

## BREACH OF CONFIDENCE

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- Equity protects certain information from unauthorised misuse, however, equity's protection is not unlimited
- **Coco v A N Clark Megarry J** – 'The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust.'
- **Breach of confidence** is a doctrine developed by equity in its exclusive jurisdiction that recognises and protects certain rights of confidentiality; it pertains to the unauthorised use of confidential information.
  - Other regimes for protecting such rights exist, such as contract, employment and intellectual property law, but this section is concerned with purely **equitable claims** – rights which equity enforces independently of the common law.

### Elements

- A successful claim to breach of confidence requires that the three elements stated by **Megarry J in Coco v A N Clark** are satisfied in addition to the requirement of specificity from **O'Brien v Komesaroff**. These four elements were affirmed by Gummow J in **Smith Kline v Department of Human Services**
- The four elements to be satisfied in order for an equitable obligation of confidence to arise include:
  - (1) The information must be specifically identified
  - (2) It must have the necessary quality of confidence
  - (3) It must have been received by the defendant in circumstances that import an obligation of confidence
  - (4) There must be an actual or threatened misuse of the information, contrary to the plaintiff's wishes
- **Coco v A N Clark**

#### Facts

- Coco designed a moped engine and negotiated with the defendant for its manufacture
- Designs were disclosed during negotiations
- After negotiations broke down, the defendants started production of a moped that Coco claimed was based on his design
- He sought an injunction preventing manufacture

#### Issues

#### Decision

- While Coco was able to establish that the circumstances under which the defendant received the information imposed an obligation of confidence, he was unable to show that the information imparted was confidential in nature or that unauthorised use was made of his information as opposed to information readily available from public sources
- Megarry J
  - The obligation of confidence may exist where there is no contractual relationship between the parties
  - **Three elements are required to successfully claim a breach of confidence**

(1) **The information must ‘have the necessary quality of confidence about it’**

- Information must be of confidential nature
- Something which is of public property and public knowledge cannot per se provide foundation for proceedings of breach of confidence

(2) **The information must have been imparted in circumstances importing an obligation of confidence**

- If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that the information was being given to him in confidence, this should suffice to impose upon him the equitable obligation of confidence.

(3) **There must be an unauthorised use of that information**

**Information must be specifically identified**

- Information claimed to be confidential must be defined with sufficient precision - **O’Brien v Komesaroff**
- Ask, which part of the information was not common knowledge? - **O’Brien v Komesaroff per Mason J**
- This requirement exists because a common remedy for breach of confidence is injunction, thus the court must determine the scope of the injunction otherwise it will be impossible to enforce. Further, the information must be able to form the subject matter of an injunction and so that the defendant may formulate an individuated defence to the items of information allegedly misused - **Ocular Sciences**
- **O’Brien v Komesaroff (1982) 150 CLR 310**

**Facts**

- K was a solicitor whose practice included creating and implementing tax minimisation schemes
- O was an accountant who believed K’s schemes could be useful to his own clients
- He obtained a set of the necessary documents from K and prepared unit trust deeds for his clients based on the K documents
- K alleged breach of copyright and breach of confidence

**Issues**

**Decision – Mason J**

- The High Court held that K’s claim of breach of confidence failed because he was unable to specify information that was confidential in nature in his pleadings
- Very little in the documents provided that constitute confidential information
- The contents of the unit trust deed and the articles of association were matters of common knowledge
- Only those improvements evolved by K could give rise to a claim for breach of confidence but K failed to identify the particular contents of the documents which he asserts constitute information the confidentiality of which he is entitled to protect

- The consequence is that he has failed to formulate a basis on which the court could grant him relief on the assumption that some part or parts of the documents constitute confidential information
- **Information claimed to be confidential must be defined with sufficient precision**
- **Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289**

#### Facts

- The plaintiffs claimed that the defendants had breached obligations of confidence relating to the design of the PLL equipment and lenses, the processes and materials used and certain software (the MPS Program) which had been written to help in the management of PLL's business.
- Particulars items included equipment designs, the plaintiffs' standard operating and testing procedures, the plaintiffs' Lens Design Booklet and the Lens Design Program
- The plaintiff sought injunctive relief against continued use of their confidential information,
- In respect of the rest of the information which the court found had been used, they claimed they were entitled as of right to an injunction.
- The plaintiffs argued that because there was a pre-existing fiduciary relationship between them and the defendants a constructive trust should be imposed on part of the defendants' business and assets.

