

TOPIC 2(A) BREACH OF CONFIDENCE

Scaffold: Breach of Confidence

- Elements
 - Info identified with specificity
 - Necessary quality of confidence
 - Received in circumstances importing obligation of confidence: reasonable person test
 - Actual or threatened misuse
- Other sub-issues
 - Contract: can oust eq confidence + can shape elements
 - Solicitors: test from *Bolkiah v KPMG*
 - Govt-plaintiff: likely to injure in public interest
- Defences
- Remedies
 - Injunction
 - Equitable compensation (distress? aggravated? exemplary?)
 - Account of profits

Is there a contract – with a contractual duty of confidence?

YES – There is a contractual obligation of confidence

- There is a **contractual promise** to keep information confidential because there is an:
 - Express promise to keep information confidential (contractual agreements, NDAs, employment contracts)
 - Implied promise to keep information confidential (in retainer of a lawyer, accountant, banker)
- That contractual obligation has been breached because ____ [e.g., the information has been used for a purpose other than the particular purpose for which it was disclosed].
- **Remedies:**
 - Contractual obligation of confidence:
 - Under contract, this breach will result in contractual damages, provided that the promisee suffered loss from the breach.
 - However, relief may also be granted in equity's **auxiliary jurisdiction**, including an injunction to prevent the continuance of breach.
 - [Go to 'Injunction']
 - Equitable duty of confidence:
 - It is possible that there is also an equitable duty of confidence that has been breached, which may result in a remedy under equity's **exclusive jurisdiction**, which are more favourable than contractual remedies, including gains-based relief like an account of profit.
 - While contract protects information that was promised under the contract to not be disclosed, whether or not it was confidential, equity only protects confidential information (*Agha v Devine*)
 - However, there is conflicting authorities (*Optus* and *Streetscape*) on whether an equitable duty of confidence will be found where there is a contractual obligation in relation to that specific information.

Does Equity intervene where there is a contractual duty of confidence regarding that information?

- Equitable obligation of confidence can exist alongside contractual obligation of confidentiality (*Optus v Telstra*)
- While *Optus* recognised that an equitable duty of confidence can arise even where there is a comparable contractual duty, especially where the contract envisages equitable remedies or

- 3. There must be an unauthorised use of the information to the detriment of the disclosing party
- **Held:**
 - (1) Quality of confidence: not enough evidence - the information was found not to be of a confidential nature as it was already in the public domain.
 - (2) Obligation of confidence: yes
 - (3) Unauthorised use: yes

Elements of Breach of Confidence

Elements of Breach of Confidence in Equity

For there to be an equitable breach of confidence, **four factors** must be established (*Optus v Telstra*):

1. The information in question must be **identified with specificity**
2. It must have the **necessary quality of confidence**
3. It must have been received by the defendant **in circumstances importing an obligation of confidence**; and
4. There must be an **actual or threatened misuse of the information without the plaintiff's consent**.

NOTE: In exam, don't spend a paragraph on an element that is obvious and is not an issue. Element (1) is not particularly important.

- *Optus Networks Pty Ltd v Telstra Corp Ltd*:

- **Facts:**

- Optus and Telstra provided telecommunications services on an interconnected network (pre-privatisation Telstra owned telecom network)
- Agreement: Telstra allowed Optus to carry traffic on network Telstra could access:
 - Cl 1.1: widely defined confidential info
 - Cl 10.10: info only used for billing purposes
 - Cl 15: obligations of confidence
 - Cl 20.2: other rights preserved
- Optus alleged Telstra had been using Optus's traffic information (quantity, source, destination, duration, time, and type of traffic) for marketing
- Optus sued for breach of contract (confidentiality provision) and equitable breach of confidence

- **Held: Telstra had breached the equitable duty of confidentiality**

- The contract did not displace the equitable obligation of confidence → The notion that an equitable duty of confidence can never arise where there is a comparable contractual duty is opposed to much authority
- The **contract here preserved equitable rights and left open the possibility of equitable relief**
- Application of test: (1)-(3) = per contract; (d) = yes

Step 1: Can the information be **identified with specificity**?

