

LAWS2015 – Finals Scaffold

Equity

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Topic 2: Breach of Confidence

- Source of obligation of confidence – equity or contract
- Elements for a breach of confidence in equity
 - Information is identified with specificity
 - Information has the necessary quality of confidence
 - Information was obtained in circumstances importing an obligation of confidence
 - Actual or threatened misuse of the confidential information
- Defences
 - Public interest
 - Iniquity
- Remedies
 - Injunction
 - Compensation
 - Orders for delivery and destruction

1. Source of obligation of confidence

Contract

- 1) The plaintiff may bring a common law action for damages for breach of contract

Equity

- 2) Equity protects independent obligations of confidence in its exclusive jurisdiction on the basis that unauthorized use of confidential information would be unconscionable *Optus v Telstra*
 - a. Equitable and contractual obligations of confidence may coexist unless the contract intends to exclude equitable remedies as a matter of construction
 - b. Equity does not intervene if the legal remedy is adequate, but it is often unclear at early stages whether damages will be an adequate remedy

2. Elements for a breach of confidence in equity

Information is identified with specificity:

- 1) There must be specific information, which is confidential, not just a general confidential subject *O'Brien v Komesaroff*
- 2) Nature of information
 - a. (a) written, verbal or photographic *Lenah Game Meats*
 - b. (b) may be the ideas rather than the way they are expressed *O'Brien v Komesaroff*

Information has the necessary quality of confidence:

- 1) **General test:** Information has the necessary quality of confidence if a reasonable person would understand it to be confidential in light of contemporary standards of morality and behaviour *Lenah Game Meats*
 - a. Consider:
 - i. (a) relationship between the parties

- ii. (b) nature of the information
- iii. (c) circumstances of communication *Del Casale*

2) Public Domain:

- a. Information cannot be:
 - i. (a) in the public domain,
 - ii. (b) common knowledge, including in a particular industry *O'Brien v Komesaroff*
- b. **Publication:** Disclosure extinguishes confidence, unless (a) limited number of people *Johns v ASIC*; of (b) transitory (i.e. only a limited number of people saw it on the website before it was taken down) *AFL v Age*
- c. **Partially Public:** Confidential where (a) public information is so linked with confidential information that it is confidential as a whole; of (b) information was construed from public information through skill and ingenuity and thus becomes confidential *Coco v AN Clark*

3) Personal Information:

- a. **General test:** Personal information is confidential if disclosure would be highly offensive to a reasonable person of ordinary sensibilities *Lenah Game Meats*
 - i. Not sufficient if it occurred on private property *Lenah Game Meats*
- b. **Examples:**
 - i. (a) personal relationships, (b) personal finances; (c) medical information *Lenah Game Meats*; (d) marital and sexual relationships/activity *Giller v Procopets*

4) Commercial Information:

- a. **Relevant factors and considerations** *Wright v Gasweld*
 - i. Skill and effort expended to acquire the information
 - ii. Whether information is jealously guarded by the employer, is not readily made available to employees and could not, without considerable effort and/or risk, be acquired by others
 - iii. Plainly made and known to the employee that the material was regarded by the employer as confidential
 - iv. The fact that the usages and practices of the industry support the assertion of confidentiality
 - v. The fact that the employee in question has been permitted to share the information only by reason of his or her seniority
- b. **Business activities:**
 - i. Business activities must themselves be confidential, and the information will not be confidential if (a) employees, contractors and inspectors regularly view activities without secrecy *Lenah Game Meats* or (b) the activities/products were not particularly special or innovative *Coco v AN Clark*

c. **Employee know-how:**

- i. The accumulated general knowledge, skill and experience of an employee in a particular field is not confidential *Del Casale*

5) **Commercial Information:**

- a. Determined according to the public interest *Cth v John Fairfax*

Information was obtained in circumstances importing an obligation of confidence:

- 1) **General test:** Information has the degree of intrinsic importance and was obtained in circumstances where a reasonable person would have realized they were not free to deal with the information as their own or could deal with the information only within limits *Del Casale*
 - a. Professionals have a continuing duty to preserve the confidence of information of former clients even after termination of their fiduciary relationship *Bolkiah v KPMG*

Actual or threatened misuse of confidential information without consent:

- 1) **Misuse:** Where (a) information was actually disclosed, even if the defendant took all reasonable steps to avoid disclosure; (b) there is a real (need not be substantial) risk of disclosure *Bolkiah v KPMG*
- 2) **Without Consent:** No breach if the plaintiff provided informed consent to disclosure *AG v Heinmann*

3. Defences

Public Interest

- 1) **Disclosure is permitted if it is in the public interest** *Cth v John Fairfax*
 - a. **Government information:** Clear public interest in enabling public discussion of government affairs, unless this is counterbalanced by prejudice to (a) national security; (b) relations with foreign nations; or (c) ordinary business of government *Cth v John Fairfax*

Iniquity

- 1) **Disclosure is permitted if (a) the subject matter is a crime, civil wrong or serious misdeed** of public importance; and (b) disclosure to a third party with a real interest in redressing such crime, wrong or misdeed *AFL v Age*

4. Remedies

Injunction

- 1) **Plaintiff may be granted an injunction to prevent the defendant from using or disclosing the information** *Coco v AN Clark*
 - a. **Whether available:** Quia temet injunction is 'readily available for threatened breach

- i. Injunction is not available if the information has already lost its quality of confidence through disclosure *AG v Heinmann*, unless disclosure was limited and there is a risk of wider publication
Johns v ASIC

b. Springboard doctrine:

- i. Available if (a) breach gave the defendant an unfair springboard over the rest of the market which cannot be sufficiently quantified by either the plaintiff's loss or defendant's gain; as (b) the defendant could have independently acquired the confidential information but at a later time
Wright v Gasweld
- ii. Defendant cannot use the information for the period of the unfair advantage *Wright v Gasweld*

Compensation

- 1) Plaintiff may elect to receive compensation in the form of either equitable compensation (losses suffered by the plaintiff) or account of profits (gains made by defendant)
 - a. Special: Can receive (a) aggravated *Giller v Procopets*; but not (b) exemplary damages *Harris v Digital Pulse*
 - b. Lord Cairn's Act damages: Damages awarded in lieu of injunction under *Supreme Court Act s68*
 - i. Unclear whether LCA damages are available as (a) allowed in VSCA *Giller v Procopets*; but (b) wording of the NSW act differs, suggesting that LCA damages cannot be awarded in equity's exclusive jurisdiction (*Meagher, Heydon and Leeming*)

Orders for delivery and destruction

- 1) Defendant may be ordered to deliver up property created as a result of a breach