LAWS 2015: EQUITY

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TOPIC 2: APPLICATIONS OF THE CONSCIENCE OF EQUITY: (A)BREACH OF CONFIDENCE

ESTABLISHING BREACH OF CONFIDENCE

***What is Doctrine of breach of confidence** ?* When someone has **received some type of secret information**, the doctrine **protects and prevent unauthorised use or sharing** of that information by the person.

1) **Enquiry 1: Is there a contract?**
   a) **No → [intro]:** On the facts, there is no contract between [X] and [Y]. Accordingly, X cannot sue for damages in breach of contract for exposing confidential information.
      i) Nevertheless, equity protects confidential information even without the existence of a contract *(Coco v AN Clark (Engineers) Ltd [1969])*
      ii) Precontractual negotiations : Megarry J in *Coco v AN Clark* held that equity could possibly intervene despite draft contracts for the manufacture of the moped engine having made, but not signed.

   b) **Yes → [intro]:** On the facts, there is a contract between [X] and [Y] where contractual promises of confidence will be enforced. On then facts, the [NDA/Employment Contract/Contractual Agreements] express promises to keep information confidential. Generally, any breach of the contract would result in contractual damages and potentially an injunction in equity's auxiliary jurisdiction. **If the contract provides for damages for breach of CI,** Equity will not intervene provided that the contract provides equal or greater protection. *(Streetscape Project (Australia) v City of Sydney [2013])*
      i) **Does the contract provide for equitable remedies?** Nevertheless, equity can intervene where there is a contractual obligation of confidence in respect to information. In Optus Networks v Telstra Corp [2010], equity was able to intervene as the contract in ***Optus*** case explicitly mentioned the availability of an account of profits (Equitable remedy) and remedies outside of contract
      ii) **Contract silent on equity?** Whereas in Streetscape, where the contract is silent as to equity, it is unclear whether equity is able to intervene. Assuming that equity is allowed to intervene then it will only protect confidential information.

<u>Proving breach of confidence:[Intro]:</u> On the facts [X] has potentially breached confidence by [X's actions]. Accordingly, [Y] could have a potential claim for equitable breach of confidence if the following elements can be made out per *Optus Networks Pty Ltd v Telstra Corporation.*

1) Information is identified with specificity
2) Must have the necessary quality of confidence
3) Received in circumstances importing an obligation of confidence
4) There must be an actual or threatened misuse of information without consent.

Optus Networks Pty Ltd v Telstra Corporation (2010) *Breach of confidence elements – Application of elements – commercial contract*
Facts: Telstra and Optus networks interconnected and traffic passes between them. In the process of this interchange, each can access information relating to the others' customers. They had signed an agreement promising not to access such data on each others' clients. - Optus claimed Telstra had broken this and used the confidential information to market its services to Optus customers, tempting some away from its network. - Optus sued for breach of the contractual duty of confidence; also wanted an account of profits for breach of equitable duty of confidence **Held:** There was an equitable breach of confidence **Remedy**: The equitable claim was not precluded under the contract, as the remedy of an account of profits, which Optus sought, was allowable under the contract **Case Principles:** application of 4 elements - **Specificity:** 'The primary judge's reasons on the contract claim and par 1 of his orders show that element (a) is made out. Where information kept confidential was identified with specificity - **Necessary quality of confidence :** His Honour was satisfied that the confidential information in question fell within the definition of Confidential Information in clause 1.1 of the Access Agreement. That requires the information to be "of a confidential nature". Accordingly element (b) is satisfied. - **Circumstances importing an obligation of confidence:** The existence of the Access Agreement establishes that the information was received by Telstra in circumstances importing an obligation of confidence. Thus element (c) is made out. - **Actual misuse of information:** The information was used for the preparation of Telstra's market share reports. Element (d) is made out.