#### Decision

- **This requirement exists because a common remedy for breach of confidence is injunction, thus the information must be able to form the subject matter of an injunction and so that the defendant may formulate an individuated defence to the items of information allegedly misused**
- It was essential in a breach of confidence action that the plaintiff should give full and proper particulars of all the confidential information on which he intended to rely for two reasons: first, the plaintiff usually sought an injunction and, unless the confidential information was properly identified, an injunction would be of uncertain scope and might be difficult to enforce; secondly, the defendant must know what case he had to meet as he might wish to show that certain of the items relied on were matters of public knowledge. The absence of proper particulars could compromise a defendant's ability to defend himself if the plaintiff could rely on matters of which no proper warning was given. If the plaintiff failed to give proper particulars it was open to the court to infer that the purpose of the litigation was harassment rather than protection of the plaintiff's rights and the action could be struck out as an abuse of process (359)
- It can equally be an abuse of process to give proper particulars of information which was not, in fact, confidential because a claim based even in part on wide and unsupportable claims of confidentiality could be used as an instrument of oppression or harassment against a defendant and there was a risk that the more technology that was put in issue the more likely it was that the court would jump to the conclusion that some of what had been copied was confidential (360)
- 359-360:
  - The rules relating to the particularity of pleadings apply to breach of confidence actions as they apply to all other proceedings.
  - But it is well recognised that breach of confidence actions can be used to oppress and harass competitors and ex-employees.
  - The courts are therefore careful to ensure that the plaintiff gives full and proper particulars of all the confidential information on which he intends to rely in the proceedings.

- If the plaintiff fails to do this the court may infer that the purpose of the litigation is harassment rather than the protection of the plaintiff's rights and may strike out the action as an abuse of process.
- The requirement of particularity may impose a heavy burden on the plaintiff.
- In a case where the plaintiff has a large quantity of confidential information and much of it has been taken by the defendant, the obligation to identify all of it might involve a great deal of work and time.
- The normal approach of the court is that if a plaintiff wishes to seek relief against a defendant for misuse of confidential information it is his duty to ensure that the defendant knows what information is in issue.

Information must have the necessary quality of confidence that equity is concerned with protecting

- This question may be considered in two limbs, secrecy and value
- Sometimes confidentiality is implicit in the information itself – e.g. medical records
- Sometimes the confidentiality is inherent in the relationship between the parties
  - In **Dutchess of Argyll v Duke of Argyll** it was held that confidences passing between parties to a marriage pass within an equitable relationship of confidence
  - The solicitor and client relationship is also inherently confidential – **Lord Ashburton v Pape**
- In other cases, the quality of confidence can be shown by the steps taken by the plaintiff to ensure the information is not used by others – **Attorney General (UK) v Heinemann Publishers Australia 189-190 McHugh J**

## Secrecy

- Must show information is secret enough in that there is some point in protecting its confidentiality
- It cannot be claimed that information is 'confidential' if it is a matter of common knowledge
- Thus it cannot be public property or public knowledge – **ABC v Lenah**
- Ask – has the information entered the public domain?
  - Degree of accessibility – if generally accessible then the info will be considered in the public domain and thus information will lose its confidentiality - it is a question of degree of publication as is demonstrated by **AFL v The Age**
  - Authority of disbursement – speculation, gossip or even assertion from an anonymous source is not sufficient for information to have entered the public domain – **AFL**
  - Effectiveness of injunction – if an injunction is ordered, will the relevant detriment be avoided? – **AFL** This will indicate information is sufficiently secret
  - Security of location – **Lenah**

## Value

- Must show information is worth protecting and is valuable enough in terms of the interests it's connected to
- Equity is not concerned with protecting banal or trivial information – information must have some sort of value
- Commercial value – **Talbot, Franklin**
- Non-commercial value – **Foster, Giller**
- Information without value/banal – **Lenah, Douglas v Hello!**

