

## EQUITY NOTES

### KEY ISSUES OUTLINE KEY FOR EXAM:

FIDUCIARY DUTIES	
<b>Liability:</b>	
1. Establish whether fiduciary duties are owed:	<ul style="list-style-type: none"><li>• Is it an accepted category?</li><li>• If not, can it be established on the facts?</li></ul>
2. Ascertain the scope of the fiduciary duties:	
3. Determine if, and how, the fiduciary has breached the conflict and/or profit rules:	<ul style="list-style-type: none"><li>• State rules before applying them to the facts.</li></ul>
<b>Defences:</b>	
Can the fiduciary's disloyalty be excused?	

**Remedies:**

- Discuss personal equitable remedies the principal may seek first.
- 1. Personal equitable remedies:
  - What are the appropriate personal remedies on the facts?
- 2. Proprietary equitable remedies:
  - Establish the principal's right to proprietary relief.
  - Identify the property(ies) in the fiduciary's hands.
  - That property(ies) may need to be traced, including into third parties' hands.
  - If the proceeds/product of the property(ies) can be traced into, discuss the appropriate proprietary remedy.
  - Discretionary remedial considerations may apply.

**Barnes v Addy Liability:**

- Only after you complete your breach of fiduciary duty enquiry should you examine the equitable liability of any third parties.

**Liability:**

1. Barnes v Addy limb 1: 'knowing receipt.'
2. Barnes v Addy limb 2: 'knowing assistance.'

**Remedies:**

- What remedies may be available against the knowing recipient and/or assistant?

**ASSIGNMENT OF PROPERTY RIGHTS IN EQUITY****Situation 1: Assignments of future property**

Step 1: Define the future property in question

Step 2: Apply the facts to the relevant case

Situation 2: Voluntary assignments of legal property incomplete at law

Step 1: Define the type of property

Step 2: Apply the rule for the relevant type of property and the relevant law

Step 3: Has the rule on when equity will complete an imperfect gift been adhered to

Situation 3: Assignments of present property recognised only in equity

Step 1: Apply the rule

Step 2: If equitable property: Ensure requirements for assignments of (present) equitable property are met

Step 3: If applicable, state the rule for assignments of partial (or 'non-absolute') legal choses in action

**BREACH OF CONFIDENCE: Not examinable**

*If you have different defendants, cover it for each defendant —> normally first 2 elements will be the same but 3 and 4 may be different. Be concise in the assignment, and be mindful If there are different pieces of information that needs to be covered as well, you need to do all the elements again...*

**Opening Statement:** To establish a breach of confidence, six elements must be established.

**Step 1: Information must be specific**

*\*EXAM Tip: Tell the examiner WHY it is specified not that it is 'specified'*\*

**Opening Statement:** P must be able to define the information that will allow for equity's protection with specificity that is sufficient  
(O'Brien v Komesaroff; Ocular Sciences v Aspect Vision Care)

**Conclusion:** On the facts, this information is/is not specific because [reason].

Step 2: Information must have the necessary quality of confidence

**Opening Statement:** P must have communication specific information to D in circumstances importing a necessary relationship of confidence (Coco v Clark) There are two subcategories that both must be satisfied.

2.1: The information must be sufficiently secret

**Opening Statement:** There is not a breach of duty where D has revealed information that is pre existing common knowledge (Coco v Clark). Whether secrecy is vitiated is a matter of fact and degree determined on the fact of the case (Jane Doe v ABC)

**TEST** (ABC v Lenah Game Meats) : Information will not have the necessary quality of privacy where a reasonable person would understand it is meant to remain unobserved.

Supporting

Opposing

- That the information is secretly observed is not enough to make it sufficiently secret (ABC v Lenah Game Meats).
- Speculation or gossip will not vitiate secrecy (AFL v Age; AB v CD and EF)

2.2: The information must be sufficiently valuable

**Opening Statement:** Equity will not protect trivial information (Coco v Clarke). There are two categories, **Trade Secrets** and Personal Information. Applying test from ABC v Lenah Game Meats, disclosure of this information is highly offensive to a RP of ordinary

sensibilities.

