mark must hang over any idea of evolution which involves an ineluctable expansion in the liabilities imposed by the courts upon honest citizens. Is it necessarily a good thing that arm's length transactions in the commercial life of the community should be subject to regulation in accordance with standards of behaviour devised for the regulation of relationships of trust and confidence which are distinctly not arm's length relationships? ... Equity never set out to bring to heel ... "the uncontrollable and disobedient psychology of the business world."' "

## 2. BREACH OF CONFIDENCE

### [2.1] INTRODUCTION

- *Breach of confidence:* Breach of confidence is a doctrine developed by equity in its exclusive jurisdiction that recognises and protects certain rights of confidentiality; it pertains to the unauthorised use of confidential information.
- *Purpose:* The equitable obligation of confidence is used to protect –
  - commercially valuable information (eg trade secrets);
  - personally private information – from misuse or exploitation by others.
- *Basis of the doctrine:*
  - 'The jurisdiction [to restrain publication of confidential information] is based, not so much on property or on contract, but rather on the duty to be of good faith. No

person is permitted to divulge to the world information which he has received in confidence, unless he has just cause for doing so': *Evans (Denning LJ)*.

- 'Like most heads of equitable jurisdiction, [BOC's] rational basis does not lie in proprietary right. It lies in the notion of an obligation of confidence arising from the circumstances in or through which information [is] communicated or obtained': *Moorgate Tobacco*.
- *Jurisdictional overlap*:
  - Other regimes for protecting confidentiality exist, such as contract, employment and IP law. Breach of confidence is a purely equitable claim — it operates independently of the CL.
  - Note that this places the equitable obligation of confidence in a somewhat unique position — most equitable responsibilities (eg trust, fiduciary obligations) have no direct common law counterparts.
  - Equitable obligations of confidence arise independently of any right of property, contract, employment law, etc.

## [2.2] ELEMENTS

- A successful claim for breach of confidence requires that P demonstrate the existence of the following four elements:
  - (1) the information said to be confidential must be identified with *specificity* and not merely in global terms;
  - (2) the information must have the *necessary quality of confidentiality* (it cannot, eg, be common or public knowledge);
  - (3) the information must be received by D in *such circumstances as to import an obligation of confidence*;
  - (4) there must be an actual or threatened *misuse of the information*, without the consent of P.

(*Smith Kline & French Laboratories (Gummow J)*).
- Elements (2)–(4) derive from the classic statement of the doctrine by Megarry J in *Coco*. Element (1) has been elaborated in more recent cases.

### [2.2.1] Specificity

- *Specificity*: The putatively confidential information must be defined with sufficient precision to attract an equitable obligation of confidence.
- *Rationale*:
  - The court must be able to assess (1) whether the information P claims is confidential is, in fact, confidential; or (2) whether any confidentiality the information once had has been destroyed.
  - If called upon to restrain a misuse by injunction, the court must be able to determine the scope of the injunction.
- *Exception*: Where complete specification of the information in pleadings would have the effect of destroying the quality of confidence in the information, P may be allowed some lack of specificity.

<b><i>O'Brien v Komesaroff</i></b> HCA 1982
<b>FACTS</b>
<ul style="list-style-type: none"> <li>● <i>Parties</i>:           <ul style="list-style-type: none"> <li>- A was an accountant.</li> <li>- R was a solicitor whose practice included creating and implementing tax minimisation schemes.</li> </ul> </li> </ul>

<ul style="list-style-type: none"> <li>• <i>Background</i>: A, believing R's schemes could be useful in his own business, obtained a set of the necessary documents from R, and prepared unit trust deeds for his clients based on R's documents. R also made some oral communications to A as to the effect and practical operation of his scheme.</li> <li>• <i>Proceedings</i>: R brought proceedings for (breach of copyright and) breach of confidence.</li> </ul>
<b>ISSUE</b>
<ul style="list-style-type: none"> <li>• Breach of confidence – elements – specificity.</li> </ul>
<b>HELD</b>
<ul style="list-style-type: none"> <li>• <i>In the present case</i>: R failed to identify any <i>particular pieces of information</i> in the relevant documents or oral communications that attracted an obligation of confidence. Generally speaking, the contents of the documents were matters of common knowledge.</li> </ul>
[The above notes are taken from the judgment of <a href="#">Mason J</a> ].

- PE notes that *Komesaroff* also concerned the second element of the action for BOC; namely, the requirement that the subject information have the necessary quality of confidence about it. The trust deeds and other documents containing legal information were not confidential in nature, because in a rule of law democracy the workings of the law are in principle (if not in fact) public knowledge.