ELEMENT 1: INFORMATION MUST BE IDENTIFIED WITH SUFFICIENT SPECIFICITY

1) **Rule:** The confidential information must be identified with sufficient specificity: *O'Brien v Komesaroff* (1982)
   a) "The more general the description of the information which a plaintiff seeks to protect the more difficult it is for the court to satisfy itself that information described was impacted or received or retained by the defendant in circumstances which gave rise to an obligation of confidence" (Independent Management Resources v Brown [1987].)
   b) Can an idea be confidential information? Mason J suggests that equitable protection may be given to ideas where the idea is sufficiently well developed and capable of realisation. *(O'Brien)*

2) **Sufficient specificity requires that:** (1) information can be **separated from non-confidential** information (2) it must be **demonstrated why the information is confidential**. *(EIFY Systems v 3D Safety Service 2017)*
   a) **Application:** On the facts, [X] must be able to prove that the confidential information be separated out the information from non-confidential information to be identified with sufficient specificity of why that is confidential. On the facts, the present facts ["confidential information"] identified is confidential as [outlined in the contract as confidential (Optus)] or is not confidential.
   a) **Blank deed document cannot be considered confidential**: the drafted unit trust deed document had nothing confidential , it was a blank deed template without confidential information. Hence. Mr K (solicitor) could not identify any part of the deed as confidential. (Application in O'Brien *v Komesaroff* (1982))

O'Brien v Komesaroff (1982) Sufficient specificity – contract/deed template form drafted not of sufficient specificity

Facts: Mr Komesaroff (solicitor) drafted unit trust deeds re tax ('Exhibit B20'). He and Mr O'Brien, an accountant and insurance salesman, provided them to clients. Mr Komesaroff and Mr O'Brien fell out.
- K sued for breach of copyright and breach of confidence on basis that O'B continued to use these unit trust deed.
 	
Held: Not identified with sufficient specificity (but Mr K won anyway for breach of copyright)
- **(i) No specificity, information too general:** There is nothing in 'Ex B20' which is confidential per se; it is merely a unit trust deed.
    ○ Plaintiff could not point to whole document and claim it was confidential. Specificity would require him to identify some sections that were confidential precisely and specifically.
    ○ Only those improvements evolved by P could give rise to a claim but K failed to identify the particular contents of the documents which he asserts constitute information the confidentiality of which he is entitled to protect (Mason J [42]) However, lacked the necessary quality of confidence (see below)
• **(ii) 'Necessary quality of confidence':** Information may be in the public domain though only notorious in a particular industry or profession is considered not confidential
    ○ O'Brien has regularly published to the world at large, albeit for a limited purpose.
    ○ effect of trust deeds known to lawyers → does not have necessary quality of confidence
• Can there be equitable protection for ideas?
    ○ Equitable protection may be given to ideas as opposed to their expression, in order to be capable of being treated with confidentiality – the idea must be sufficiently well developed and capable of realisation. (Mason J)

ELEMENT 2: MUST HAVE THE NECESSARY QUALITY OF CONFIDENCE

[Intro]: For [X] to make out a claim in breach of confidence, [X] must show that the information has the necessary quality of confidence that the court is willing to protect as confidential. The information on the present facts is [Personal Information/ Commercially sensitive information/ Information held by governments]. The court is [likely / unlikely] to protect such information as [APPLY].

Generally overview of information protected:

1) What information is the court **willing to protect as confidential**
   a) Private activities (e.g. Sexual activities) (Giller v Procopets 2008)
   b) Information that injures public interest (*Prince Jefri Bolkiah v KPMG)*
   c) Information NOT ON public domain
   d) Information that is NOT common knowledge
   e) Commercial information (sometimes)

2) What information is the court **NOT willing to protect as confidential?**
   a) Activities in private (Lenah Game Meats 2001)
   b) Information that is common knowledge (Coco v AN Clark)
   c) Information on the public domain (*Johns v Australian Securities Commission* (1993)
   d) Government secrets are not prima facie confidential

3) **Exception 1: Government secrets**
   a) Rule: Government secrets are not prima facie confidential **UNLESS** disclosure is likely to injure the public interest, information will not be protected. Court will look at facts through 'different spectacles: *Commonwealth v John Fairfax & Sons Ltd* (1980)

b) What Information that injures public interest ?