- Interests in personality (of which privacy might be one but not the only one) – **Jane Doe**
- Compilations of well-known information may be confidential if sufficient effort has gone into the compilation
- Interest in the functioning of a religion – **Foster**
- The mere fact that information is not common knowledge, or is a record of events that occurred on private property, does not entail that it has the necessary quality of confidence
- Rationale behind cases like Giller, Wilson and Doe – intrusion upon seclusion is highly offensive to a reasonable person in the plaintiff's situation, plaintiff has an interest in matter (Gleeson J in Lenah)
  - Personal integrity, human autonomy should be the interest, as opposed to offence
  - E.g. favourite band when young does not affect personal integrity, would be banal like in Lenah
  - Political views don't necessarily relate to humiliation or offence but can be linked to personal integrity
- **Australian Broadcasting Corporation Ltd v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 (OL)**

#### Facts

- Unidentified trespasser secretly filmed the stunning and killing of possums by the plaintiff's employees
- The film was passed on to an animal liberation organisation and then to the ABC for broadcasting
- The plaintiff applied for an interlocutory injunction to restrain the ABC from broadcasting the film

#### Issues

#### Decision

- The High Court, Callinan J dissenting, held that the plaintiff was not entitled to an injunction because no legal or equitable right had been asserted which could be enforced by an injunction
- Kirby J held that it was not necessary for an injunction to support a legal or equitable right, but that the proper exercise of judicial discretion which favoured freedom of discussion, in this case animal welfare, justified refusing the injunction
- Lenah fails on the second element
  - Lenah fails on the secrecy requirement
  - Lenah fails on the value requirement
    - Info about how possums are slaughtered, butchered is banal, no commercial interest is in play
- **Australian Football League v Age Company Limited [2006] VSC 308**

#### Facts

- Contracts between football player and the AFL required players to submit to random drug testing for use of 'recreational' drugs including outside the football season
- Main purpose of drug testing was to be focused on the education and rehabilitation of drug-using players
- Contracts stated that the first two positive drug tests a player returned were to remain confidential between the AFL and the player
- A third positive drug test resulted in publication and penalty

- Three AFL players returned second positive tests
- That information came into the hands of the Age newspaper
- The Age and another newspaper proposed publishing the name of the three footballers
- The AFL and the AFL players' sought a permanent injunction to prevent publication
- The newspapers contended that the information was confidential in nature yet the information had lost any equitable confidentiality protection it had once held through entering the public domain

#### Issue

- The information had clearly spread past its original holders through instances of limited publication
- Was this publication sufficient to destroy the confidentiality of the information?
- Did the confidential information actually enter the public domain?

#### Arguments

- ABC contended that there was ample evidence of widespread public dissemination of the names of the three AFL players and in such circumstances the court cannot sensibly restrain the media from publishing what is known publicly
- ABC contended that if the confidential information has entered the public domain the information has lost any confidential quality it may have had previously and thus would be pointless for the court to restrain publication of matters which are well known by a large number of members of the public
- The AFL contended that there had been no more than limited speculation in the internet exchanges
- *Check about anonymity in media and discussion forums online*

#### Decision

- It was held that the information remained confidential despite that limited disclosure of the names of the footballers had occurred
- **A limited dissemination to a small group of people (parties to the confidence) will not remove confidentiality of information, it won't vitiate secrecy**
- **Complete secrecy is not necessary – information may be known in its entirety by some and still be confidential**

### ➤ **Jane Doe v Australian Broadcasting Corporation [2007] VCC 281, [122]–[137] (OL)**

#### Facts

- Rape victim testifying in Court
- ABC published her name

#### Issue

- Is standing up in open court public disclosure?