<p><b><i>Ocular Sciences v Aspect Vision Care</i></b> High Court of England and Wales 1997</p>
<b>FACTS</b>
<ul style="list-style-type: none"> <li>• <i>Background</i>: <ul style="list-style-type: none"> <li>- A and R entered into an agreement whereby A would supply soft contact lenses to R. A company owned by A manufactured the lenses for A.</li> <li>- Relations between A and R deteriorated to the extent that A tried to put R out of business by increasing the price of the lenses and then ceasing their supply altogether.</li> <li>- R set up its own manufacturing plant and made its own lenses to the same design as those made by A.</li> </ul> </li> <li>• <i>Proceedings</i>: A brought proceedings against R alleging, inter alia, breach of confidence in respect of the design of the lenses, the processes and testing procedures used in their manufacture, and certain software used by A.</li> </ul>
<b>ISSUE</b>
<ul style="list-style-type: none"> <li>• Breach of confidence – elements – specificity – particularisation of pleadings.</li> </ul>
<b>HELD</b>
<p><u>Breach of confidence actions and abuse of process</u>: There is a real danger that breach of confidence actions will be used to oppress and harass competitors and ex-employees.</p> <p><u>Abuse of process: failure to give proper particulars</u></p> <ul style="list-style-type: none"> <li>• <i>P's duty to adequately particularise</i>: If P wishes to seek relief against D for misuse of confidential information it is its duty to ensure that D knows what information is in issue. Failure to give proper particulars may be a particularly damaging abuse of process.</li> <li>• <i>Rationale</i>: <ul style="list-style-type: none"> <li>- Requiring Ps to give full and proper particulars will minimise the risk that breach of confidence actions are brought vexatiously. If P fails to adequately particularise its case, the court may infer that the purpose of the litigation is harassment rather than protection of P's rights.</li> <li>- The allegations in a statement of claim for breach of confidence often impute conduct of a gravely improper (perhaps in some cases even criminal) character, and accordingly call for clear particularisation.</li> <li>- A court will find it difficult to enforce an injunction where the confidential information</li> </ul> </li> </ul>

- the subject of the injunction has not been properly identified.
- D must know what case he has to meet. D will be unable to show, say, that the relevant information is a matter of public knowledge if he is unsure of the precise nature of that information.

Abuse of process: providing particulars of information which is not confidential

- *Non-confidential information*: It can be an abuse of process to give proper particulars but of information which is not, in fact, confidential.
- *Rationale*: A claim based even in part on wide and unsupportable claims of confidentiality can be used as an instrument of oppression or harassment against D.

[The above notes are taken from the judgment of [Laddie J](#)].

[2.2.2] Quality of confidence

- *Quality of confidence*: Information must have ‘the necessary quality of confidence about it’: [Coco \(Megarry J\)](#).
- *Confidential information*: ‘[F]acts, schemes or theories which the law regards as of sufficient value or importance to afford protection against use of them by the defendant otherwise than in accordance with the plaintiff’s wishes’: [Meagher, Gummow and Lehane](#).

[2.2.2.1] DETERMINING WHETHER INFORMATION IS CONFIDENTIAL

- *Old test*: In [Ansell Rubber](#) (VSC, 1967), it was held that information is confidential if it can fairly be said that there would be difficulty in acquiring the information except by improper or unlawful means.
- *Current test*: As the justificatory basis for the action of BOC has shifted from the protection of trade secrets and similar information in commercial and employment relationships to include the protection of human autonomy and dignity, the test for what constitutes confidential information has shifted: see [Lenah Game Meats, Jane Doe](#).

<b><i>ABC v Lenah Game Meats</i></b> HCA 2001
<b>FACTS</b>
<ul style="list-style-type: none"> <li>• <i>Background</i>:               <ul style="list-style-type: none"> <li>- A intended to broadcast a videotape depicting the stunning and killing of brush tail possums on R’s premises.</li> <li>- The videotape had been obtained by third party trespassers. A knew that the tape had been made surreptitiously and unlawfully, at least by the time proceedings were instituted.</li> </ul> </li> <li>• <i>Proceedings</i>:               <ul style="list-style-type: none"> <li>- R sought an injunction restraining the publication on the grounds, inter alia, that such publication would constitute an actionable breach of confidence.</li> <li>- R unsuccessful at trial but successful on appeal to the TSC.</li> <li>- A appealed, arguing that the facts alleged in the statement of claim disclosed no (legal or) equitable basis on which R was entitled to injunctive relief.</li> </ul> </li> </ul>
<b>ISSUE</b>
<ul style="list-style-type: none"> <li>• Breach of confidence – elements – quality of confidence.</li> </ul>
<b>HELD</b>

- *Confidentiality*: There is no bright line which can be drawn between what is private and what is not.
- *Activities carried out on private property*: The fact that a certain activity is carried out on private property will not of itself clothe it with the necessary quality of confidence.
- *Offence test*: ‘The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.’
- *In the present case*: Information about slaughtering methods is not confidential: the operations of the abattoir are seen by workers, inspectors and other visitors, and are licenced by a public authority. The fact that the activities were carried out on private property does not have the effect of clothing the information with the necessary quality of confidence.

[The above notes are taken from the judgment of [Gleeson CJ](#)].

