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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).
 - o An entire tax minimisation scheme (O'Brien).
- Sufficiently Specific:
 - Game show concept (Talbot).
 - o 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).
 - o 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 Ones 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.

- Circle of Confidence (OTF):
 - State: [P] may argue that like Jane Doe, [INFORMATION] was imparted to a circle of confidence which therefore does not vitiate secrecy.
 - Note: Must be a select number of people who are trusted with info.
 - Jane Doe P told friends about rape. P told prosecutors and police as they were needed to prosecute. Journalists in circle of confidence through statutory gag.
 - Lenah Trespassers not brought into CoC.
 - Foster Lots of people knew about religious ceremonies but closed religion.

Authority of Source of Information:

- Red Flag: Anonymous online gossip.
- State: Like AFL, [INFORMATION] could be construed as gossip or inuendo and non-authoritative as...
 OR
- State: Unlike AFL, [INFORMATION] could not be construed as gossip or inuendo and therefore non-authoritative as...
- AFL v The Age People speculating online (gossip columns) about the identity of players who tested positive to drugs, does not qualify as entering the public domain.

Effort to Restrict/Hide Information:

 Lenah - Info re possum canning practices could be seen by inspectors and other visitors. No effort to place confidentiality requirement on them.

Medium of Information:

 Giller - People knew P and D were sleeping together (knowledge not secret) but the actual media of depiction (VHS tapes – visual) was considered sufficiently secret.

• 2nd Element – Value:

- State: [INFORMATION] must be sufficiently important and valuable to warrant equity's protection (Coco).
 - Note: Value is determined objectively. Just because someone would pay for it not to be disclosed does not mean it is sufficiently important or valuable (Hello! – Photos of a celebrity wedding).

Commercial Case (OTF):

- Rule: As [INFORMATION] is commercial in nature, equity will protect
 it if was created through the "skill and ingenuity of the human brain"
 (Coco).
 - Note: the threshold is not that high → "Fairly undemanding test" (Link 2).
- Generic Idea with Skill Applied:

- 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 crosspollination 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).
- <u>Giving Case</u> **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.