

APPLICATIONS OF THE CONSCIENCE OF EQUITY

Breach of Confidence

Principle: equity may act to protect information it itself deems confidential (in its exclusive jurisdiction) and/or information agreed to be confidential by the parties via contract (in its auxiliary jurisdiction)

1. Has the equitable obligation been ousted?

- (1) Contractual and equitable duties of confidence can co-exist. However, where the contract expressly or impliedly ousts equitable remedies, equity ought to respect the intention of the parties: *Optus v Telstra*
- (2) Clause likely needs to be express; exhaustive definition: *Optus v Telstra* [mere fact contract defined the contractually protected information, didn't oust the equitable obligation of confidence]
 - i. The contract does not exclude equitable obligations of confidence if it contemplates or preserves rights and remedies available at equity (e.g. account of profits)
- (3) Where contractual duty of confidence - typically there is no need to talk about equitable duty of confidence (no need for equity to come in): so, you can get an injunction and equitable remedies in aid of your common law rights

2. Is there an equitable duty of confidence (EDC) and has it been breached? If equitable obligated not ousted, apply *Coco v AN Clark (Engineers) Ltd* test for breach of confidence, clarified by the four-step test in *Optus v Telstra*

- (1) The information in question must be identified with specificity so the Court can frame an injunction the D can comply with: *O'Brien v Komesaroff*
 - i. E.g., in *O'Brien*, P could not point to any specific part of his trust unit deed precedent [that his ex-partner had continued using without his consent] which was confidential; merely tendering whole document was insufficient
 - ii. Confidential information may be written, verbal, or photographic: *ABC v Lenah Game Meats*
 - iii. Confidential information may extend to the ideas themselves and not just their expression: *O'Brien v Komesaroff*
- (2) The information itself has the necessary quality of confidence about it
 - i. It is information which the person largely keeps to themselves, not information which, by way of advice to others, they regularly published to the world at large: *O'Brien v Komesaroff*
 - ii. Information may be categorized as public knowledge though only notorious in a particular industry or profession: *O'Brien v Komesaroff*
 - iii. Common sense test - can be explicit or imputed (constructive)
 1. Reasonable person would understand it to be confidential in light of contemporary standards of moral and behaviour? *ABC v Lenah Meats*
 - iv. Per Gaudron J in *Johns v ASC* there are two considerations: (a) whether intrinsically confidential and (b) whether since lost via entry to public domain

SP of this promise as damages to husband would be merely nominal and thus inadequate

2. In *Beswick* – P sold D his coal business; one term of deal was that D would pay pension to P's wife after his death; wife, suing as P's executor, obtained SP of this promise
- c. Once it is established that damages are inadequate, and there is jurisdiction to award specific performance, LCA damages are an available remedy

4. **Do other circumstances suggest specific performance should be denied?**
Discretionary considerations weighting against granting of SP include:

- a. Supervision – SP may be refused if: obligations imprecise such that Ct would need to give 'indefinite series of rulings' to ensure performance; if D would have to carry on activity over extended period: *Argyll Stores*
 - i. Distinguish between an order to carry out an activity (e.g. running a shop) and an order to achieve a result (e.g. conveyancing of land)
 - ii. Will not require the court to supervise and judge the quality of performance on an on-going basis (e.g., one-off binary)
 - iii. If lessee and seeking specific performance of lease – all you're asking is that lease be executed and registered (one-off transaction). But different if you're a lessor seeking the order: *Argyll Stores* [no SP of contract to run supermarket store for 20 years as would involve constant supervision to ensure shop was open]
- b. Personal service – SP of personal service contracts not susceptible as Court will not engage in supervisory role: *Giles & Co v Morris*
 - i. *Giles & Co* ordered to perform contract with 3rd party to execute employment contract with Morris; still had to execute (Morris can then claim damages for breach of contract)].
 1. Contract entered into pursuant to SP order may not be enforceable because it is a contract for personal services, not necessary a bar to order for execution (e.g., obligation to sign a contract could be specifically enforceable)
 2. Consider whether objective standards to gauge performance
 3. Contract capable of SP if ordered by one side: sign or not agreement to appoint. If employer seeking SP – problem of supervision/personal services
- c. Mutuality – SP may be refused to P if it would be unavailable to D at date of order: *Giles & Co v Morris*
- d. Hard and unconscionable bargain: Equity will not make an order for specific performance where an agreement is not 'fair, certain and just in all its parts': *Dowsett v Reid* [e.g., lessor would have to pay more than his total income to erect shed, ringbark etc], although lessee has right to common law contractual damages but no SP because not fair in circumstances – considering value, nature of consideration)
 - i. Court must balance hardship to D if SP granted vs hardship to P if refused
 - ii. Rare that inadequacy of consideration alone will be sufficient to establish hardship (e.g. *Falke v Gray*)
 - iii. If the tenant had to continue trading unprofitably until the expiration of the lease, the effect of the order could be oppressive: *Argyll* (loss which the defendant may suffer through compliance may be far