i) Client legal privilege : if Information provided in a solicitor and former client relationship that is confidential would be disclosed during litigation proceedings , then confidential information cannot be shared to uphold principle of client legal privilege (*Prince Jefri Bolkiah v KPMG)*

ii) High threshold where some embarrassment is not enough to injure public interest *Commonwealth v John Fairfax & Sons Ltd* (1980)

Commonwealth v John Fairfax & Sons Ltd (1980) Government information – not confidential information unless in public interest
Facts: P (Cth) sued to restrain publication of book on Australia's Defence and Foreign policy between 1968-75 which contained unpublished govt memos, assessments, briefings, cables. At this point, copies had already been sold specifically to the Indonesian Embassy and US Embassy. **Held:** No 'necessary quality of confidence' - **Mason J:** Where government is involved, an injunction for breach of confidence could only be granted if the publication would harm the public interest. - **(i) Public interest test**: Court determines government's claim by reference to public interest; unless disclosure is likely to injure the public interest, it will not be protected. - **(ii) Application: (mason H)** While some embarrassment to Australia may occur, and may make foreign countries less willing to share confidential information, disclosure was not likely to injure the public interest in the circumstances. <u>It merely threw light on past workings of the government</u>. Too much emphasis was placed on fact they were classified – it appears there is no regular procedure for reconsidering classification of documents. - Mason J was not persuaded that degree of embarrassment was enough to engage 'public interest' test and justify interim injunction.
Prince Jefri Bolkiah v KPMG [1999] Client legal privilege – sufficient public interest
Facts: KPMG audited the Brunei Investment Agency (BIA) when it was chaired by the Prince. KPMG also acted for the Prince personally in other matters. The Prince was later dismissed by the Brunei government, which engaged KPMG to investigate BIA. The Prince subsequently sought an injunction against KPMG to restrain it from working for the Brunei government on the basis that it possessed confidential information about him. **Held:** Injunction ordered - It held that while there was no absolute rule a solicitor or accountant could not act in litigation against a former client, such a professional might be prevented from doing so if it were necessary to avoid a significant risk of disclosure or misuse of confidential information. - If such a risk did exist, there is a presumption that unless special measures were taken to prevent it, confidential information would be disclosed. - Here, there was such a risk, which the information barrier (ad hoc Chinese Wall) arrangement did not address.

4) **Exception 2 :** Information is public knowledge
   a) "However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge." (*Coco v AN Clark (Engineers) Ltd* [1969] at 47)

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

Facts: Pf enters into negotiations with Df regarding joint venture to manufacture a moped engine that had been designed by P and P had granted access to designs were to D. Draft contracts were drawn up, but never signed. After negotiations broke down, D said there were too many problems with P's designs and wanted to design their own using P's design elements. P sues for breach of confidence and sought an interlocutory injunction to prevent manufacture and sale of the moped engines.
 	
Held:
- Note: there is no contract which existed, so cannot sue for breach of contract = only can bring a equitable action.
- (i) Information did not contain necessary quality of confidence:
  o On the facts, Information regarding the design elements was found **not to be of a confidential nature as it was already in the public domain**.
  o His evidence had failed to demonstrate that the engine created by the D's was based on his engine, and in any event his engine did not have the 'original qualities' which would amount to confidential information
- (ii) Information imported an obligation of confidence:
  o Held that information shared during a joint venture discussion is confidential.

