

# **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*

# LAWS2015

## Finals Scaffold

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#### Topic 4: Nature and Constitution of Trusts | Establishing an express trust

☐ What type of trust do we have

- ☐ Express
- ☐ Resulting
- ☐ Constructive

##### Establishing an express trust and general trust principles.

☐ Are the three certainty of terms present?

☐ Was there an **intention** to create a trust?

- ☐ Contrast the creation of the trust with other legal relationships
- ☐ IPCL Notes for further other relationships

☐ Is the **subject matter** certain?

☐ Are the **beneficiaries** certain?

☐ Consider, the beneficiary principle exception

- ☐ Is it a trust of imperfect obligation (animal/graves/masses)
- ☐ Is it a trust which states a motive, but is in substance for persons?
- ☐ Is it a trust for an unincorporated association?
- ☐ Charitable trust? (go to topic 10)
- ☐ Quistclose trust? (go to topic 7)

A trust is a legal relationship between trustee, who holds legal title for the benefit of the beneficiary, a trustee owes fiduciary obligations to a beneficiary *Banford*

#### [1] What type of trust do we have?

##### Is it an Express Trusts

1) An express trust is created by express intention of the settlor to have specified property held on trust for the benefit of one or more persons

a. Fixed Trust

a. A trust where the trustee's, and their proportion of the interest is fixed and ascertainable from the construction of the trust.

b. Discretionary

a. Where a trustee is given discretion to choose the beneficiaries, and their proportion of the beneficial ownership – importantly the trustee has to choose someone.

c. Powers of appointment

a. A trust where the trustee is given discretion to choose beneficiaries and the proportion of beneficial ownership, and the discretion of whether to distribute the assets at all.

### Is it an Resulting Trusts (implied trust)

- 2) This is an implied trust, which equity uses to fill incomplete gaps in equitable ownership of property where equity deems it do be appropriate.
  - d. Automatic: for failed express trusts
  - e. Presumed resulting trusts: A trust that results back to the settlor due to equity's suspicion: E.g., If A gives property to B and B is not A's spouse or child – equity presumes that B holds it on trust for A due to suspicion

### Is it an Constructive Trusts

- 3) A constructive trust is imposed by the operation of law, independently of, and sometimes contrary to the intention of the parties (not dependent on express intention of parties)
  - f. Vendor Purchaser Constructive Trusts

### [2] Are the three certainties present?

#### Was there an intention to create a trust?

*If facts say 'X holds on trust for Y' then write, 'there is no issue with certainty of intention'*

- 1) An express trust will not be valid unless there is a clear intention to create a trust, *Knight* which is an objective test of the express or implied intention at the time of making the trust *Brynes*
  - a. We do not consider the subjective intention rebutting the subjective approach in *Jolliffe*
  - b. There must be words of 'imperative' not mere hope or moral obligation *Countess of Bective*

#### Factors that indicate that there is a trust relationship

- 1) For there to be a trust, the term trust is not required *Re Schebsman* and there are other factors which can indicate a trust
  - a. Separation of trust property from your own property, is an indication of a trust *Puma*
    - i. But, the mere fact you do not separate property is not determinative *Alloys*
  - b. If the terms impose a 'legal obligation' not 'mere wishes' *Williams*
    - i. [in this case 'confidence she would give to daughter' was not sufficient]
- 2) Using the term 'trust' would be difficult to rebut on an objective interpretation if the other elements are present. *Brynes*

#### Is it a trust or is it another legal relationship?

- 1) However, it could be argued that [settlor] did not intend to create a trust but rather it is [other relationship]
  - a. Is it a 'absolute gift' with mere precatory words? 'X to A in hope, expectation, confidence'
    - i. Words which do not impose a 'legal obligation' do not create a trust *Williams*
      1. 'It is my wish' is a gift not a trust *Nomchong*
      2. 'in confidence...' is a gift not a trust *Williams*
      3. 'in full confidence, that she would do what was right' *Re ADams*



## Topic 6: Fiduciary Obligations

- ☐ Is there a fiduciary relationship?
- ☐ Has there been a breach of the fiduciary relationship?
  - ☐ Scope of relationship
- ☐ Is there a defence to the breach/
  - ☐ No conflict rule
  - ☐ No profit rule
- ☐ Did the fiduciary have fully informed consent? (defence)
- ☐ What remedies can the beneficiary seek?
  - ☐ Rescission
  - ☐ Equitable compensation
  - ☐ Account of profits
  - ☐ Constructive trust

### Is there a fiduciary relationship?

- 1) There are some **presumed fiduciary relationships** per Mason J *Hospital Products*

**State:** prima facie, there is a fiduciary relationship here because, [relationship] is one of the fixed categories *Hospital Products*

#### [1] Is it a trustee and beneficiary?

- a. A trustee owes fiduciary duties to beneficiaries *Hospital Products; Keech*
  - i. This includes express, resulting and discretionary trusts (for discretionary, they owe duties to all the trusts potential beneficiaries *ME Assets*).
  - ii. In *Keech* there a trustee held a lease on trust for an infant. The lease expired, and the trustee refused to renew the lease for the child – but rather did for himself – breach.
  - iii. In *Boardman* Mr Boardman the solicitor for trustee's was a trustee de son tort, as he intermeddled in affairs of trust.