<i>Jane Doe v ABC</i> VCC 2007
FACTS
<ul style="list-style-type: none"> <li>• <i>Background</i>: <ul style="list-style-type: none"> <li>- P was raped by her estranged husband (H). H was convicted and sentenced.</li> <li>- D reported on the sentencing of H. It identified P and H by name, described the offences committed by H, revealed that the offences had occurred in P’s house and named the suburb in which the house was located.</li> <li>- The journalists who published the story plead guilty to offences under the <i>Judicial Proceedings Reports Act 1958</i> (Vic) s 4(1A), which makes it an offence in certain circumstances to publish information identifying a victim of a sexual offence.</li> </ul> </li> <li>• <i>Sharing of information</i>: <ul style="list-style-type: none"> <li>- P had told at least 14 people of the rape and H’s identity prior to the broadcast. They were all trusted friends of P, or members of P’s immediate family.</li> <li>- P had reported the rape and appreciated that the investigation and prosecution would inevitably involve the disclosure of her identity to those involved in those processes.</li> </ul> </li> <li>• <i>Proceedings</i>: P instituted proceedings alleging, inter alia, breach of confidence.<sup>3</sup></li> </ul>
ISSUE
<ul style="list-style-type: none"> <li>• Breach of confidence – elements – quality of confidence – the public domain.</li> </ul>
HELD
<p><u>Identifying confidential information</u></p> <ul style="list-style-type: none"> <li>• <i>Reasonable expectation test</i>: <ul style="list-style-type: none"> <li>- <i>Test</i>: Confidential or private information is information in respect of which a person has a reasonable expectation of privacy, ie, an expectation that it not be disclosed or published without their consent.</li> <li>- <i>Question of fact</i>: Whether P has a reasonable expectation of privacy is a matter for evidence. P’s conduct will be relevant here — for eg, if P consents to being identified in a news broadcast, their conduct may be seen as inconsistent with a reasonable expectation of privacy.</li> </ul> </li> <li>• <i>On the offence test</i>: <ul style="list-style-type: none"> <li>- <i>Practical test only</i>: The offence test is a ‘useful practical test.’ It is not a test of universal application.</li> </ul> </li> </ul>

<sup>3</sup> Nb P also alleged a tortious invasion of privacy, and succeeded on this ground. *Jane Doe* thus became the second case in Australia (after the QDC’s decision in *Purvis*) where a plaintiff was awarded damages for breach of privacy.

- *Construction*: The ‘highly offensive’ formulation applies to the act of disclosure of the information, not to the nature or quality of the information itself.

In the present case

- *Information easy to identify as confidential*: The information identifying P as the victim of a rape is information capable of being characterised as information which the person to whom it relates has a reasonable expectation would remain private, because –
  - the information is about participation in sexual activity (the fact that it is about *non-consensual* sexual activity and that H was identified as P’s estranged husband adds significantly to its private nature)<sup>4</sup>;
  - the prohibition on publication of the information by *JPRA* s 4(1A) adds to that expectation of privacy.<sup>5</sup>
- *Effect of disclosure*:
  - P’s disclosure of what H had done to her to trusted friends and family did not constitute conduct inconsistent with a reasonable expectation of privacy. This is so notwithstanding that P did not expressly ask any of them to keep the information confidential; P had a reasonable expectation that they understood from the nature of the information that it was confidential.
  - P’s reporting of the rape to the police cannot be regarded as conduct inconsistent with a reasonable expectation of privacy. To make such a finding would be to ignore the protection intended to be conferred on victims of sexual assault by *JPRA* s 4(1A) and would act as a powerful disincentive to reporting sexual offences.

[2.2.2.2] INFORMATION IN THE PUBLIC DOMAIN

- *Publicly accessible information*: Information loses its confidentiality when it enters the public domain.
- *Question of fact and degree*: Whether information has entered the public domain is a question of fact and is invariably one of degree.

<i>AFL v The Age</i> VSC 2006
FACTS
<ul style="list-style-type: none"> <li>• <i>Background</i>:               <ul style="list-style-type: none"> <li>- AFL players are contractually obliged to submit to random drug testing for use of recreational drugs. Contracts provided that the first two positive tests in respect of any player were to remain confidential. The third positive test would result in publication and penalty.</li> <li>- Three AFL players returned their second positive tests. This information found its way into the hands of D, who proposed publishing the players’ names.</li> <li>- Speculation and assertions as to the identity of the players could be found on internet discussion forums; the SMH published three names electronically before recalling the article; a caller on Fox Footy mentioned the name of one player; there was oral discussion vis-à-vis the identity of the players within the AFL (ie between officials, doctors, etc.).</li> </ul> </li> <li>• <i>Proceedings</i>:               <ul style="list-style-type: none"> <li>- P sought a permanent injunction to prevent publication.</li> </ul> </li> </ul>

<sup>4</sup> [Hampel J](#) considered the fact that H was identified was relevant because expert witnesses testified that where sexual offences are committed by persons with whom the victim has previously had an intimate relationship, feelings of humiliation, shame and guilt are often compounded.

<sup>5</sup> [Hampel J](#) noted, in obiter, that s 4(1A) would by itself have given rise to a reasonable expectation of privacy.