Supporting

- Personal information the distinction between secrecy and importance is more blurred. Often the very nature of the information as something between the parties is what gives it its importance. Wilson v Ferguson- intimate photos would ordinarily bear a confidential character

Opposing

**Conclusion:** On the facts, this information is/is not sufficiently valuable because [reason].

Step 3: Circumstances importing the duty

**Opening Statement:** To establish a breach of confidence, the plaintiff must demonstrate that the information was shared under conditions that imposed a duty of confidentiality (Coco v AN Clark).

3.1: Describe mode of transmission

**3.1 (a): P deliberately confides the information to D:** The mode of transmission in this circumstance involved P communicating information to the D in circumstances importing an obligation of confidence (Coco v AN Clark).

Supporting

Opposing

- 'However secret or confidential the information, there can be no binding obligation of confidence if that information

	<p>is blurted out in public or is communicated in other circumstances which negate any duty of holding it confidential' Coco v AN Clark</p>
<p><b>3.1 (b) D improperly or surreptitiously takes the information from P:</b> The mode of transmission in this circumstance is when D takes the information from P in a way that attempts to avoid notice or attention; secretly.</p>	
<p><u>Supporting</u></p> <ul style="list-style-type: none"> <li>• Per ABC v Lenah Game Meats equity will protest confidential information that is improperly or surreptitiously taken by D.</li> <li>• In Lenah Game Meats the video of the possum slaughtering process was taken by individuals who illegally and surreptitiously obtained the information by trespassing on the property.</li> <li>• See also Hellewell v Chief Constable of Derbyshire for personal/private information cases, Laws J stated that: 'if someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in a private act, his subsequent disclosure of the photograph would, in my judgement, as surely amount to a</li> </ul>	<p><u>Opposing</u></p>

<p>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.</p>	
<p><b>3.1 (c) D changes upon the information:</b> The mode of transmission in this circumstance is when D changes upon the information.</p>	
<p><u>Supporting</u></p> <ul style="list-style-type: none"> <li>Attorney General v Guardian Newspapers- where an 'obviously confidential document is wafted by an electric fan out of a window into a crowded street, or when an obviously confidential document, such as a private diary, is dropped in a public space, and is then picked up by a passer- by.'</li> </ul>	<p><u>Opposing</u></p>
<p>3.2 Apply the 'knew or ought to have known' test</p>	
<p><b>Opening Statement:</b> The test for duty importation is whether or not D knew or ought to have known the information was given to them in confidence (Coco v AN Clark)</p>	
<p><u>Supporting</u></p> <ul style="list-style-type: none"> <li>Megarry J in Coco v AN Clark- 'if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon</li> </ul>	<p><u>Opposing</u></p> <ul style="list-style-type: none"> <li></li> </ul>

reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.'

**Conclusion:** On the facts, the element of circumstances importing the duty is/is not satisfied due to [reason].

#### Step 4: Breach of duty

**Opening Statement:** In order to prove a breach of confidence, P must demonstrate that D used (or intended to use) the information without authorization (Coco v AN Clark).

*Can use in third party scenarios where the defendant disclosed information to a third party... ## (d) Breach of duty – some earlier cases*

- \*Talbot\*: the network did make an unauthorised use of the concept or idea communicated confidentially by the plaintiff orally and in his submission*
- \*Foster\*: these secrets may, by continuing publication of the book in the Northern Territory, be revealed to those to whom it was always understood it would not be revealed*
- \*Giller\*: the showing of the video film of the sexual activities without consent of the parties would be an unauthorised distribution of the information*

**Conclusion:** On the facts, this information was/was not used without authorisation and is such there is/is not a breach of duty.

#### Step 5: Defences

**Opening Statement:** D may seek to rely on an exculpatory defence (i.e one which will entirely negate P's cause of action).

##### 5.1. Publication in the public interest``````

**FOR GOVERNMENT:** *"Because the information concerns Commonwealth/government affairs, the plaintiff must demonstrate detriment to the public interest from disclosure; here, publication would likely cause detriment by [prejudicing national security/defence], [undermining diplomatic relations], [compromising intelligence sources/methods], [impairing ongoing investigations or operational effectiveness], and/or [chilling frank internal deliberation within government], such that equitable relief is justified notwithstanding the defendant's interest in publication."*

**Opening Statement:** In the UK, a D could rely on the defence of overriding public interest in disclosing the relevant information, as of yet no such defence is accepted in Australia.