#### Decision

- People who know who she is due to their presence in the courtroom have been brought into the circle of secrecy
- People who were not in the court room were subject to a statutory regime designed to keep them uninformed
- Therefore, information was not easily accessible
- 'Although Ms Doe admitted she had not expressly asked any of them to keep the information confidential, I am satisfied they constituted what Dr Brann referred to as

her “trusted circle” and that in telling them, she had a reasonable expectation they understood from the nature of the information that it was confidential.’ [122]

- ‘I do not consider the fact that YZ communicated the information to people robs it of its confidential nature so far as the plaintiff is concerned. The information still remained information of a personal nature concerning the plaintiff. The possession of the information by YX does not alter its private character, and its disclosure by him to third parties does not constitute disclosure by the plaintiff in circumstances incompatible with a desire to keep such information confidential.’ [123]
- As well as being sufficiently confidential in its character, the information must also be shown to be such as to merit equity’s protection.
- Any formula, pattern, design or compilation of information of any kind can be the substance of confidential information. There is no restriction on the mode or medium through which confidential information may be conveyed.
  - For compilations, intellectual effort has to be involved, does not have to be a great level of effort (Talbot) but must be some.
  - E.G. phone book does not involve intellectual effort, just drudge
- **Talbot v General Television Corporation Pty Ltd [1980] VR 224 (OL at 5 to 10)**

#### Facts

- A film producer developed a concept or idea for a series of television programmes to be entitled ‘To Make a Million’ which would depict the story of the success of selected millionaires combined with the specific theme that the success of those persons could provide an example and inspiration for viewers of the program to ‘make a million’ for themselves.
- He prepared a written submission for use in negotiation for the sale of the programme to TV networks.
- In the course of negotiations with the Channel 9 network in December 1976 he disclosed the concept and presented the submission
- At the network's request he subsequently forwarded a pilot script, but despite attempts to communicate further received no response.
- In April 1977 he became aware of promotional material being broadcast by the defendant, the operator of the Channel 9 network station in Melbourne, advertising a forthcoming series of segments on a current affairs programme in which persons who became millionaires through their own efforts would spell out their recipes for success and posing to the viewers the question: ‘Could you be a millionaire too?’
- The film producer communicated with the defendant and demanded that the segments be not broadcast.
- He obtained an interim injunction but nevertheless the first segment was broadcast.

#### Issues

#### Decision

- Held: by Harris J and affirmed by the Full Court:
  - (a) The television programme concept (a) had been sufficiently developed to be capable of protection as confidential information (e.g. there were scripts, format); (b) had a quality which removed it from the realm of public knowledge: (c) had been communicated to the network in circumstances importing confidence.
  - (b) The network had made unauthorised use of the concept in preparation of the segments for its programme series.

- (c) An injunction lay against the defendant even though it was not the person to whom the film producer had communicated the information and was an innocent third party when notified of the claim of unauthorised use.
- (d) The unauthorized use was a wrongful act within the meaning of a 62(3) of the (VIC) Supreme Court Act 1958. Accordingly the film producer was entitled to damages.
- Young CJ treated damages under Lord Cairns' Act as compensating the plaintiff for what they had lost
- **You have to have something that goes something beyond common place**
- **Need to have novelty and ingenuity – threshold for this is however not high**
- However, could argue it was a common place idea

➤ **Franklin v Giddins [1978] Qd R 72 (OL)**

Facts

- A nectarine grower owned a new breed of nectarine developed through cross pollination and grafting
- A rival and former employee stole a branch from the grower's property
- Breeding information for a novel breed of nectarine was being protected

Decision

- The information was sufficiently specific as the genetic encoding contained with the product tree
- The tree as a self-replicating source was distinguished from some other scientific and genetic information where there would be laboratory notes or a different source of the same information
- Once the first element was made out, secrecy was clearly established and as a classic trade secret (a secret formula or product) value was also established
- Although information had not been confidentially imparted by the plaintiffs to the male defendant while a contract was in existence between them, the male defendant had behaved unconscionably and in contravention of the plaintiffs' rights. In the circumstances, the plaintiffs were therefore entitled to equitable relief against him independently of any contractual relationship.
- Having regard to the fact that the female defendant knew that the Franklin Early White nectarine trees grown in the orchard conducted by her and her husband were the produce of a stolen trade secret, it would be unconscionable for her to derive any benefit from the trees, and that she, as well as the male defendant, having infringed the plaintiff's rights was subject to the equitable jurisdiction of the court.