- The information claimed to be 'confidential' must be **specifically identified**, and **not described too generally** and be able to be separated from non-confidential information (*O'Brien v Komesaroff*)
 - The description must indicate what the information conveyed, and **what parts of it were not common knowledge** (*O'Brien*)
- *O'Brien v Komesaroff*: failed for claiming whole unit trust deed "generally" confidential

- Komesaroff created a unit trust deed as a tax minimisation idea to be sold with his partner O'Brien - After they fell out, O'Brien kept selling the deed - Komesaroff sued for breach of confidence – he could not identify which specific parts of the document were confidential (but note that he won as there was a breach of copyright)

Step 2: Does the information have the **necessary quality of confidence**?

Simply asserting that something is confidential does not make it confidential in the eyes of equity. For it to be protected in equity, it must have the 'necessary quality of confidence'.

- The position is different from contractual confidence, where parties are free to promise each other that they will not disclose information regardless of whether equity would have recognised an obligation of confidence in respect of the same information.

[Three categories]

• **(1) Personal information**

- **Information about a person**, such as information relating to health, personal relationships, or finances may be easy to identify as private (ABC v Lenah Game Meats)
 - personal diaries
 - medical information
 - personal financial information
- **Intimate information**
 - Private and personal information shared between intimates (eg in a marriage) may be imbued with an equitable obligation of confidence: Duchess of Argyll v Duke of Argyll
 - Breach of confidence to show sex tape to partner's family and friends: Giller v Procopets
 - Breach of confidence to post on Facebook explicit images and videos of former partner: Wilson v Ferguson
- Information about activities which a reasonable person with contemporary standard of morals would understand was not intended to be observed (ABC v Lenah Game Meats)
 - e.g. A film of a man in his underpants (ABC v Lenah Game Meats)

• **(2) Commercially sensitive information**

- Relevant considerations to determine whether commercial information may be considered confidential (Wright v Gasweld, per Kirby P)
 - How widely the information is known (inside and outside the business) - e.g. the fact that it was plainly made known to the employee that the material was regarded by the employer as confidential
 - The extent of measures taken to guard the secrecy of the information - e.g. the fact that the information is jealously guarded by the employer, is not readily made available to employees and could not, without considerable effort and/or risk, be acquired by others
 - Value of the information to the plaintiffs and their competitors (including the amount of effort/money expended in developing the information)
 - How easy it would be to independently obtain the info - i.e. the ease/difficulty with which the information could be properly acquired or duplicated by others
 - Industry conventions supporting that the info is confidential
 - The fact that the employee in question has been permitted to share the information only by reason of his or her seniority or high responsibility within the employer's organisation
- E.g. The file is likely to have contained confidential information – given it would give a competitor a 3-month advantage in working out how to replicate P's technology, P has a good reason to want to keep it secret.
- **Employment**
 - General situation: post-employment use by ex-employee of employer's confidential information obtained during employment
 - Distinguish between **employee know-how** (not confidential) and **confidential information of the employer** that the ex-employee learnt during the employment (UWA)

TOPIC 3(A) SPECIFIC PERFORMANCE

Scaffold: Specific Performance

1. Availability: damages inadequate remedy
 - Contract for disposition of interest in land
 - Contract for sale of personalty if not readily available on market
 - Contracts to pay money to 3rdP if nominal damages only
2. Bars to relief
 - Continual supervision: carrying on activity vs achieving a result
 - Mutuality
 - Inability to precisely draw order
 - Personal service contracts
 - Hardship

Availability

Step 1: State the test for specific performance

- Specific performance will only be granted if:
 - There was a binding and valid contract;
 - with valuable consideration, and
 - damages at common law are an inadequate remedy

Step 2: Was there a contract for valuable consideration?

YES

- This is a contract for valuable consideration so equitable relief is possible.

NO

- A court has no jurisdiction to grant specific performance of a promise not supported by valuable consideration (*Roxborough v Rothmans of Pall Mall Australia*)
 - A deed is not sufficient
- Nominal consideration would not be considered sufficient in equity.
- If consideration has passed but is inadequate, a court has jurisdiction to order specific performance, but inadequacy of consideration may be a factor relevant to refusing relief on discretionary grounds.

