LAW 3111 Equity exam script

	Topic 2: Breach of confidence
INTRODUCTION	A breach of confidence involves a conscience based wrong whereby it imposes a duty to protect a person's confidential information to prevent the person into whose hands confidential information has passed from using it in some unauthorised way ***(Coco v AN Clark). Gummow JJ in Smith Kline*** discussed the principle as an '**obligation of conscience'** meaning that those privy to confidential information have an ethical and legal duty to uphold its confidentiality. • Any kind of information may be protected by the equitable obligation of confidence, such as trade secrets or commercially valuable information that cannot otherwise be protected by patent, trademark or copyright law • Confidential information can take many forms such as drawings, written documents, photographs, works of art, electronic documents, recordings etc
ELEMENTS	***Coco v AN Clark (Engineers) Ltd [1968] FSR 415, Megarry J at 419:*** *'In my judgment, three elements are normally required if …a case of breach of confidence is to succeed. First, the information itself … must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information'* **So, with this case in mind and recent cases the elements are now as follows:** (1) The information said to be confidential must be identified with specificity and not merely in global terms; (2) The information has the necessary quality of confidentiality (and is not for example common or public knowledge); (3) The information was received by the defendant in such circumstances as to import an obligation of confidence, and; (4) That there is actual or threatened misuse of that information, without the consent of the plaintiff [P] may consider bringing an action of breach of confidence (BOC) against [D] for disclosing [INSERT INFO] to (INSERT WHO), and seek equitable relief as to the damage suffered. What is required to be established is specificity (*O'Brien),* that the information has the necessary 'quality of confidence', circumstances importing the duty and unauthorised use *(Megarry J in Coco v AN Clark).*
Information must be specific	A (post-Coco) preliminary condition of liability – the need to specify the information(s) that will submit to 'Coco analysis' P must be able to define the information they are seeking equity's protection of with sufficient specificity and not merely in global terms *(O'Brien v Komesaroff; Ocular Sciences v Aspect Vision Care)* • Information must be detailed, not described in general terms → the court should be able to assess its confidential nature distinctly *(O'Brien)* • If the information is too general, its hard to establish a duty of confidence • *Mason J in O'brien* also noted that for a court to grant relief for a breach of confidence, the claimant must specifically identify what information is confidential and not common knowledge → failure to do so may result in the court being unable to grant relief • Where there are multiple candidate items of confidential information, the plaintiff must 'particularise' each of them per *O'Brien*

	(Rule): Per *O'Brien,* the information disclosed by [D] can/cannot be identified with sufficient precision and not in general terms: [insert information]. This specificity is demonstrated as [insert reason]. *In **O'Brien,** when the unit trust deed was read on its own, without the proof of further material facts, it was not a sufficiently precise definition of what was the confidential information which was to be foundation of an action for breach of confidence → the contents of the unit trust deed and the article of association were matters of common knowledge → "the respondent … was given every opportunity to define more specifically the information upon which he relied"* [D] can identify with sufficient precision the information disclosed which is protected: [insert information] ('***the information***'). This element is established. • [P] should distinguish from generality as seen in *Ocular Sciences* where it was held that 'warehouse information' was not specific. • Established that where there are multiple candidate items of confidential information, the plaintiff must 'particularise' each of them. • [D] should argue [INFO] is analogous to the **vague** and **unidentifiable** tax scheme Komesaroff had alleged was disclosed without authorisation in *O'Brien* *Sample analogy:* • *Much like in **O'Brien @ 326**, where Komesaroff had not made clear which specific parts of the unit trustee contained confidential information…* • *The facts here are **dissimilar** to O'Brien because of the information in the [insert info holder eg package] being sufficiently specific. The information here includes (list)* <u>Mention if relevant: If all documents are confidential</u> However, in contrast *Ocular Sciences,* all of the [insert documents] OTF are confidential. Whereas only some/not all of the documents in *Ocular Sciences* were confidential. In the filing cabinets of *Ocular Sciences* there was statements of Snell's law (basic principles in Physics learnt in High School) as well as documents included in press releases about new inventions that were not confidential as they had been broadcast and published in the press. On balance, the specific element for [insert information] is likely met because the information can be identified with sufficient specificity (what [D] is claiming as confidential can be identified with sufficient precision).
Information must have the necessary quality of confidence	**Rule:** Per *Megarry J* in *Coco v Clark,* the information must have the **NQOC** such that it can be protected by equity. [P] must satisfy the additional requirements of **secrecy** (the information is not publicly available) and **value** (the information is not trivial and not benal), to prove that (INSERT INFO) has the NQOC **RULE:** Per *ABC v Lenah Game Meats*, the information must be **sufficiently secret** as opposed to *'public property and public knowledge' (Cwth v Fairfax citing Saltman).* It is not necessary for information to be secret, in the sense that it has not been communicated by the person or person to whom it relates, for it to satisfy the test of private or confidential *(Jane Doe).* There is no breach of confidence if D reveals something to another which is already common knowledge (Megarry J at 419-420 in Coco) • Whether secrecy has been vitiated is a matter of fact and degree, to be determined on the facts of the case (*Jane Doe v ABC*). • It is not enough that the information is secretly observed (*ABC v Lenah Game Meats*) • Speculation/gossip does not vitiate secrecy (*AFL v Age*; *AB v CD and EF*).

