

LAWS2015 - Final Scaffold 2025 S2

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Topic 2 - Breach of Confidence and Estoppel

I. Has there been a breach of confidence?

1. **State principle: [Claimant]** may bring a claim for breach of a [if applies: contractual] duty of confidence or equitable duty of confidence. Where [claimant] pursues a claim for a breach of an equitable duty of confidence, it does not depend on any implied contract, but rather on the broad principle of equity that he who has received information in confidence shall not take unfair advantage of it (*Seager Ltd v Copydex*).
 - a. N.b. *Seager* concerned information obtained in negotiations that was improperly used finding that even where no contract has been concluded, a breach of an equitable duty of confidence can still be established.
2. **Does the contract impose a contractual obligation of confidence potentially ousting an equitable obligation? *Optus***
 - a. **Is there no contract?**
 - i. Then equity is available *Coco v Clark*
 - b. **Does the contract clearly envisage equitable remedies?**
 - i. Then equitable remedies will be available *Optus*
 - c. **Does the contract attempt to rule out equity?**
 - i. Prima facie, equity will not be available. The position in Australia is that it is possible to rule out an equitable remedy however there is a high threshold (*Optus*).
 1. Merely codifying the contractually protected information is not sufficient to exclude equitable obligations of confidence (*Optus*).
 2. Even where the contract stipulates an obligation of confidence, that does not mean that an equitable claim doesn't exist (*Optus*).
 - ii. The likely conclusion is that the contract does not effectively rule out equitable remedies.
3. **The first question in determining whether there is a breach of an equitable obligation of confidence is whether the information in question is identified with specificity *Optus***
 - a. [Claimant] must identify confidential information with sufficient specificity so that the defendant may know specifically what information they are being ordered not to disclose (*O'Brien v K*).
 - i. In *O'Brien*, claiming that a whole trust deed was confidential information did not satisfy this element. There had to be a specific piece of information or component of the whole trust deed that was confidential.
4. **The following issue is whether the information has the 'necessary quality of confidence' *Optus***
 - a. [A] **Is the information inherently confidential?**
 - b. [1] **Personal Information?**
 - i. A practical test of what is private is where disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities (*ABC*). This can include:
 1. Information relating to health, personal relationships or finances (*ABC*)
 2. Activities, which a reasonable person applying contemporary standards of morals and behavior would understand to be meant to be unobserved (*ABC*).
 - c. [2] **Commercial information?**
 - i. The relevant considerations include: *Wright v Gasweld per Kirby J*
 1. Whether skill or effort was expended to acquire the information?
 2. The employer has 'jealously' guarded the information and it has not been made readily available without considerable effort by others.
 3. The fact that the employee is made aware that the employer regarded the information as confidential.

4. Whether usages and practices of the industry support the assertion.
 5. The fact an employee was only permitted to access the information by reason of high seniority or responsibility in the organisation.
- ii. Is the information regarded as ‘know-how’ rather than confidential information?
1. The general principle is that people are permitted to develop their skills with information from a previous employer.
 - a. In *Del Casale* knowledge of the location of valuable marble was considered know-how because although it was valuable, it wasn't information that the employers had explicitly researched or developed.
 - b. Further, courts will tend not to grant relief where the know-how of an employee relates to the question that confidential information answers *Del Casale per Hodgson JA*.
- iii. Is there a subsisting duty of confidence between lawyer and client?
1. There is a continuing duty to preserve the confidentiality of information imparted during a solicitor-client relationship (*Bolkiah v KPMG*).
 - a. The court can intervene where there is a real risk, not merely fanciful or theoretical, but it does not need to be substantial (*Bolkiah v KPMG per Lord Millett*)
 - b. In *Bolkiah*, KPMG was instructed not to work for a client with adverse interests to B although B no longer retained KPMG.

d. [3] Government information?

- i. Government information can be confidential but it is subject to a higher threshold to be confidential, that is, if disclosure would injure the public interest (*Cth v John Fairfax*)
 - ii. This cannot be established because embarrassment would arise or the government would be exposed.
 - iii. It will only be established if the information prejudices matters of national security or public health (*John Fairfax*).
 - iv. N.b. Where the information is in relation to a crime, you can disclose the information *Burton*.
- e. [B] Has the quality of confidence been lost via entry into the public domain?**
- i. **[General principle]** If information has entered the public domain by the time equity's jurisdiction is invoked and is known to a substantial number of people the quality of confidence is lost - *Johns v ASC*
 1. **However**, if it has only been in the public domain for a short period, it may retain its quality of confidence. Equity does not require absolute seclusion of information (*Johns*)
 2. The information does not need to be kept absolutely secret (*Prince of Wales v Associated Newspapers*) - In this case, photocopying the contents and sending this to friends did not destroy confidence.
 3. **Transient publication** also does not destroy confidence. That is, if something has been published for a short period before being taken down, this does not destroy confidence (*AFL v The Age*). It is relevant to consider (1) the number of people that had seen it and (2) the amount of time it was published for.
 4. **Caveat:** Even if no one reads it, information published in a Court judgement is considered to be in the public domain (*Johns*).

5. Was the information imparted/received in circumstances importing an obligation of confidence? (*Optus*)

- a. The equitable jurisdictional basis for granting relief lies in the notion that an obligation of conscience arising from circumstances in or through which the information was communicated or obtained

Topic 3 - Remedies in Equity

I. Should specific performance be ordered?

1. **[General rule]** Specific performance is a discretionary order from the court, exercising its auxiliary jurisdiction to compel the defendant to perform their obligations according to the terms of a contract.