5) **Exception 3:** Information on the public domain
   a) **Rule:** Once information is in the public domain, it can no longer be the subject of the necessary quality of confidence: *Johns v Australian Securities Commission* (1993) ; *CoCo v AN Clark 1969*
   b) What is public domain?
      i) **Limited publication / Transitory disclosure** = maybe in public domain but may also be not (Johns v Australian Securities Commission)
         (1) Kwok v Thang (1999) suggest that a "transitory publication of information not remembered or discovered by all those interested may not defeat obligation of confidentiality if Pf is seeking to a more permanent and enduring form of disclosure"
            (a) Example: In AFL v The Age Co Ltd (2006), Court found that the players names being revealed by a caller to 'fox footy' caller on a TV program or an internet posting by unverifiable person regarding the players use of drugs did not breach confidentiality as there was no dissemination to public at large and information disseminated only to a limited audience
      ii) **Prior publication** = Kwok v Thang (1999) suggest that once a prior publication has published information this generally destroys confidentiality.
      iii) **Read/published open court** = in public domain (Johns v Australian Securities Commission)
      iv) **Information tendered by Royal Commission** = in public domain (SPLIT JUDGMENT)
         (1) Reasoning: RC operates similarly to court and once released and used in public hearing, ut was in the public domain (Johns v Australian Securities Commission, Brennan and Dawon JJ)
         (2) *Note dissenting Guardon and McHugh JJ*: RC public hearings are not like a court where they operate on ad hoc basis and not confidential.
      v) Information known only ro a particular industry or profession = in public domain
         (1) Principle: Information may in public domain even if it is only know to a particular group (lawyers) (*O'Brien v Komesaroff* (1982))

Johns v Australian Securities Commission (1993) 178 CLR 408

Media publication

Facts: Johns examined by the Australian Securities Commission for collapse of Tricontinental Group. Transcript was provided to the Royal Commission. RC gave copies to the media. Johns sought injunction against media restraining further publication.
Issue: Did release to the RC meant that the information was in public domain?
Held: yes, no injunction ordered.

- All agreed:
  - Limited publication = maybe in public domain but may also be not
  - Read/published open court = in public domain
- **Brennan J**: Information was already in public domain after it was tendered to RC (because RC same as Court) so the media obtained information no longer had the necessary quality of confidence.
  - Public domain is not measured by extent of media reporting.
  - Accordingly, no obligation of confidence was imposed on media outlets either by equity or by the Act.'

- **Gaudron J (dissenting):** Whether information is in the public domain is a question of fact. Publication, no matter how extensive and no matter whether by third parties or the confidant , does not necessarily extinguish the obligation. A Royal Commission is distinct from a court, for they operate ad hoc and proceedings need not be public. It is arguable the information only passed into Victoria, an area of 'limited significance' in the context of a duty of confidence based in a law of the Ct

Kwok v Thang 1999

Media Publication – publication destroys confidentiality

Facts: Aaron Kwok, Hong Kong star, sought to restrain the publication of an embarrassing video on the internet. However, description of the video had already been published in a Hong Kong newspaper
Issue: Did the prior publication destroy confidentiality?
Holding: No breach of confidence

- **Publication generally usually destroys confidentiality**: 'But a prior transitory publication of information, which may not be remembered or discovered by all of those who would be interested in it, does not necessarily defeat an obligation of confidentiality, where what is sought to be restrained is a more permanent and enduring form of disclosure

6) **Exception 4: Activities in private vs private activities**
   a) **Rule:** Information revealed confidentially will not be protected if the information itself is not confidential (Coco v AN Clark [47].)
      i) Private activities = court will protect
      ii) Activities in private = court will not protect
   b) **Application**: whether disclosure or observation of information/conduct would be highly offensive to a reasonable person of ordinary sensibility (ABC v Lenah Game Meats Gummow J [42,43])
   c) **Activity in private examples :**
      i) activity of killing possums was done in private but not necessarily sufficiently private in nature such that it was confidential (ABC v Lenah Game Meats , Gummow J)
   d) **Private Activities examples**
      i) Artwork relayed in private (Prince Albert v Strange (1874))
      ii) Intimate information – sexual activities (Giller v Procopets 2008) , posting explicit images and videos of former partner on Facebook (Wilson v Ferguson 2015)
      iii) Personal information – personal diaries, medical information, personal financial information (ABC v Lenah Game Meats Pty Ltd (2001)
      iv) **Exception:** Private Activities can lose their necessary quality of confidence if disclosed by person (Lennon v News Group Newspapers 1978 FSR 573)
         (1) Lennon Newspapers : Cynthia Lennon (John Lennon's wife) wrote a book based on her marriage with John Lennon. John alleged breach of confidence if information was published.

Held: the information about the marriage was not a breach of confidence due to John Lennon's open disclosure about a lot of information in the book during press interviews.

