

WEEK 4 - Confidential information (Chapter 9)

The principles relating to confidential information form the basis for an equitable cause of action known as 'Breach of Confidence', a situation that arises when a person who receives information of a confidential nature, in circumstances of confidence, makes (or may make) unauthorised disclosure or use of that information.

The jurisdiction does not arise due to any proprietary right, but due to an obligation of conscience arising from the circumstances in which information was obtained. Equity grants relief where it appears that the information in question has 'the **necessary quality of confidence** 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. **(Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2))** (1984) 156 CLR 414. Equity imposes an absolute duty of confidence on those who receive information of a confidential nature in these circumstances as 'equity is moved to intervene by reason of the circumstances in which the defendant obtained the information, rather than any intrinsic value or importance in the information itself or by any apprehended damage to the plaintiff in its misuse'. **Doble v Chaffey Services Pty Ltd [2025] WASCA 3 at [84]**

Coco v An Clark (Engineers) Ltd sets out the elements that need to be satisfied for a claimant to succeed in an action for breach of confidence:

Elements:

- information must have the **necessary quality of confidence**
- the information must have been imparted in circumstances importing an obligation of confidence → **duty of confidence** (owed to the claimant)
- unauthorised use of that information to the detriment (**Commonwealth v John Fairfax** - set at a low level= *will expose his actions to public discussion and criticism*) of the party communicating it → **breach of the duty**
- absence of defences

1 - Necessary quality of confidence

The test to be applied is whether or not the information has "the necessary quality of confidence"

(Coco v A N Clark (Engineers) Ltd [1969] RPC 41)

1. The information is 'specifically identified' - Must be capable of objective and specific description and not merely described in global terms (see O'Brien v Komesaroff (1982) 150 CLR 310/ **Optus Network v Telstra Corporation**)

2. The information 'remains secret' - secrecy (either at the present time, or immediately prior to any unlawful disclosure. Must not be publicly known or common knowledge or public domain. (**ABC v Lenah Game Meats Pty Ltd (2001) 185 ALR 1**). If the information is already in the public domain, the right to relief is generally lost. **Australian Football League v Age Company Ltd (2006) 15 VR 419** the names of three AFL players who had tested positive for drugs were published on an internet discussion forum. An electronic newspaper article had also named the players to a limited group of subscribers for about five hours. A further publication of one of the player's names had occurred when a telephone caller named the player on the Fox Footy television program. Regardless, Kellam J found that the information had still not yet fully entered the public domain and remained confidential. A permanent injunction was ordered on the release of the players' identities.

Whether the information is of 'public domain' is a matter of facts.

Further, the kind of information must be considered

- **Personal information**

Depends on the nature of the information – for example:

- Information acquired in personal relationships (**Argyle v Argyle [1967] Ch 302; Giller v Procopets(2008) 24 VR 1**)
- Information acquired in the course of friendship (**Stephens v Avery [1988] 2 All ER 477**)

- private works who wants to be kept secret (**Prince Albert v Strange**) found that the jurisdiction to prevent unauthorised use was based both in property (in what the modern reader might regard as copyright in unpublished works) and in equity's power to restrain breaches of trust, confidence, or contract. As the etchings had come to Strange via a breach of contract, trust or confidence, equity could prevent the unauthorised use of the materials. Albert was able to claim breach of confidence over the publication of extracts from his personal diaries, despite they were circulating in a restricted group of readers on the understanding that they should not be published.

- Medical information that includes the identity of the patient where its disclosure would cause

prejudice to the patient with no real benefit to the public (**AFL v Age Company Ltd (2006) 15 VR 419**)

- Sexual relationship, preferences and activity **Wilson v Ferguson** it was a breach of confidence for a jilted lover to post 'sexted' pictures and videos from his ex-girlfriend onto Facebook.

- **Commercial information**

Information of a highly confidential nature such as:

- Details about a company's customers, financial information, etc
- Information that provides the person who acquires it with a "springboard" in terms of the time and cost savings the information will give them in developing their own products, techniques, ideas, etc

→ **Trade secrets** (vigorously protected by equity)

Must be genuine trade secrets acquired in a commercial setting – to determine this, the following factors are relevant (**Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd [1967] VR 37**):// **Del Casale v Artedomus [2007]**

- Extent to which the information is known by those involved in the business and outside the business
- Extent of measures taken to guard the secrecy of the information
- Value of the secret to the business and to its competitors
- Time and cost in developing the information
- the ease or difficulty with which the information could be lawfully acquired or developed
- whether it was plainly disclosed that the information was confidential
- usage and practise of the industry supports that the information is confidential
- whether it was permitted to share the information only by reason of their seniority in the business..

However:

- Products already on the market will not be regarded as confidential – i.e. it's permissible to reverse engineer a product (copyright will be a separate issue)st

** **Trade secret and 'Know how'** - acquired during the course of employment may not be regarded as confidential (**Faccenda Chicken Ltd v Fowler [1985] 1 All ER 724**)

Difficulties arise in the employment context when employees seek to leave their jobs and set up businesses in competition with their former employers. In these cases, the courts are guided by the principle that an employee should be free to use his or her accumulated knowledge, skill and experience ('know-how'). By the same token, there is an implied term in every employment contract. To aid this process of balancing, the courts have adopted the following

three-tiered classification of categories employment information:

- trivial information, which is publicly available or so obvious that it cannot be protected;
- information that must be treated confidentially until the termination of employment, whereupon it becomes part of the ex-employee's collective skill, knowledge and ability; or
- highly confidential trade secrets, which will be protected by the courts even after the termination of employment

'[a]n identified piece of confidential information does not cease to be confidential simply because it is memorable'.