Step 3: Are common law damages inadequate?

- The issue is whether damages are adequate.
- The test is whether damages would be an inadequate remedy **for any loss that might be incurred**, and not actual loss incurred (so the actual amount of damages that a court would grant is not relevant to the inquiry)
- If **common law damages would not be available at all** – e.g., since there was no legally enforceable contract in signed writing (s 54A) – then damages would be considered **inadequate**
- **Land**
 - In Australia, it is assumed that **all land is unique, and damages would be inadequate** (*Pianta*) since the money value of land would not enable the purchaser to obtain the same land (*Adderley v Dixon*)
 - Therefore, a contract relating to land is always specifically performable (Sale of land – *Lysaght v Edwards*; Leasehold – *Walsh v Lonsdale*)
- **Chattels**
 - In the case of goods or securities **obtainable upon the market**, damages are an **adequate remedy** which can place the disappointed buyer or seller in as good a position as if the contract had been fulfilled, because they can simply purchase a replacement elsewhere (*Dougan v Ley*)
 - Where chattels are **rare and unique**, damages would be **inadequate** since the purchaser cannot obtain them elsewhere (*Dougan v Ley*) [Question: is it sufficiently rare to get it? → It does not mean that you can only get specific performance if it is completely impossible to go out and buy the personal property]

TOPIC 3(B) INJUNCTIONS

Scaffold: Injunctions

Final Injunctions

- 1. Basis: legal or equitable rights
- 2. Actual or threatened infringement
- 3. [auxiliary/concurrent only] Damage inadequate?
 - Licences (*Cowell v Rosehill Racecourse*)
 - Restraint of trade in employment contract (*Curro v Beyond*)
 - Mandatory restorative injunction re nuisance (*Redland Bricks v Moris*)
- 4. Bars to relief = discretionary

Interlocutory Injunctions

- 1. Prima facie case
- 2. Balance of convenience
- Also: undertaking as to damages
- Public law: consider public interest

Mareva Orders: high level of caution

Anton Piller Orders: high level of caution

Injunctions are court orders forbidding someone from doing something, or commanding someone to do something.

Step 1: Does the plaintiff have a legal or equitable right?

- An injunction will only be granted to protect a **legal or equitable right from being infringed** (*ABC v Lenah Game Meats*)
 - Mere unconscionability and injustice do not amount to a legal or equitable right (*ABC v Lenah Game Meats*)
- Legal right
 - breach of contract
 - tort - e.g. trespass
- Equitable right
 - breach of confidence
 - equitable estoppel
 - fiduciary duty
 - rights under trusts
- Examples: No legal or equitable right
 - *Australian Broadcasting Corp v Lenah Game Meats*:
 - **Facts:** The plaintiffs were a meat processing factory that seeks an injunction to stop the ABC in publishing the footage of possum processing
 - **Held:** the plaintiffs had no cause of action against the ABC, the Court could not grant an injunction
 - No legal cause of action (trespass), since ABC was not the trespasser
 - No equitable cause of action (breach of confidence), since Information was not confidential
 - Privacy cause of action was not argued
 - *Day v Brownrigg*:
 - **Facts:** Plaintiff's house had a name called Ashford lodge and had been called so for 60 years. The defendants live in a house that is called Ashford Villa for 40 years and they want to change the name of their house to Ashford lodge too, so plaintiff seeks injunction to prevent the neighbour from changing the name of their house

- **Held:** Plaintiff does not have a legal right to the name of their house, so cannot get an injunction
- **Smethurst v Commissioner of Police:**
 - **Facts:** Plaintiff was a journalist. Police raided the plaintiff's house to look for evidence that she might have committed crimes involving disclosure of secret information about the intelligence services. The police took information from her phone using their USB. Plaintiff argued trespass to land and trespass to goods as the warrant was invalid because it insufficiently described the crime that was being investigated
 - **Held:** No injunction granted for the trespass.
 - The tort (trespass) was already completed, there was no risk of continuing trespass – her legal rights would not likely be infringed in the future → If a tort is complete, that is a reason for refusing an injunction
 - She did not argue breach of confidence and possible tort for privacy for strategical purpose

Step 2: What type of injunction is being sought?