ABC v Lenah Game Meats Pty Ltd (2001) *Activities in private – trespassing to obtain video footage – not confidential information*
Facts: ABC obtained footage of possums being stunned and killed by Lenah Game Meats filmed by trespassers who unlawfully hid cameras on site. Lenah sought injunction preventing broadcast of footage. **Issue:** Was the information private (obtained only through trespass) and therefore confidential? **Held:** No, injunction not granted. The activity was done in private but not necessarily sufficiently private in nature such that it was confidential - **Gleeson CJ:** No bright line between what is private and what is not. An activity is not private simply because it is not done in public. Just because the activity occurs on private property does not make it private. Must look at the nature of the activity. - **Private information :** 'Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved' - **Legality of actions and confidentiality operate separately.:** Information obtained through trespass does not automatically become a breach of confidence. (Lenah Game Meats)

7) **Exception 5:** Commercial Information
   a) **Rule:** commercial information does not prima facie have the necessary quality of confidence, Justice Kirby posted factors to consider whether commercial information is confidential (Wight v Gasweld Pty Ltd 1991) Kirby P
      i) How widely the information is known (inside and outside the business), on public domain?
      ii) Measures taken to guard secrecy of the information
      iii) Value of information (how much it costs to develop the information)
      iv) How easy it would be to independently obtain the info
      v) Industry conventions support that information is confidential.
   b) Employment information
      i) **[starting point]:** [X], the ex-employee of the company has employers confidential information obtained during employment . To determine whether the information used has the necessary quality of confidence, it must be determined whether the information is 'know-how' information or confidential information learnt during coruse of employment: (UWA v Gray , [164].)
         (1) **"know-how' information** can be used : general knowledge skill and experience acquired during course of employment. (computer skills, coding skills)
         (2) **Other confidential information** of the employer that ex-employee learnt cannot be used
            (a) Exmaple – a secret formula or process readily distinguishable form an ex-employees general know-how.

      ii) **Artificial distinction if 'know-how' information used to find confidential information**: if confidential information can be figured out by an employee through their general knowledge, experience, or by conducting their own investigation, it becomes difficult for a court to protect as ut becomes artificial to treat confidential information as severable (Del Casale v Artedomus 2007)
         (1) Del Casale v Artedomus 2007 held that the two directors who had left the company and had set up their own business importing the same Italian stone as their former employer was not a breach of confidence. Equity would only protect truly confidential information such as trade secrets. The stone was found to be able to be sourced at trade fair and the stone is available to other companies.

ELEMENT 3: RECEIVED IN CIRCUMSTANCES IMPORTING AN OBLIGATION OF CONFIDENCE

Test: Given the reformulation by the court in Optus, there is now no need for the information to have been imparted intentionally with confidence. The information must have been imparted in circumstances where a reasonable person would realise, on reasonable grounds, that he or she was not free to deal with the information as his or her own, or that he or she could only deal with it within certain limitations: *ABC v Lenah Game Meats Pty Ltd* (2001) (Coco v AN Clark , Megarry J)

1) **An obligation can arise even where there was no imparting of the information;** e.g.where the information is obtained surreptitiously (secretly) *ABC v Lenah Game Meats Pty Ltd* (2001) Gleeson CJ)
2) **Examples of importing an obligation of confidence :**
    a. Information in private diary
    b. information shared during a joint venture discussion is confidential (Coco v AN Clark 1968)
    c. **Existence of the Access Agreement** establishes that the information was received by Telstra in circumstances importing an obligation of confidence *Optus Networks Pty Ltd v Telstra Corporation (2010)*
    d. **Client legal privilege** (duty of confidentiality): former client that restrains former solicitor for acting another client must demonstrate the solicitors possession of confidential information and how the information is relevant to the new matter or adverse to themselves. *(Bolkiah v KPMG)*
    e. **Eaves dropping :** In *Smith Kline,* eavesdroppers will have been deemed to owe a duty of confidence even if information was not intentionally imparted to them.