2. **Is there an enforceable contract?**

- a. Specific performance is a remedy that enforces a party's legal obligations under a contract. On these facts, [Party] has a contract with [Counterparty] where [Counterparty] has a legal obligation to [Obligation]. Hence, there is a legal obligation to which specific performance may potentially be sought.
- b. N.b. With gratuitous promises (gifts) specific performance is not available as there exists no legal obligations to which specific performance can be ordered > Go to "II. Should an injunction be ordered"

3. **Are damages an inadequate remedy?**

- a. The following issue is whether damages are inadequate to remedy the plaintiff's loss due to the defendant's breach of their legal obligations *Dougan*. Equity does not decree specific performance on any distinction between realty and personalty, but because damages at law may not afford a complete remedy *Adderley v Dixon*. It must be objectively reasonable that damages are inadequate for the plaintiff, but this may take into account their circumstances and intentions *Dougan*.
- b. **[For Contracts for sale of land]** Specific performance is decreed over contracts for land where the land has a peculiar and special value to the purchaser *Dixon*
 - i. N.b. In *Pianta* the Court still granted specific performance to a property developer that wanted to acquire land for a solely financial purpose.
- c. **[For Contracts for the Sale of Goods]** Generally, in contracts for the sales of goods, specific performance will not be decreed because damages at law, calculated on the market price of the goods are considered a complete remedy, because they may repurchase the same quality and amount of goods with the damages *Dixon*
 - i. **[Exception]** Where the goods are difficult to come by or not readily marketable. Examples:
 1. Scarcity i.e., limited number of 'taxi licenses' *Dougan*
 2. Not available in the public market *Perry v British Railways Board*
 - a. This case concerned the delivery of steel where specific performance was decreed because a steel manufacturers strike resulted in steel not being readily available.
 3. Rarity, beauty, distinction *Falke v Grey*
 - a. Sale of two Ming vases
 4. Where the property is subject to great price fluctuations or it is difficult to assess damages *Adderley v Dixon*
 - a. *Dixon* concerned a contract to sell bad debts, and because it was difficult to assess how much the purchaser would actually collect from the bad debts, this made damages too difficult to assess such that specific performance was ordered.
- d. **[For Contracts that provide a benefit to a third party]** A contract that transfers property or a benefit to a third party are generally regarded as attracting specific performance because damages are almost always an inadequate remedy *Coulls v Bagot's*. This is because, only the promisee may obtain damages and where the benefit of a contract is provided to a third party, damages recoverable by the promisee are only nominal *Coulls v Bagot's*.

Topic 4 - Nature and Constitution of Trusts

I. What type of trust do we have?

1. Is it an express trust?

- a. An express trust is created by express intention of the settlor to have specified property held on trust for the benefit of one or more persons.
- b. Then note the type of express trust:
 - i. **Fixed Trust:** A trust where the beneficiaries', and their proportion of the interest is fixed and ascertainable from the construction of the trust.
 - ii. **Discretionary:** Where a trustee has discretion to choose the beneficiaries, and their proportion of the beneficial ownership - importantly the trustee **has to choose** someone.
 - iii. **Powers of appointment:** A trust where the trustee is given discretion to choose beneficiaries and their proportion of beneficial ownership, AND the discretion to choose not to distribute the assets. This means that the beneficiaries have no power to be entitled to any of the property.

2. Is it a resulting trust?

- a. This is an implied trust, which equity uses to fill incomplete gaps in equitable ownership of property where equity deems it to be appropriate.
 - i. **Automatic:** for failed express trusts
 - ii. **Presumed resulting trusts:** A trust that results back to the settlor due to equity's suspicion.

3. Is it a constructive trust?

- a. A constructive trust is imposed by operation of law, independently and is not dependent on the express intention of the parties.
 - i. E.g. Vendor Purchaser Constructive Trusts

4. Or is it not a trust?

- a. *It could be argued that [Settlor] did not intend to create a trust but rather a [other relationship]*
- b. **Is it a condition? 'To X on condition that X confer a benefit to Y'**
 - i. If there is:
 1. A condition precedent (property does not vest in X until performed); or
 2. Condition subsequent (property divests from X if not performed); or
 3. Inter vivos gift (property vests back to settlor on non-performance).
 - ii. Then it is not a trust relationship, but rather a gift subject to an equitable condition **Re Gardiner**.
 - iii. But the **wording of the obligation must be definite** so that the court can determine at all times where the property should be vested **Re Gardiner; Gill v Gill**
 1. **[CONDITION OF DIVESTMENT]** In **Re Gardiner**, the property was transferred subject to the recipient subject to them paying out an amount within two years of the transfer. This was considered a condition of divestment meaning that if it is not satisfied the interest is extinguished.
 2. But C.f. **[MERE PERSONAL EQUITABLE OBLIGATION]** **Gill v Gill** where the condition was to permit someone stay in the transferred house. This is different from a condition attached to the divestment of the property but rather a condition attached to ownership of it. The Court will not extinguish the interest where this condition has failed but will order performance of the obligation.
- c. **Is it an 'equitable charge' 'To X, subject to a charge in favour of Y in order to secure an obligation from Y'**
 - i. Result: [A] takes property, but B has an equitable proprietary interest in the property to secure [A]'s performance of an obligation where B can only execute their charge in the event of default.
 - ii. Failure: where [A] does not meet the terms of the charge, the chargee may appropriate the property and satisfy payment out of the proceeds of sale.
 1. However, if a clause states, that a sum from proceeds of sale equal to debt owed to be held on trust to discharge debt (rather than all proceeds held on trust/charge over all proceeds) then creates trust as alternate payment mechanism, not a charge **Associated Alloys** [intention to create trust over proceeds from steel production].