➤ Non-commercial information may be protected if it has the necessary characteristics

➤ **Foster v Mountford and Rigby Ltd (1976) 14 ALR 71 (OL)**

Facts

- An anthropological book published details on a group of indigenous Australians and their religious practices

Decision

- The information was secret as only those initiated into the religion and brought into the circle of secrecy knew of it
- Information of religious practices has a value in social dignity
- A prima facie case had been made out that continuing publication of the defendant's book would reveal secrets to those to whom it was always understood such secrets

would not be revealed, thereby occasioning social damage of a serious nature and of a type to which monetary damages were irrelevant.

- An interlocutory injunction was granted

➤ **Giller v Procopets [2004] VSC 113, [145]–[159], [187]–[189] (affirmed on appeal: [2008] VSCA 236) (OL)**

Facts

- The defendant who had previously been in a de facto relationship with the plaintiff took videos of their sexual activities
- Some, but not all, of the videos had been made with the plaintiff's knowledge
- The defendant attempted to show the videos to members of the plaintiff's family and to her employer
- The police confiscated the videos and an order was granted preventing their future distribution
- The plaintiff claimed damages for mental distress caused by the defendant's breach of confidence in attempting to show the videos

Decision

- The Victoria Court of Appeal held that the plaintiff was entitled to compensation for distress either as equitable compensation or as statutory damages
- **Maxwell P –**
  - Upheld claim for intentional infliction of emotional distress

➤ **Wilson v Ferguson [2015] WASC 15, [17]–[59] (OL)**

Facts

- Parties were former lovers.
- Applicant claimed respondent published via internet explicit images which had been confidentially shared between parties during course of relationship.

Decision

- Explicit nature of images was itself suggestive of confidential character.
- Conduct of respondent in posting photographs and videos of applicant to social media accessible to large number of people involved breach of equitable obligation to maintain confidentiality of images.
- Publication occurred in breach of equitable obligation of confidence owed by respondent to applicant.
- Appropriate relief for breach of obligation was grant of injunction prohibiting further publication of images and award of equitable compensation.
- Equitable compensation should include award to compensate applicant for humiliation, anxiety and distress.

➤ Some cases are concerned with information that mixes both commercial and non-commercial characteristics:

➤ **Douglas v Hello! Ltd [2008] 1 AC 1 (OL)**

Facts

- Secret photos of celebrity wedding were to be exclusively published by OK magazine
- However, a journalist took photos of the wedding and sold it to a rival magazine company, Hello!

Decision

- The fact that a party is offering to pay for something does not mean it is valuable info
- The details of a wedding are banal - there was no personal intimacy

- There was no pioneering innovation in weddings – no novelty or ingenuity
- The House of Lords agreed in a 3-2 judgment that the photographs of the wedding were confidential, that there were circumstances of confidence and that publication of the photographs had been to the detriment of OK magazine.
- The continuing development of breach of confidence in respect of personal information is occurring in a context of broader judicial consideration of the appropriate ways in which the law should protect individual privacy and personality from unwarranted interference and attack
- Either argue personal integrity/humiliation or novelty and ingenuity

#### Circumstances imposing an obligation of confidence – knowledge of restrictions

- According to Megarry J in *Coco v A N Clark*, if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that the information was being given to him in confidence, this should suffice to impose upon him the equitable obligation of confidence.
- If information is blurted out, no obligation of confidence can arise – Megarry J in *Coco*
- \*\*cannot just cite *Coco* because it is just a giving case; *Lord Ashburton v Pape* is a more comprehensive source
- An equitable duty to respect the confidentiality of confidential information arises where the recipient of the information knows or ought to know of restrictions placed on the information's use (i.e. confidentiality of information)
- The circumstances in which information was acquired are critical.
  - Protected information may be deliberately confided to a person under circumstances requiring its continued confidentiality, in which case the principal issue is that the acquirer knew or ought to have known of restrictions on use.
  - Alternatively, information may be acquired surreptitiously, or by chance.
- Turns on the way the defendant came to learn