[D] is likely to allege that [INFO] was not secret as it was known in the local community/ broadcasted on television or to the public

When is information considered to be 'public':
(i) If it was confidential and has been disclosed
(ii) If it was so general to begin with that it could never have been confidential

SUFFICIENTLY SECRET?

*In **Lenah Game Meats**, the activities secretly observed and filmed were not relevantly private, as an act does not become private simply because the owner of the land would prefer that it were unobserved.*

*In **Jane Doe**, it was held that the fact that other people are aware of the information does not of itself rob it of its private confidential nature → confidence was lost because information had entered into the public domain where it could be generally accessible → Ms Doe's information had been leaked beyond her trusted and confidential circle (a contained and controlled leak of information is allowed to some extent)*

Will pre-publication 'speculation' vitiate secrecy?

*In **AFL v Age Company Ltd**: 'the fact that such speculative gossip, innuendo and assertion by unknown persons has been placed on the web sites of various discussion fora does not make confidential material lose its confidential nature'. Information had lost any equitable confidentiality protection it had once held through entering the public domain??? Held that the limited actual publication that had occurred did not amount to public knowledge as whatever speculation had entered the media, was not insufficient to rob the information of its secret quality → no one knew the AFL they were just informed predictions*

*Ferguson CJ, and Osborn and McLeish in **AB v CD and EF**, observed that: 'the trial judge's finding . . . that the proposed disclosures would involve official confirmation of EF's role as a police informer, is a conclusion that this role is not currently known'* → only when DPP releases the information is that information known publicly, prior to that the information was only speculation

SUFFICIENTLY VALUABLE?

[P] must establish that the information equity is trying to protect is not information that is mere trivial tittle-tattle, however confidential *(Megarry J at 421 in Coco).*

When applying the second sub-element, it is necessary to determine whether – in its nature – the information is either:

1. Valuable in a commercial sense **('trade secret' line of cases**); or
2. Important in a non-commercial sense **('personal/private information' line of cases)**

TRADE SECRETS

Something constructed from information in the public domain will be sufficiently valuable where something *'new and confidential'* is brought into being '*by the application of the skill and ingenuity of the human brain'* (*Coco v Clark*).

- This is a fairly undemanding test (*Link 2 v Ezystay Systems*)
- TV program in *Talbot v General TV Corp*, manuals in *Link 2 v Ezystay Systems,* new nectarine in *Franklin v Giddins* were all of sufficient importance

Determining the sufficiency of a trade secret's value

	TEST: trade secret must reflect the “skill and ingenuity of the human brain”, if it is then it is sufficiently valuable and merits equity’s protection. It is not “trivial tittle tattle” → “something new and confidential may have been brought into being by the application of the skill and ingenuity of the human brain” *(Megarry J at 420-421 in Coco)* *--- to be continued in notes*