- ii. Failure to obey results in contempt of Court
 - b. Test per *Cardile*
 - i. **Very strong prima facie case on merits**
 - ii. **Damages inadequate** – might not be enough money to satisfy
 - iii. **Objective, real risk of dissipation or secretion of assets so as to render any judgment which the applicant may obtain nugatory**
 - 1. If the defendant has previously acted in a way to show his probity isn't to be relied upon
 - 2. Type of company D raises an inference
 - iv. **Balance of convenience (see above)**
 - 1. Satisfied if all that D is asked to do is keep money in jurisdiction and not do anything
 - 2. Discretionary factors
 - a. Has the applicant proceeded diligently and expeditiously?
 - b. Has a money judgment been recovered in the proceedings?
 - c. Are proceedings (e.g. civil conspiracy proceedings) available against the third party
 - i. Why have they not been taken?
 - ii. Should the grant of any order be conditional on an undertaking by the applicant to commence such proceedings?
 - v. **Must give undertaking as to damages** (agree to compensate party if injunction overturned): *Cardile*
 - c. In exceptional cases can get orders against 3rd party if:
 - i. Application for such an order must be supported by clear evidence showing exceptional grounds. The jurisdiction to grant such an order must be exercised with great caution. Look also at discretionary factors above
 - ii. (1) third party possesses or holds exercising power of disposition over assets of potential judgment debtor
 - iii. (2) some process of law is available to claw back the assets (e.g., liquidator, trustee in bankruptcy): *Cardile* [LED Builders obtained freezing order against Cardiles, the owners of the company that LED was suing, as the insolvency law/liquidators would ultimately give LED recourse to the Cardiles' funds if they won against the shell company]
 - 1. Purpose of the order was to preserve the assets of the company in aid of LED's other substantive rights and remedies
6. **Anton Piller orders (search and seize orders)**
- a. Nature: ex-parte interlocutory order allowing persons to enter premises to search for docs relevant to case; operates in personam requiring persons present at premises to allow search on pain of contempt: *Anton Piller*
 - b. Requirements:
 - i. There must be an extremely strong *prima facie* case;
 - ii. The potential or actual damage must be very serious;
 - iii. Clear evidence that the defendants have incriminating documents or things in their possession, and there is a real possibility they may destroy such material before any application *inter partes* can be made
 - iv. Must give undertaking as to damages

- i. “To be at her disposal any way she thinks benefit for benefit of her family”: *Lambe v Earns*
 - ii. Where received as guardian not trustee: *Countess of Bective*
 - iii. Result: no obligation imposed and X takes property as absolute legal and beneficial owner
- 2. Provision imposed an equitable condition on the gift and by taking it, the person incurs an equitable duty to perform the condition. To X as a gift, on condition that X confer a benefit on Y
 - a. Result:
 - i. Condition precedent: property does not vest in X until performed
 - ii. Condition subsequent: property will divest from X if not performed
 - iii. Inter-vivos gift: property vests back in settlor on non-performance
 - iv. Testamentary: property vests back in residue of estate
 - b. Wording of obligation must be definite such that Ct can determine at all times where property vested. Requires black and white certainty if vesting/divesting condition.
 - i. Condition in *Re Gardiner* [testator left son money subject to son paying brother £1000 within 2 years; clear (due to time limit) and so a condition failure to fulfil meant son forfeited right to property; beneficial interest goes back to estate – condition precedent (vesting condition)]
 - 1. Son took inheritance on trust for brother or subject to equitable charge; has inheritance ONLY on condition he paid brother (gift subject to vesting condition)
 - 2. NB: strict time limit = condition
 - ii. No condition in *Gill v Gill* [obligation on brother in will to indefinitely allow sister to stay in house, keep her rooms in ‘fit state’: too vague/ not a vesting condition/condition of forfeiture like *Re Gardiner*, not true conditions on his interest in property even if phrased as so]
- 3. Provision means that the person takes the gift beneficially, but subject to an equitable charge in favour of the other person with respect to fulfilling the purpose. To X, subject to a charge in favour of Y [to secure X doing something].
 - a. Result: X takes property, but Y has an equitable proprietary interest in the property to secure X’s performance of an obligation (no fiduciary obligations)
 - b. Retention of title/proceeds clauses: if clause provides 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/larger pool of assets to secure payment) then creates trust: *Associated Alloys* [intention to create trust over proceeds from steel production].
- 4. Equitable personal obligation: To X, and X must confer benefit on Y
 - a. Result: X does not have beneficial interest, under quasi-contractual equitable obligation to apply whole gift for benefit on Y (Y has no proprietary interest in the property, but X liable in equity to carry out obligation as if contracted; son liable to pay equitable compensation to sister): *Gill v Gill* [the obligations on Brother re house and cattle were equitable personal obligations; too vague to be conditions].
 - i. Cf *Re Gardiner*: no personal obligation to make payment after 2 years.
 - b. Y should seek orders analogous to specific performance or equitable compensation

If certainty of intention fails, recipient takes as a gift

B Certainty of subject matter

ISSUE: Is the trust property capable of ascertainment with certainty?

