

LAWS2015

Equity Mid Sem Scaffold

TOPIC 2: APPLICATIONS OF CONSCIENCE

Breach of Confidence

- ☐ Is there a contract between the parties.
- ☐ Information identified with specificity.
- ☐ Necessary quality of confidence.
 - ☐ Commercial Information.
 - ☐ Personal Information.
 - ☐ Government.
 - ☐ BUT, Public Domain.
- ☐ Obligation of confidence.
- ☐ Actual or threatened misuse?
- ☐ Does it fall under a defence? (Public Interest)
- ☐ Remedies

NB: Duty of confidence is only owed to the claimant *Frazer v Evans*

State principle: [PERSON] may bring a claim for breach of the equitable duty of confidence. Equity will restrain ‘the publication of confidential information improperly or surreptitiously obtained, or of information imparted in confidence which ought not to be divulged’ *Pape at 322*

Optus affirmed a 4-step test, clarifying the 3-step test position in *Coco v Clark*

[1] Is there a contract between the parties? Does the contract impose a contractual obligation of confidence?

- 1) Is there **no contract**?
 - a. then equity is available *Coco v Clark*
- 2) **Does the contract clearly envisage equitable remedies?**
 - a. then they will be available *Optus*
- 3) **Does the contract attempt to rule out equity?**
 - a. Prima facie, equity will not be available, however note this is a high bar *Optus* to rule out equity there must be;
 - i. An express, exhaustive statement defining confidential information
 1. This is a high bar, as the statement in *Optus* was not sufficient as it did not exclude equitable obligations and was treated as simply codifying the contractually protected information and not extinguishing the equitable ones.
 - a. “confidential information means...”
- 4) **Does the contract stipulate an obligation of confidence but is otherwise silent?**
 - a. In these circumstances the law is uncertain and contentious *Optus; Streetscape*
 - i. Barret JA’s obiter, in *Streetscape* supported the idea that where there is a contractual stipulation dealing with confidential information there is no room for an imposition of a equitable obligation.

- ii. However, the FCAFC in *Optus* it suggest that equity can provide other remedies and if the contract is silent, it should be presumed that there is both an equitable and contractual claim.

[2] Has the information been identified with sufficient specificity?

- 1) [Claimant] must identify the confidential information with sufficient specificity (not mere global terms) so that the court is able to frame an order that the defendant can comply with *O'Brien*
 - a. Per Mason J, you should be able to point to the part of the information which is not public knowledge.
 - b. The degree of specificity will depend on the circumstances of the facts *Sent v John Fairfax (Nettle J)*
 - i. Often it cannot be identified for fear of disclosure, so less precision may be necessary so as not to annihilate the confidence sought to be protected
 - c. Examples
 - i. *O'Brien* was a solicitor who claimed breach of confidence for tax scheme in trust deed. He could not point to the part of the document that was confidential, was not sufficient.
 - ii. *BBC v Harper Collins* the Plaintiff needed to specify which parts of the Top Gear White Stig's book was confidential not the whole book

[3] Does the information have the 'necessary quality of confidence'?

- 1) Per Gaudron J in *Johns v ASC* the information must have the necessary quality of confidence which means that it is; [A] intrinsically confident and [B] has not entered the public domain

a. [A] Is the information intrinsically confidential?

- i. There are generally three categories of confidential information
 1. Factors to consider *Australian Medic-Care Co Ltd v Hamilton Pharma*
 - a. The extent it was known to outside businesses/industry/others;
 - b. Was there a lot of skill and ingenuity to make the information;
 - c. Value of the information to business and others;
 - d. Steps taken to keep the information secret;
 - e. The fact that it was made known to the employee that the material was regarded as confidential;
 - f. The fact that industry practices support the assertion of confidentiality; and
 - g. The fact that the employee has been permitted to share the information in a certain way.
 - h. Reasonable people recognise the information as confidential info
 - i. **NB:** these are just to be used as a guide (refer to specific sections below)

ii. [1] Commercial Information

- iii. Is the information public property or public knowledge?
 1. **However**, if it is making of something using 'public materials' the court in *Coco* stated where 'ingenuity, skill and application of the human brain' may be enough to maintain the confidential quality of confidence.
 - a. **Employment**