#### [2] Is a business partner and business partner?

- b. In a partnership, each partner is expected to act for the benefit of the partnership over their own individual interests which is fiduciary *Chan*
  - i. The partnership agreement does not need to be finalised for the duty to arise *UDC*
    - 1. The duty exists between 'prospective parties' who have embarked on the conduct of a partnership before the precise terms have been settled.
  - ii. The duty still arises even during the winding up of a company *Chan*
- c. In *Chan* a doctors medical practice was coming to an end. Chan obtained a agreement to grant him a new lease of the business which gave significant benefit. Was a breach of the duty.
- d. In *UDC* it was held that fiduciary duties were owed prior to the conclusion of the final agreement.

## Topic 7: Resulting trust

- ☐ **Is there an automatic resulting trust?**
  - ☐ Has an express trust failed due to certainty of subject matter, objects or beneficiary principle?
  - ☐ Has the trust's purpose been fulfilled?
  - ☐ How will the surplus be distributed?
- ☐ **Is there a presumed resulting trust?**
  - ☐ Is it a relationship of resulting trust?
  - ☐ Can you rebut the presumption
  - ☐ Does the presumption of advancement apply?
  - ☐ Can you rebut the presumption? (incl illegality)
- ☐ **Is it a Quistclose trust?**
  - ☐ Is there a mutual purpose?
  - ☐ How does the trust operate – what is its effect?

### Is there an automatic resulting trust? [good idea to go to case notes]

An automatic resulting trust will be created when there is (1) uncertainty as to the objects or subject matter; (2) or where the purpose of the trust is already frustrated or fulfilled.

#### [1] Is there an intention to create an express trust which has failed?

- 1) Where an express trust has failed, due to lack of certainty of subject matter/objects/beneficiary principle, the property is held on automatic resulting trust for the settlor *Vandervell*
  - a. If there is uncertainty as to the intention, then there is no resulting trust and the settlor fails to transfer the legal estate.

#### [2] Where the purpose of the trust is fulfilled, and there is surplus trust property

- 1) Where the purpose of the trust is fulfilled, and there is left over trust property the surplus will reverse back to the settler of the of the trust *Re West Sussex* however there are often complications.
  - b. Is it a **donation tied to a contractual benefit**?
    - a. Where the funds are tied to a contractual benefit (i.e., ball tickets, subscriptions, raffle tickets) these will not create an automatic resulting trust. *Re West Sussex*.
      - i. This is because, when you pay money under the contract, you are paying to gain contractual benefits.
        1. The money will revert back to the crown.
  - c. Is it a **small unidentifiable** donation?
    - a. The position is less clear with regards to small donations

## Topic 8: Constructive Trusts

### ☐ Constructive Trusts and Third Parties

- ☐ Trustee de son tort
- ☐ Knowing Receipt
- ☐ Knowing Assistance
- ☐ Inducement
- ☐ Proprietary Claims
- ☐ Unconscionable Conduct
- ☐ Common Intention Constructive Trust
  - ☐ Joint Endeavour Constructive Trust
  - ☐ Stolen Property
  - ☐ Mistaken Payments
  - ☐ Remedial Constructive Trusts

A constructive trust may be imposed by the court, contrary to the parties intentions, to benefit a party who has been wrongfully deprived of their rights.

## Third Party Liability

There are four main circumstances, where third parties may be made a constructive trustee.

1. Trustee de son tort
2. Knowing receipt
3. Knowing inducement
4. Knowing assistance

### Trustee de son tort / de facto

*Where you are not a trustee but, behave like one, so the law treats you as one*

#### [1] Has the person 'intermeddled' in the affairs of the trust without authority?

- 2) Where a person who is not a trustee, intermeddles in the affairs of the trust without authority *Mara*, they will become a constructive trustee
  - a. In *Boughman* a solicitor who was employed by trustee's 'intermeddled', hence he was treated as a trustee and therefore liable as a fiduciary.
  - b. Essentially if you act like a trustee then you will be held to be a trustee, it is a voluntary assumption of office, followed by conduct which amounts to breach *Twig*.

### Knowing Receipt *Barnes v Addy*

*Where you wrongfully receive trust property, and you had knowledge that it was trust property*

#### [1] Is there a trust, which has trust property