#### **Where the information was given**

- The question is whether a reasonable person, standing in the recipient's shoes would have realised that the information was given in confidence – **Coco per Megarry J**
- For example, an employee who is given information in the context of work

#### **Where the information was taken**

- Where information is stolen or taken, the court will import a duty of confidence – **Franklin**
- The surreptitious obtaining of information by unlawful means constitutes a breach of confidence – **Franklin**

#### **Where the information passes to a third party**

- Each person in a chain of recipient must acquire the information in circumstances importing a duty to be so bound

- For example, in **Franklin**, the male defendant stole the relevant information however the female defendant was also liable for breach of confidence by virtue of her knowledge of the theft

#### **Where the information was transmuted accidentally**

- Where an obviously confidential document is wafted to a third party or where someone comes across an obviously confidential document accidentally, an obligation of confidence may arise – **A-G v Guardian per Lord Goff**
- The question is an objective one, would a reasonable person in the shoes of the recipient realise that the document was obviously confidential?

- **Lord Ashburton v Pape [1913] 2 Ch 469, 475, adopted in Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39 at 50 (per Mason J)**

##### Facts

- Privileged document belonging to the plaintiff in a pending bankruptcy action, were obtained by the defendant in the same action
- The defendant copied the documents and returned the originals
- The trial judge ordered that the defendant return all originals of privileged documents and restrained him from using any of the copies or information contained, except for the purpose of the present bankruptcy proceedings
- The plaintiff appealed on the ground that the exception in the trial judge's injunction was wrong and should be removed

##### Issues

##### Decision

- The copy, as well as being a copy of a privileged document, is also a document obtained in breach of the equitable rule of confidence, and as such the owner of the original document may apply to a court for an injunction to prevent use of the document obtained through breach of confidence
  - A court of equity will restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged
  - Where an obviously confidential document is wafted to a third party or where someone comes across an obviously confidential document accidentally, an obligation of confidence may arise
- **Smith Kline v Dept of Community Services (1990) 22 FCR 73, 86 (per Gummow J) (OL)**

##### Facts

- Plaintiff held the patent for a class of drug used to treat stomach ulcers
- Prior to distribution, customs regulation required evaluation of the drug and marketing approval from the department of health
- Plaintiff delivered extensive data concerning the drug including information concerning its chemistry and quality control to the department
- Marketing approval was obtained
- Later, a marketer of generic pharmaceutical products applied for marketing approval in respect of a brand of cimetidine, to be manufactured overseas and assembled in Australia

- While the plaintiff and marketer's products would have been similar, they would not have shared all the same physical characteristics – e.g. different production methods could have led to different impurity levels
- The department's usual action where a generic application had been lodged was to consult any recently completed evaluations on the same drug
- The plaintiff opposed of the use of its application and data on the basis that the data had been provided to the department in confidence

#### Issues

#### Decision

- It was held that there were circumstances indicating to the department that the data had been provided by the plaintiff in confidence
- It is not necessary for the plaintiff to show that detriment will be occasioned by the misuse of the confidential information because the equitable obligation of confidence protects against unauthorised use of information, rather than against loss - **Gummow J**
- Neither the facts established by the evidence, nor the general law, nor the framework under which the departmental officers operated, established that the secretary of the department knew or ought to have known of the circumstances of the limitation claimed by the plaintiffs on the purpose for which the information could be used within the department.

### ➤ **Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 280-282 (Lord Goff) (OL)**

#### Facts

- Peter Wright worked for MI5
- After retiring he wrote a book describing his work; this was in breach of the Official Secrets Act 1911
- The Guardian published articles on proceedings in the Australian courts by the UK government to stop the publication
- The A-G then sought and received an interlocutory injunction restraining publication of information obtained by Wright

#### Issues

#### Decision

- A duty of confidence precludes disclosure to others, and a third party (like a newspaper) with confidential information is similarly bound by a duty if they know it is confidential
- The articles in The Guardian contained no damaging information, thus no breach of confidentiality
- As the book was already published worldwide, the injunctions were not necessary
- **There can be an injunction and an award of monetary compensation or an account of profits**

### ➤ **Australian Broadcasting Corporation Ltd v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 (OL) (including Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804; [1995] 4 All ER 473 as discussed by Gleeson CJ)**

- 'In *Hellewell v Chief Constable of Derbyshire*, Laws J said:  
"If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the

act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available."