	TOPIC 3: FIDUCIARY DUTIES
INTRODUCTION	*Structure for fiduciary problems* 1. *Establish the fiduciary relationship* 2. *Is the transaction in issue within the scope of that relationship?* 3. *Is there a breach of the conflicts and/or the profits rule?* 4. *Are there defences available to the fiduciary?* 5. *Remedies against the fiduciary– personal and/or proprietary* 6. *Is there third-party liability?* 7. *Remedies against the third party– personal only*
Does a fiduciary relationship exist?	P will argue that there exists a fiduciary relationship between them and the defendant. Inherent in fiduciary relationships is a position of vulnerability, where one party places reliance on the other **(Hospital Products Ltd v United States Surgical Corporation).** Fiduciary duties seek to protect against self-seeking behaviour in the context of such relationships by requiring that the fiduciary entirely subordinates their interests to those of the principal. **TWO CIRCUMSTANCES IN WHICH A FIDUCIARY RELATIONSHIP EXISTS** • Accepted category • Factual fiduciary relationship - Vertical (one party to has to subordinate their economic interests to the other, one party may exert from skill or resources; or - Horizontal (professional business partnership for example) Historically, equity has accepted certain relationships are intrinsically fiduciary in nature. Where a relationship falls into an accepted category, equity's position is that the existence of a fiduciary relationship arises as a matter of legal inference. As such P is not put to proof on the matter. **'Accepted' and 'factual' fiduciary relationships:** **(a) Accepted categories:** • When dealing with an accepted fiduciary relationship, the existence of the fiduciary relationship arises as a matter of legal inference **(b) Factual (or 'unaccepted') categories:** • When dealing with a factual (or unaccepted) fiduciary relationship, the existence of the fiduciary relationship must be proven (by the principal) 'on the facts' – i.e. as a matter of factual inference ***NOTE if you have an accepted category make sure to describe how the relevant relationship falls into the accepted category** **The (currently) accepted categories of fiduciary relationship:** ▪ **Trustees and beneficiaries: Keech v Sandford (vertical relationship)** • Suppression of economic interests for the trustee is made in favour of the beneficiary • Trustee owes the beneficiary a duty ▪ **Agents (defendants) and principals (plaintiff): McKenzie v McDonald** (agent acts on principals behalf when dealing with third parties) – E.G. an agent will sell a property to prospective buyers (third parties) on behalf of the principal (owner of the property), agent is the fiduciary • Agent owes principal fiduciary duties, not the other way around – 'one-way basis'

- **Employees and employers: Warman v Dwyer** (employee owes a fiduciary duty to the employer) employee is an agent of the employer
- More senior the employee, the more likely the employee will be authorised to act on the employers behalf (more likely the FD will be at play)
  - **Directors and companies: Regal (Hastings) v Gulliver** (directors owe a fiduciary duty to the company)
- You will subordinate your own economic interests in favour of the company
- Director = agent, company = principal, as the company is incapable of dealing with third parties, the directors do so on its behalf
- Directors are solely in control of the companies property, but do not own it
  - **Solicitors and clients: Nocton v Lord Ashburton** (solicitor owes a fiduciary duty to the clients (principal)
- Solicitor acts on behalf of the client
  - **(Co-)Partners: Chan v Zacharia** (horizontal relationship)
- Every partner subordinates their interests on all partners, are all recipients on fiduciary duties
  - **Bankruptcy trustees and creditors** (court will appoint the trust to administer the bankruptcy assets, meaning money that is owed gets owed, creditors owe the money)
  - **Guardian and ward???** Sometimes included per **Hospital Products,** in this case it was recognised that the guardian is a fiduciary concerning property that the guardian administers for the ward
  - **Executor-beneficiaries of deceased's estate**

Equity won't put P to proof of these categories and thus equity infers as a matter of law that one party to the relationship made a 'fiduciary undertaking' to the other.

Factual categories

Despite accepting some relationships as categorically fiduciary, equity may be persuaded that a fiduciary relationship was formed outside the accepted categories and thus P would argue this. In these situations, however, equity does not draw a legal inference that one party undertook to totally subordinate their interests to the other. As such P must prove that their relationship with D is a fiduciary one OTF.

VERTICAL FACTUAL FIDUCIARY RELATIONSHIP

A vertical (non-associative) fiduciary relationship arises where fiduciary duties are owed on a one-way basis, meaning by one party to another. The relevant test to prove the existence of a vertical factual fiduciary relationship is Mason J's undertaking test from ***Hospital Products.***

Per ***Mason J's*** undertaking test, a vertical factual fiduciary relationship will exist where a putative fiduciary has undertaken or agreed to 'act for, or on behalf of, or in the interests of, another person in which will affect the interests of that other person in a legal or practical sense'. Such relationship gives the fiduciary a 'special opportunity to exercise the power or discretion to the detriment of that other person' who is thus 'vulnerable to abuse by the fiduciary of [their] position' ***(Hospital Products)***

The three components of Mason J's Hospital Products test:

A) Undertaking: Did the alleged fiduciary undertake to carry out a particular function or responsibility for the principal in relation to some matter?, if yes, we do have an undertaking

B) Entrusting: Did this function or responsibility give the alleged fiduciary a power and discretion to affect the principal's interests, legal or practical? (Does D have a power or discretion that could affect P's interests?)

C) Vulnerability: In carrying out this function or responsibility, did the alleged fiduciary have a special opportunity to act to the detriment of the principal, who was, accordingly, vulnerable to the fiduciary's abuse?
(if yes, yes and yes, then equity will specifically infer as a matter of fact, that the alleged fiduciary undertook entirely to subordinate their economic interests to the principle

In ***Hospital Products*** it was held that a fiduciary relationship didn't exist as there was not the dynamic of vertical subordination as existed in the settled categories → there was not a power imbalance → business transaction is supposed to be mutually beneficial
'In observing the requirements of the [contractual] best efforts clause, Blackman was … **not** required to have regard to USSC's interests to the exclusion of his own. He was not required to resolve any conflict entirely in favour of USSC and he was, therefore, not placed by the best efforts clause in a fiduciary position'.