[A] Final/Perpetual Injunction

Final injunction = injunction that is given at the end of the trial, which settles dispute finally (but does not necessarily last forever – injunction could be limited for just a limited amount of time)

1. Is the jurisdiction to grant injunctions enforcing equitable rights (exclusive jurisdiction) or in aid of legal rights (concurrent/auxiliary jurisdiction)? → Do damages need to be an inadequate remedy for the injunction to be granted?

- **Exclusive jurisdiction (jurisdiction enforcing equitable rights)** - **no need to show damages are inadequate** → **duty of confidence, fiduciary duty, rights under trusts**
 - Since the plaintiff is seeking an injunction to protect an equitable right, the injunction would be granted in equity's exclusive jurisdiction, so there is no need to establish that damages would be an inadequate remedy (since common law damages are not available for equitable wrongs)
 - E.g. if you make out breach of confidence, you are prima facie entitled to an injunction, subject to discretionary reasons why it might be refused
 - E.g. **Wilson v Ferguson**: breach of confidence → injunction against further distribution
- **Auxiliary/concurrent jurisdiction (jurisdiction in aid of legal rights)** - **must show common law damages are inadequate** (injunctions are not available if damages are adequate) → **contract, tort**
 - Injunction is available in the auxiliary jurisdiction even for **non-proprietary right** (**Cardile v LED Builders**) → e.g. injunctions to prevent a breach of contract are available
 - Examples:
 - Restraint of trade in employment contract (**Curro v Beyond**)
 - Licences (**Cowell v Rosehill Racecourse**)
 - Query: implied negative stipulation
 - Mandatory injunction re nuisance (**Redland Bricks v Morris**)
- **Statutory (common law) jurisdiction** - **no need to show damages are inadequate**
 - The Common Law Procedure Act 1854 conferred the common law courts power to grant an injunction in certain cases (common law courts could not grant injunctions before)
 - (1) It **only applies if there is a common law claim available**, not an equitable claim → It could only be used to protect legal rights not equitable rights
 - (2) It **could not be used quia timet** (because the wrong has not occurred and the common law right has not arisen)
 - This jurisdiction is dependent on an ability to sue for common law damages - it is not a question about whether damages are inadequate, since statute does not require it

Topic 7 Resulting Trusts

Scaffold: Resulting Trusts

- Automatic Resulting trust
 - Issue: intention create trust or dispose (bona vacantia)
 - Indicia: contract? size of gift?
 - Issue: certainty of objects or automatic resulting trust
 - Order of distribution: not first-in first-out (see Topic 9)
- Presumed Resulting Trust
 - 1. Presumption of resulting trust?
 - Mortgage: liability = contribution to purchase price
 - If so: held proportionate to contributions
 - 2. Presumption of advancement?
 - Categories: husband-wife, father-child, mother-child
 - If so: rebutted?
- 3. Presumption of resulting trust rebutted?

Scaffold: Quistclose Trusts

- 1. Is there a trust –certainty of intention?
- 2. If there is a trust: nature of the trust?
 - View #1: double-limbed express trust (Re AETT, Gummow J)
 - If so: recipients beneficiaries until failure, then lender beneficiary
 - If so: certainty of objects + beneficiary principle issues?
 - View #2: automatic resulting + power (Twinsectra, Lord Millett)
 - If so: lender beneficiary, revocable power for borrower to pay
 - If so: no issue re certainty of objects + beneficiary principle
 - Which view = depends on facts (Raulfs v Fishy Bite, Campbell JA)

Resulting trusts are a default mechanism for working out **where the beneficial interest lies** in property when that is **not clear**.