- **Douglas v Hello! Ltd [2008] 1 AC 1, [108]–[125], [127]–[128] (Lord Hoffmann), [307] (Baroness Hale), [323]–[330] (Lord Brown), [244], [255]–[260] (Lord Nicholls, dissenting on breach of confidence), [272]–[300] (Lord Walker, dissenting on breach of confidence) (OL)**

#### Unauthorised Use - Breach of duty

- In takings cases –taking is unauthorised so any use of info is unauthorized
- Information must be used without authorisation – **Coco per Megarry J**
- Where information is taken any use will be unauthorised – **Talbot, Franklin**
- Where the information is govern, there may be some authorised uses
  - What were the parameters of permission granted?
- Ensuring truth in advertising does not require regulative vetting of ads for truth – **Castrol**
- Preventing poison in the community is a stricter regulative purpose and may indicate more powers to insist for information – **Smith-Kline**
- Use or threatened use of confidential information against the plaintiff's wishes must also be shown
- 'use' is a wide concept
- It may include threatened publication – e.g. **AFL v The Age** or commercial exploitation of the information – e.g. **Coco v A N Clark**
- It is not necessary for the plaintiff to show that detriment will be occasioned by the misuse of the confidential information because the equitable obligation of confidence protects against unauthorised use of information, rather than against loss as discussed by **Gummow J in Smith Kline & French**
- Exception here is where the plaintiff is the government attempting to protect governmental secrets from exposure. In such cases the government is required to demonstrate that there will be some detriment to the public interest if information is released – discussed in **Commonwealth of Australia v John Fairfax & Sons Ltd**
- No confidence, however, will be breached where confidential information is discovered through the defendant's own endeavours, by independent re-discovery, or through a public source.
- **Castrol Australia Ltd v EmTech Associates Pty Ltd (1980) 33 ALR 31 (OL)**

#### Facts

- Involved the provision of technical report to Trade Practices Commission
- Use of report findings found in plaintiff's advertising
- Trade Practices Commission sought to prosecute plaintiff

#### Issues

- Is information in report in the public domain?
- Does "public interest" excuse disclosure?

#### Decision

- The defence of public interest includes disclosure of matters carried out or contemplated in breach of the country's security or in breach of the law or otherwise destructive of the country or its people including matters medically dangerous to the public or other misdeeds of similar gravity
  - It has been suggested that the public interest can be divided into the following, non-exhaustive, categories: (1) the prevention of harm; (2) the improvement of the administration of justice; and (3) the realisation of the democratic idea
  - In granting interlocutory injunctions, it is sufficient to establish a prima facie breach of confidence to show that confidential information was given in circumstances imposing an obligation of confidence and to show that unauthorised use of the information would cause a detriment to the party communicating it
- Detriment will be assessed subjectively, if at all, and any 'substantial concern' will be sufficient to make out the requirement.
  - There is no need to show detriment – **Moorgate per Gummow J, Gummow in Smith Kline**
  - **Moorgate Tobacco Co Ltd v Philip Morris Ltd [No. 2] (1984) 156 CLR 414, 437–438**

(OL)

#### Facts

- M who was a member of the British American Tobacco Group, sued another company P which was a member of the PMTG and its holding company alleging breach of fiduciary obligation, abuse of confidential information

#### Issues

- Could an overseas company prevent the registering of a trademark in a proposed new brand of cigarettes by an Australian company after discussions had taken place regarding the proposed new product?

#### Decision

- Relief under the jurisdiction is not available, however, unless it appears that the information in question has "the necessary quality of confidence about it" and that it is significant, not necessarily in the sense of commercially valuable but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff
  - Confidential information is not property
- **Smith Kline v Dept of Community Services (1990) 22 FCR 73, 111–12 (SET, 12.2.2a, bottom of p 280)**

### Defences

#### Public interest

- A claim of breach of confidence may be susceptible to a defence of **disclosure in the public interest**
  - The action can be defended in the UK by showing an overriding public interest in disclosure.
- Australian courts have traditionally taken a more restrictive view of such a defence, although Gleeson CJ in ABC v Lenah has indicated (obiter dicta) that such a defence would be available.