ELEMENT 4: THERE MUST BE AN ACTUAL OR THREATENED MISUSE OF INFORMATION WITHOUT CONSENT

Rule: Neither actual unauthorised use, nor detriment, is necessary. What is necessary is an actual or apprehended unauthorised use: *Optus Networks Pty Ltd v Telstra Corporation* (2010)

1) ID: the scope of the obligation of confidentiality based on the circumstances to indicate whether there is a breach.
2) *Smith Kline:* (Gummow J) The plaintiff comes to equity to vindicate his right to observance of the obligation, not necessarily to recover loss or to restrain infliction of apprehended loss. The obligation of conscience is to respect the confidence, not merely to refrain from causing detriment to the plaintiff.
3) *Cth v John Fairfax*: (Mason J) It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism.

DEFENCES FOR BREACH OF CONFIDENCE

1) No breach confidence in an iniquity

a) **Rule:** Information will lack necessary quality of confidence if the subject matter is the existence or real likelihood of the existence of an inequity and confidence relied upon to prevent a third part with a real and direct interesting redressing crime wrong or misdeed (Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) 1987)
    i) **Note:** the information only loses the necessary quality of confidence if the information contains or discloses the wrongdoing (I [2002] NSWC 170 at [198]-[200])

    b) Examples of iniquity : crime, wrong or serious misdeed of public importance (Corrs Pavey Whiting [456])

2) **Forced disclosure (eg. Court- ordered discovery)**
    a) If the court or legislation authorises a breach in confidence, then the party is protected from breach of confidence
    b) In *Royal Women's Hospital v Medical Practitioners Board of Victoria,* court held that statute that demanded for evidence form doctors about late term terminations was not a breach of confidence.

REMEDIES

[Conclusion] :On the facts, [Y] can establish an equitable claim against [X] for equitable breach of confidence. Accordingly, [Y] can seek [(1) injunction/ (2)equitable compensation (plaintiff's loss) or (3) account of profits]

**INJUNCTION : STOP THE USE OF INFORMATION

1) **When is injunction available?**
    a) Injunction available because distribution not so widespread and used to prevent ongoing/continuing musyse *Wilson v Ferguson* [2015] WASC
    b) To prevent disclosure of information before open court. (must be before proceedings) *Prince Jefri Bolkiah v KPMG*

2) **When is injunction not available?**
    a) Injunction unavailable because distribution is so widespread or already in the public domain *Wilson v Ferguson* [2015] WASC
    b) **Exception**: Springboard injunction (invention of new product)
        i) [starting point] If the Defendant's misuse of confidential information (breach of confidence) has given it a head start over other competitors, the springboard doctrines permit the Court giving an injunction to hold back that Defendant until the other competitors have a chance to catch up .
        ii) So even if the information is in the public domain, it is possible under the Springboard doctrine to get an injunction (limited injunction) against the Defendant to prevent them from using that information for a limited period of time to allow competitors to catch-up

DELIVERY UP

1) someone has made something by misusing confidential information, an order that can be made is to hand over things manufactured, so they can be destroyed
    a) *Peter Pan Manufacturing Corp* **:** Bras already made were handed over to be destroyed where the person had misused the information and hence, the property belongs to the wrongdoer and the court can force handing over.

TOPIC 3: REMEDIAL EQUITY: (A)SPECIFIC PERFORMANCE

OVERVIEW OF SPECIFIC PERFORMANCE

Note: specific performance can only be sought for (**1) a breach of contract** and (**2) to enforce positive obligations**, not negative obligations.

The ability of equity courts to award specific performance is due to its concurrent jurisdiction where equity can provide remedies where there are also common law rights involves such as specific performance granted for breach of contract.

ESTABLISHING SPECIFIC PERFORMANCE

[Introduction]: On the facts, there is a contract between X and Y for [contract terms of sale]. [X] would likely prefer specific performance as opposed to a common law remedy for damages for a breach of contract because the facts suggest [reason for specific performance] However, the court will only have jurisdiction to grant specific performance if valuable consideration has been provided and damages at common law as a remedy are inadequate.