- Being appointed as Australia's exclusive distributer of USSC products was in both Blackman and USSC's interests – both parties would profit from the arrangement
- The subject matter over which his fiduciary obligations extended was to use his 'best efforts' to promote USSC's products and build up the market for them in Australia
- Parts were at 'arms length' and on equal footing due to the commercial contract therefore NO FIDUCIARY DUTY AROSE
- Defendants argument = 'purely of a commercial kind'
- *'The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction'.*

In ***Breen v Williams,*** Breen unsuccessfully sought a declaration that her doctor-patient relationship was fiduciary and that Williams owed her a duty to give these records to her

- Essentially the relationship between doctor and patient is a contractual one whereby the doctor undertakes to treat and advise the patient and to use reasonable skill and care in so doing'.
- the doctor received this trust and confidence not because the doctor in any sense acts as a representative of the patient, "but simply in the exercise of his or her professional responsibilities"
- the right of access claimed by Breen is not one given by the contract between her and Dr Williams – nor can it arise from any undertaking express or implied by Dr Williams to act as the representative of Ms Breen as no such undertaking was given

Horizontal factual fiduciary relationship

A horizontal fiduciary relationship arises where fiduciary duties are owed on a multi-lateral basis, meaning by all parties to each other. This refers to a joint venture relationship – an 'association of persons for the purposes of a particular trading, commercial, mining or other financial undertaking or endeavour with a view to mutual profit, with each participant usually …. Contributing money, property, or skill' ***(United Dominions Corporations Ltd v Brian Pty Ltd)***

Per ***Gibbs CJ in United Dominions Corporations Ltd v Brian***, a horizontal relationship will be a fiduciary one where there is a relationship 'based on the same mutual trust and confidence, and requiring the same good faith and fairness, as if a formal partnership deed had been executed.

United Dominions Corporations Ltd

- Circumstances pointing towards a FR includes that the arrangements between the prospective join venturers had passed far beyond the stage of mere negotiation, each had agreed and been accepted as a participation in each of the proposed joint ventures → proposed participants in each joint venture were under a fiduciary obligation to one another

	in relation to the proposed project at the time when the first of the mortgages was given and accepted • The relationship between the parties was fiduciary since the willingness of the parties to proceed with the project prior to executing the agreement demonstrated a high degree of mutual trust and confidence …. to be continued in notes
Scope of the fiduciary relationship	At the second stage of a breach of fiduciary duty enquiry, the plaintiff-principal must show that the fiduciary's impugned/alleged misconduct comes within the scope (both thematic and temporal) of the parties' fiduciary relationship. Per ***Birtchnell v Equity Trustees,*** a scope enquiry requires delineating the 'subject matter over which the fiduciary obligations extend'. Per Finn, Stone and Perram JJ in ***Grimaldi v Chameleon Mining***, the 'actual function or responsibility' determines the 'subject matter over which the fiduciary obligations extend'. This is a question of fact **(Grimaldi)** • Look at the nature of the agreement (the contract e.g. trust deed or instrument for a partnership?) and the actual course of dealings • Make sure to specify D's relevant conduct • **Hospital Products v USSC:** there was nothing to the relationship other than contract • **Birtchnell v Equity Trustees:** fiduciary relationship evolved over time **THEMATICALLY – This refers to <u>what</u> the fiduciary duty covered — i.e., the subject matter of the duty (scope usually fails as it can not be captured thematically)** **TEMPORAL – This refers to <u>when</u> the fiduciary duty applied — i.e., the time frame during which the fiduciary relationship existed.** **LOOKING AT** • Nature of the agreement (e.g. contract); and • The course of dealings (e.g. if the relationship has evolved and the subject matter expands…) • <u>Where there is 'nothing to the relationship other than the contract' you analogise to</u> ***Hospital Products Ltd v United States Surgical Corporation*** • <u>Where the fiduciary relationship evolves over time analogise to</u> ***Birtchnell v Equity Trustees*** **NOTE: In *Grimaldi v Chameleon Mining*** • The scope of an agency relationship is generally circumscribed and narrow – agents are appointed for specific purposes or tasks. After completion the relationship ends. • The scope of a company director relationship is generally broad • Partnership relationships often evolve over time … to be continued in notes