- The concept of public interest may encompass both notions of disclosures of crimes and misdeeds and broader public concerns such as health and security

### Iniquity

- A defendant may argue that they only disclosed information in breach of an obligation of confidence in order to bring to light some wrongdoing
- It is subject to a three step test set out in **AFL V Age**
  - (1) Is a serious wrong or civil misdeed being disclosed?
  - (2) Is the iniquity of public importance (does it affect the community as a whole or the public welfare?)
  - (3) Is the disclosure to a third party with a real and direct interest in redressing the alleged wrong (will the disclosure actually help fix the wrong doing?)
- You cannot plead your own iniquity to defeat someone else's duty of confidence - **Kumar**
- **Smith Kline v Dept of Community Services (1990) 22 FCR 73, 110–11 (OL)**
- **Australian Football League v Age Company Limited [2006] VSC 308**

### Decision

- Defendants argued the defence of iniquity contending that information concerning a crime, wrong or misdeed of public importance will not be recognised by the law as being confidential
- They submitted that persons privy to such information cannot by agreement or otherwise prevent its disclosure by reverting to equitable doctrine of breach of confidence
- In addressing the three elements, Kellam J said
  - (1) Disclosure of names of players who have tested positive will not disclose any iniquity of a serious criminal nature – at best, disclosure may establish players had traces of illicit drugs in their urine and this may be relevant to the possibility of or suggestion of a crime having been committed but no crime could be proved by that information alone
  - (2) There is no suggestion that it is the intention of the defendants to disclose such matters to a third party with a real interest in redressing any such possible crime – the defendants seek to disclose the information for the purposes of an 'interesting story' for football fans and for other readers and for no other purposes
- **Minister for Immigration v Kumar [2009] HCA 10 (OL)**

### Facts

### Issues

### Decision

- **You cannot plead your own iniquity to defeat someone else's duty of confidence**

### Remedies

- An extensive range of equitable remedies is available when a breach of confidence is made out
- The exception here is the equitable proprietary remedy, the constructive trust
  - In Australia, it is thought that constructive trusts are not available as the plaintiff has a pre-existing property right in the subject matter of the alleged trust, given that information is not 'property'

- **Injunctive or declaratory relief** is typically sought where the confidence has not yet been broken; however injunctive relief may still be necessary to prevent further breach
- The plaintiff will have a strong claim to injunctive relief where an order preventing the defendant's misuse of information will protect the plaintiff from all subsequent harm. Once information has been misused an injunction will not be awarded unless the plaintiff can show the likelihood of repetition.
- Where information has already been used or disclosed, courts may deem injunctions inappropriate and favour the use of a monetary remedy, such as equitable compensation or an account of profits.
- **Accounts of profits** are sought when the confidential information has a commercial value – availability of this remedy distinguishes the equitable obligation of confidence from the contractual obligation of confidence
- Where the breach of confidence has caused loss to the plaintiff, **equitable compensation** can be obtained. **Lord Cairns' Act damages** may also be available
- Recent English and Australian decisions pertaining to the misuse of personal information have also shown that the courts are prepared to award monetary compensation for non-financial harm and distress suffered by plaintiffs

In *Australian Football League v The Age*<sup>22</sup> a newspaper wanted to publish names of footballers who had recorded multiple positive drugs tests. This information was prima facie confidential to the AFL and the footballers. The names had been broadcast on cable television (to a small audience); they were also known to AFL officials. Additionally, there had been extensive internet speculation concerning the footballers' identities, some of which correctly identified them. The newspaper argued that publication had destroyed the information's confidentiality. Kellam J held that it had not; the limited actual publication that had occurred did not amount to public knowledge. A distinction was drawn between gossip and innuendo on the one hand, and public knowledge on the other, internet speculation falling into the former category.