TOPIC 3: Remedial Equity

Specific Performance

- ☐ Contract with Consideration?
- ☐ Damages inadequate?
- ☐ Courts Discretion
 - ☐ Constant Supervision
 - ☐ Personal Services
 - ☐ Mutuality
 - ☐ Hardship
 - ☐ Ready, willing and able to perform?
- ☐ Remedies

Specific performance is a discretionary order from the court, exercising its auxiliary jurisdiction to compel the defendant to perform their obligations according to the terms of a contract (in personam) *Bunard; Argyll*

This remedy will only be ordered where there has been an actual or threatened breach of an enforceable contract supported by valuable consideration, in circumstances where damages are inadequate.

[1] Is there an enforceable contract supported by valuable consideration?

- 1) [RULE] To obtain an order of specific performance, there must be valuable consideration as equity does not assist a volunteer *Corin* (deeds are not sufficient unless accompanied by consideration)
 - a. Notably, the amount of consideration does not matter, however may come into play regarding discretionary factors.
 - b. **Consider:** Is the contract certain, is there consideration?
 - c. Additionally, the plaintiff must be ready, and willing to perform the contract.
- 2) Where there is no consideration, and no contract — equity will not interfere – go to injunctions

[2] Are damages an inadequate remedy?


- 1) [RULE] Further, damages must be inadequate to remedy the plaintiff's loss due to the defendant's breach *Dougan*
 - a. It must be objectively reasonable that damages are inadequate for the plaintiff, taking into account their circumstances and intentions *Dougan*
 - b. **Agreement to sell land [always]**
 - i. Damages at common law in Australia are generally seen as inadequate for land *Pianta* affirming *Dixon*
 1. This is because each parcel of land is unique and has a 'special and peculiar value' *Dixon*
 2. Despite the SC of Canada casting doubt on this principle in *Paramadevan*, their approach was not adopted in Australia.
 - ii. NB: in *Pianta* it was a property developer who wanted the land to develop and sell, even though this interest is solely financial the court still granted specific performance.

Lord Cairns Act [Equitable Damages]

- ☐ Section 68
- ☐ Jurisdiction to grant
 - ☐ Are you able to get an injunction or specific performance?
 - ☐ Discretionary bar doesn't matter
 - ☐ Impossibility of injunction and specific performance
 - ☐ Is there a trespass
- ☐ Assessment of Quantum
- ☐ Can you get them for equitable wrongs

STATE: Where the court is able to grant an injunction, or order specific performance the court **may** (discretionary) award damages to the injured party in substitution or in addition *s68 SCA*

NB: No application required for specific performance/injunction for the court to exercise its power to award equitable damages. It is enough that the court had jurisdiction to grant such equitable relief. *Giller*

 **Prerequisite:** You should have already proved either an Injunction or Specific Performance can be established

IF THE CLAIM IS A LEGAL RIGHT

[1] Does the court have jurisdiction to grant equitable relief?

- 2) The plaintiff must be able to establish that the court would have jurisdiction to order specific performance or a injunction when proceedings commenced. *Waterways*

Considerations

- a. The court can order damages under s68 even if the court would not have made the order due to some discretionary defence (i.e., hardship) *Waterways*
- b. Equitable relief must be available at the time in which proceedings are commenced *McMahon*
 - i. For example, where a lease has already expired, equitable damages will not be awarded *McMahon*
- c. Is there statute?
 - i. [Contentious] Arguably, you can also get them even if they are sought in relation to the breach of a statute, if that provision manifests an intention to create private right enforcement *Wentworth*