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Breach of Confidence

Define: [D] will owe a duty of confidence to [P] for [INFORMATION] if [P] successfully makes out all 4 elements of breach of confidence (BoC).

Specificity

- **Rule:** [P] must define with sufficient precision the information in question (**O'Brien**).
 - **Note:** Information can be virtually anything like photographs (**OK!**), tribal practices (**Foster**), workplace manuals (**Link 2**), etc.
- **Not Sufficiently Specific:**
 - An entire warehouse of documents → Some documents could be confidential others may not be (**Ocular Sciences**).
 - An entire tax minimisation scheme (**O'Brien**).
- **Sufficiently Specific:**
 - Game show concept (**Talbot**).
 - DNA/Genetic material of a nectarine (**Franklin**).
 - Specific photos (**Douglas v Hello**).
 - Tribal Rituals (**Foster**).

Necessary Quality of Confidence

- **Rule:** [P] must prove that [INFORMATION] has the necessary quality of confidence and in doing so prove the information was sufficiently secret and valuable (**Coco**).
- Relationships that create an inherent quality of confidence (OTF):
 - **Marriage** (**Duchess of Argyll**).
 - **Solicitor and Client** (**Lord Ashburton v Pape**).
- 1st Element - Secrecy:
 - Newspaper wants to Publish (OTF):
 - **State:** Like **AFL**, the fact that a newspaper wants to publish a “scoop” may indicate that the information has not yet entered the public domain.
 - Degree of Accessibility:
 - **High Degree:**
 - **O'Brien** – Legislation in tax avoidance scheme is “common knowledge”.
 - **Lenah** - Nothing preventing entry / many inspectors going in and out of factory / no attempt by factory to hide what was occurring.
 - **Low Degree:**
 - **AB v CD** – One's identity as a police informant was secret as very few people were aware.
 - **Jane Doe** – Could find out rape victim by attending open court but legal restrictions on revealing identity meant not accessible.
 - **Foster** – Closed religion unlike Christianity.

- **Talbot** – Pitched TV show where interview millionaires. Format/production, notes, script questions, presentation were specific and taken. P had “a particular take” on the format.
 - **Compilation of Publicly Available Information:**
 - **Link 2** – Compilation of various publicly available documents for a hotel accommodation business had the requisite skill.
 - **Genetic Development:**
 - **Franklin** - Nectarine grower bred new nectarine through cross-pollination and grafting which was stolen. **Held:** DNA developed through ingenuity.
 - **No Skill:**
 - **Douglas (Lord Walker Dissent)** - just because someone offers to pay for something does not mean it’s valuable. It’s banal – no product of human ingenuity, just photos of a wedding.
 - **If Satisfied** → Like Talbot, the format was not “self-evident” but rather...
- **Non-Commercial Case (OTF):**
 - **Rule:** Non-commercial information may be protected if it has the requisite value, especially if it is intimate or personal in nature (**Foster**).
 - **Note:** “Information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private” (**Lenah**).
 - **Religious Ceremonies:**
 - **Foster** – Book that would outline secret religious ceremonies of an aboriginal tribe → distinguish from a universal religion like Christianity).
 - **Intimate Information:**
 - **Giller** – Man filmed sex between him and his partner. They broke up. He wanted to show the video to 3rd parties. **Held:** Breach of confidence.
 - **Jane Doe** – Woman who witnessed a rape’s identity was revealed.

Circumstances Importing the Duty:

- **Rule:** Equity will restrain the publication of [confidential information improperly or surreptitiously obtained **OR** of information imparted in confidence which ought not to be divulged] (**Smith Kline**).
- **Giving Case - Objective Test:** The court will consider whether a reasonable person in the position of [D] would have realised the information was given in confidence (**Coco**).
 - **State:** [P] will likely contend that despite [INFORMATION] being given to [D] it was not to be feely used.