Automatic Resulting Trust

If A intends to give away all his beneficial interest in a property and thinks he has done so but, by some mistake or accident or failure to comply with the requirements of the law, he has failed to do so either wholly or partially, there will, by operation of law, be a resulting trust for him of the beneficial interest that was not effectively transferred (Vandervell v Inland Revenue Commissioners)

Where an express trust has failed

- Where the creation of an express trust has failed (e.g. for failing any of the three certainties; for breaching the beneficiary principle), an automatic resulting trust will arise in favour of the settlor (Vandervell)
- **[Uncertainty as to objects]** **Uncertainty of objects** in a trust will render the trust invalid, and an automatic resulting trust arises and brings the equitable interest back to the **settlor** (Re Leek (decd))
 - Consequently, the trust property forms part of the settlor's estate upon their death, making it subject to estate duty
- **[No beneficiaries identified]** Where **a trust is created but the beneficiaries are not identified at all**, an automatic resulting trust arises, and the beneficial interest reverts to the settlor or the **person who transferred the property into the trust** (Vandervell)
 - Vandervell: Vandervell set up a trust of the option without identifying the beneficiaries, therefore he as the settlor of the trust, is the beneficiary of an automatic resulting trust
 - The option was given to the trustees to hold on trust, not for their personal benefit, but to ensure the shares returned to Vandervell's control. However, the trust's beneficiaries were unclear and could not include Vandervell since he was trying to avoid tax).

- Why did the automatic resulting trust operate in favour of Vandervell, and not the Royal College (it was the College who granted the option)? → the whole transaction (granting of shares, granting of the option back to the trustees) was created by Vandervell, so he is the true transferor of that option to the trustees, so it results back to him

Where there is an exhaustion of an express trust (an express trust has satisfied its purpose, and a surplus remains)

- **Exhaustion** occurs when **a trust has achieved its purpose and can no longer be performed**, resulting in an automatic resulting trust of the remaining funds for the **original contributors**.
 - Most likely example is where **the settlor tries to give a particular kind of benefit to a particular person** (like in **Abbott Fund**) that you can't give them any longer once they are dead
 - If the trust is just for the person's benefit, then it is an absolute trust for them, and when they die, it passes into their estate
- **[1] Is there an express trust in the first place? → intention**
 - **[Contractual payments]** Since the **payment under contract is not held on trust**, there is **no trust to exhaust** and no automatic resulting trust could arise. The funds became bona vacantia and passed to the Crown (**Re West Sussex**)
 - **Re West Sussex Constabulary's Widows, Children and Benevolent Fund Trusts**: benevolent fund for police who joined the subscription, when they died their widow and dependents would be looked after by gifts from the fund → payments from members' subscriptions and money entertainment events were considered contractual, with the payment as consideration for rights (e.g., member benefits or event tickets).
 - **[Large legacies (amounts left in people's will) and large donations made to the fund]** treated as being paid into the fund on trust, as significant contributions imply an expectation that the collector will use the funds solely for the stated purpose (**Re West Sussex**)
 - **[Money from collection boxes]** in **Re Gillingham**, the court assumed money put into the collection boxes were donated for a specific purpose and therefore was held on trust, whereas in **Re West Sussex**, the court held that donations in collection boxes were given absolutely and not on trust → It is a question of the **objective intention of the donors** when contributing to the fund
 - *Was the money intended to be held on trust and used for a specific limited purpose? Or was it given absolutely without any conditions?*
 - **Factors to consider when determining intention:**
 - Words used by the collector: If the collector explicitly stated that the funds would be held on trust for a particular purpose → there is a trust
 - Amounts donated: Significant donations may imply an expectation of accountability or specific use, potentially suggesting a trust.
 - Donor's connection to the fund: The donor was personally connected to the cause, indicating an intention for the funds to be held on trust
- **[2] If a trust exists, determine whether the express trust is exhausted → What is the trust for?**
 - **[Trust for a specific purpose – exhaustion applies]**
 - **Abbott Fund**: trust for the relief of 2 deaf and dumb women was exhausted when they died - since the women could no longer be relieved after death
 - **Re Gillingham Bus Disaster Fund**: **A memorial fund was created after a bus accident to cover cadets' funerals and assist disabled cadets, which a variety of people contributed to** – **[not a charitable trust** because cadets were not a section of the public and it was not relieving poverty] - much of the fund remained unused as the families successfully sued the bus company for damages - the trust was exhausted as it can no longer be performed
 - **Re West Sussex Constabulary**: The West Sussex Constabulary had a **benevolent fund for members of police force who subscribed, providing support for widows and dependents after their death** – the fund ceased when the police force was disbanded and