On the facts, the contract for [object] is for valuable consideration of [X dollars]. The maxim does not require the consideration be paid or executed. (*Reef & Rainfdorest Travel Pty Ltd v Commissioner of stamp duties 2002*) Further, damages would likely be an inadequate remedy because [*Application/ heavy engagement with the facts to explain why damages may be inadequate*]

****note: a contract for valuable consideration is sufficient, no need to have been paid or executed***

****note: contract for land MUST BE IN WRITING per CA s23C, however chattel can be an oral agreement***

1) **Damages is an adequate remedy**
   a) Contract for disposition of shares, stocks = no specific performance
      i) Court of equity will not generally decree specific performance of a contract for the sale of stock or goods because damages at law calculated upon the market price of the stock or goods are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for. (Adderley v Dixon (1824), Leach VC)
   b) The value of the damages is certain = no specific performance (Adderley v Dixon (1824))

2) **Damages is not an inadequate remedy**
   a) Contract for disposition of interest in land = specific performance
      i) Uniqueness of land "Court of equity decrees specific performance of the contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon general money value of land may not be a complete remedy to the purchaser to whom the land may have a peculiar and special value" (Adderley v Dixon (1824), Leach VC)
      ii) HCA authority for land holding a peculiar and special value (*Pianta v National Finance & Trustees Ltd* (1964) 180 CLR 146, 151)
   b) Contract for chattels = sometimes there is specific performance

i) **[starting point]:** Generally, the court of equity will not decree specific performance of a contract for the sale of chattel because the damages can be calculated upon the market price of the goods and are a complete remedy (Adderley v Dixon (1824), Leach VC) Nevertheless , on the facts, it can be argued that the [chattel in question] could decree specific performance because [Apply factors below]:

ii) Uncertainty in the value of damages = specific performance

(1) **Contract to sell Bad Debts = specific performance** : Bad debts is where the purchaser of the debt is uncertain about how much profit can be made) was held to be uncertain and therefore damages would be inadequate (Adderley v Dixon (1824))

(2) **Principle:** Where damages are uncertain, damages would be an inadequate remedy (Adderley v Dixon (1824))

iii) Chattel cannot be obtained from another source = specific performance

(1) **Cannot be obtained from another source**:

(a) The present facts can be likened Taxi Cab Licenses *in Dougan v Ley* which the court noted were "sufficiently rare and difficult" to source and hence specific performance was ordered.

(b) The present facts can be likened to the contract of sale of Two Ming Vases in *Falcke v Gray (1959*) which was theoretically available but SP refused for hardship reasons.

(2) **Can be obtained from another source:** The present facts can be distinguished from the Hepplewhite chairs sold by Roche to Cohen in the case of *Cohen v Roche* where the chairs were characterised as '*unremarkable' and possessed no special feature* that made them unique and irreplaceable and hence specific performance was not appropriate.

(a) **Nevertheless, even if the chattel can be obtained.. subjective intentions is considered.** In *Dougan v Ley,* the court considers subjective intentions of the plaintiff in developing a fleet of taxi cans where the court had awarded him SP. Accordingly, even if it is possible to obtain chattel by another source, if it is still rare in nature, the court may still award SP.

(i) **Distinguish from Dougan v Ley –** does facts say that another source can be easily obtained immediately? If yes = no SP.

c) Contracts to pay money to third party if nominal damages only = specific performance

i) **Principle:** specific performance if damages would only be nominal: *Coulls v Bagot, Beswick*

(1) Nominal damages: Where a 3rd party attempts to sue parties within a contract, only nominal damages will be received due to privy of contract.

ii) Note: no clear HCA authority for the principle

(1) Coulls v Bagot is not a situation where there was a 3rd party which received benefits from the contract, Mr C and Mrs C were joint tenants which received royalties from O'Neil.

(2) **[scaffold]:** Beswick is now authority for the obiter in Coulls v Bagot (Windeyer J obiter that specific performance can be awarded to overcome privity doctrine since specific performance is available where damages are inadequate – due to privity doctrine. However, there is no HCA authority on this point currently, but it is arguable that the 3rd party will be able to get specific performance due to the obiter in Coulls v Bagot influencing the ratio Beswick.