1. Is trust property certain?

- a. E.g., trust of “the residue of my estate” certain, residue being a term of art; in contrast, trust of “the bulk of my estate” or “most of the money in bank account” fails as uncertain: *Palmer v Simmonds*
- b. E.g., trust of ‘reasonable income’ objectively determinable in context: *Re Golay’s Wills Trust* [testator left trust of the ‘reasonable income of his properties’; this was ascertainable as Ct capable of making an objective assessment in context of real estate market/beneficiary’s standard of living, Courts try to uphold trust as much as possible]
- c. If not, no property passes to trustee and estate/settlor remains absolute owner

2. Is each beneficiary’s share ascertainable?

- a. *Tangible property* – need certain amounts/proportions and *must be segregated* (even if property identical) UNLESS *you treat it as trust over the whole of the fungible assets* where beneficial co-ownership proportions can be identified with sufficient certainty: *Re London Wine Co* [no trust over unsegregated wine in cellar]; *Re Goldcorp* [no trust over unsegregated gold ingots].
 - i. Segregation includes physical segregation, or possible segregation (segregation to take place at the trustee’s discretion)
 - ii. E.g., fails if wording is “each of my 3 kids is to have one house held on trust” or “each of my 3 kids is to have one of my 10 paintings” as unclear which house/painting to each of them
 1. If in exam, each child had been living in a house – might be possible to infer who gets what
 2. A will which states ‘my children are to have my three houses held on trust for them’ is valid because there is a single trust where the three children have an undivided share in the trust property (three houses)
 - iii. *Examiner’s trick*: don’t fall for trust over ‘100’ of “all sheep born the same day” or “bottle of wine in the same vintage”. Because not all sheep / bottles of wine are the same; even if its identical still need segregation if the assets are tangible
 1. You can save the trust by saying over whole item in these shares (which makes sense if items are fungible – e.g., grain in a barn / coffee beans / unfiltered orange juice; but this doesn’t make sense with paintings)
 2. However, if property truly identical/fungible (e.g., 20% of grain in barn fails for lack of segregation), more likely to construe as trust over whole asset in relevant shares (e.g., 1/5 share of grain in a barn): *Re London Wine*
 - a. CANNOT treat “half of my paintings” as trust over the whole (doesn’t work to construe it as half for me half for you – e.g., what if I buy more paintings?)
- b. Intangible property - need not be segregated if all fungible/interchangeable – just need certain amounts (assets and relevant proportions identified with sufficient certainty): *Ellison*

- i. Incl resulting and constructive trustees once they are aware of the trust such that their conscience is affected by it. I.e., 3P only owes fiduciary duties if they know its trust property
- b. Partner / partner e.g., *Chan v Zacharia* [Drs in medical practice partnership owed FDs; relationship broke down; Chan renewed lease for himself, profiting etc from relationship; lease held on constructive trust in equal shares for both]
 - i. Incl prior to execution of final JV agreement / prospective partners / during negotiations / circs leading up to final agreement: *United Dominions Corp v Brian* [UDC owed Brian FDs prior to conclusion of final agreement; cutting him out of deal was a breach; relationship itself, vs a concluded agreement, gave rise to fiduciary obligations]
 - 1. A fiduciary relationship can exist even if parties never reach agreement upon the consensual terms
 - 2. Here, partnership indicated by profits were to be shared, JV property was held on trust, policy was matter for joint decision
 - 3. The fact that the partnership is confined to one joint undertaking (not ongoing relationship) does not prevent the relationship being fiduciary
- c. Solicitor / client: *Nocton v Lord Ashburton*
 - i. NB. once the retainer has come to an end, no subsisting FD (just duty of confidence) per *Bolkiah v KPMG* (see above)
- d. Director / company
- e. Agent / principal
- f. Expanded categories?
 - i. Doctor / patient? – no, no inherent conflict between them; Drs do not act on behalf of/subjugate their interests to those of patients: *Breen v Williams* [Dr not a fiduciary so no FD re handing over records; FDs are negative, not positive (no issue re no-conflict or no-profit duty so no basis for accessing records)]
 - 1. Potentially yes in some circs where there are conflicts of interest – e.g., Dr who places themselves in position of conflict/makes a profit by recommending path tests / hospital they have financial interest in. Starting point is the relationship such you would expect someone to not profit/conflict.
 - 2. Any substantial benefit received by the doctor from a patient (other than proper remuneration) is presumed to be the result of undue influence; doctor has onus of rebutting presumption
 - ii. Civil servant / Crown? *AG for HK v Reid* [civil servant owed FDs to HK Crown given his power and influence; accepted bribes to obstruct CRL proceedings in HK; held bribes on constructive trust for Crown because acquired in breach of FD; Crown could trace into real estate in NZ]
 - iii. Employee / employer? – if high ranking employee then yes: *Warman v Dwyer* [Dwyer was a branch manager of Warman; owed FDs; became aware of “corporate opportunity” so quit and started his own competing business; was in breach]
 - 1. Consider nature of relationship/what employee able to do (level of trust, confidence and vulnerability)
 - iv. Parent / child; guardian / ward? - yes Canada;
 - v. Crown / ATSI? – positive duty to inform of lease in Canada (*Guerin v the Queen*); no in Aust per *Wik*