

2.1. Breach of confidence

1. Source of obligation of confidence

- a. **Contract:** The plaintiff may bring a common law action for damages for breach of contract
- b. **Equity:** Equity protects independent obligations of confidence in its exclusive jurisdiction on the basis that unauthorised use of confidential information would be unconscionable (*Optus v Telstra*)
 - i. Equitable and contractual obligations of confidence may coexist unless the contract intends to exclude equitable remedies as a matter of construction
 - ii. 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 of breach of confidence

Mention *Coco AN Clark* case where Megarry J said there were three elements required but should not be taken as a strict test, the key case is *Optus v Telstra* which identified four elements to establish breach of confidence

- a. **[1] The information must be identified with specificity:**
 - i. Dependent on the circumstances of the case
 - ii. The more general a description of information it is, the more difficult it is for the court to satisfy the specificity requirement required to give rise to an obligation of confidence (*O'Brien v Komesaroff*)
 1. E.g. if it was a trust deed, must be able to point to the particular information that was confidential (*O'Brien v Komesaroff*)
 2. Information could be characterized as public knowledge (not confidential) if it is notorious within a particular industry or profession (*O'Brien v Komesaroff*)
 - iii. **Nature of information:**
 1. May be written, verbal or photographic (*ABC v Lenah Game Meats*)
 2. May be the ideas rather than the way they are expressed (*O'Brien v Komesaroff*)
- b. **[2] The information must have the necessary quality of confidence:**
 - i. **General test:** whether disclosure of information would be highly offensive to a person of ordinary sensibilities (Gleeson CJ in *ABC v Lenah Game Meats*)
 1. Consider: (a) Relationship between parties; (b) nature of information; and (c) circumstances of communication (*Del Casale*)
 2. Look to whether the information is 'private': activities which a reasonable person applying contemporary standards of morals and behaviour would understand to be meant to be unobserved
 - a. E.g. information about a person's health, personal relationships, or finances, are likely to be identified as private (*ABC v Lenah Game Meats*)
 - ii. **Public domain (not confidential):** Information cannot be (a) in the public domain, or (b) common knowledge, including in a particular industry (*O'Brien v Komesaroff*):
 1. Information that is inherently public is not confidential (*Johns v ASC*), depends on facts of the case
 2. **Publication:** Disclosure extinguishes confidence (*AG v Heinemann*) unless (a) to a limited number of people (*Johns v ASC*); or (b) transitory (*AFL v Age*)
 - a. **Examples:**
 - Information published by the media (*Douglas v Hello*);
 - information released in proceedings of a court, tribunal or commission where open to the public and capable of being lawfully reported on (*Johns v ASC*); and
 - information about public companies where there is a disclosure requirement (*ABC v Lenah*)
 - information used in public hearings, and transcripts that lawfully can be published are within the public domain (*Johns v ASC*)
 - solicitor's precedents for unit trust deeds were published within a certain industry/profession (*O'Brien v Komesaroff*)
 3. **Partially public:** Confidential where:
 - a. public information is so linked with confidential information that it is confidential as a whole; or
 - b. information was construed from public information through skill and ingenuity and thus becomes confidential (*Coco v AN Clark*)
 - iii. **Personal information:**
 1. **General test:** Personal information is confidential if disclosure would be highly offensive to a reasonable person of ordinary sensibilities (Gleeson CJ in *ABC v Lenah Game Meats*)
 - a. Not sufficient that it occurred on private property (*Lenah Game Meats*)
 2. **Examples:** (a) Personal relationships; (b) personal finances; (c) medical information (*Lenah Game Meats*); (d) marital and sexual relationships/activity (*Giller v Procopets*); (e) private journals (*Prince Albert v Strange*); (f) wedding photos (*Douglas v Hello*); (g) witnesses, informants, suspects, prisoners; (h) cultural information
 - iv. **Commercial information:**
 1. **General test:** Commercial information is confidential if a reasonable person would recognise it to be part of the private 'stock' of his former employer (*UWA v Gray*)
 2. **Business activities:** The business activities must themselves be confidential, and information will not be confidential if:

- a. employees, contractors and inspectors regularly view activities without secrecy (*ABC v Lenah*); or
 - b. the activities/products were not particularly special or innovative (*Coco v AN Clark*)
- 3. *Employee know-how*:
 - a. The accumulated general knowledge, skill and experience of an employee in a particular field is not confidential (*O'Brien v Komesaroff*); and
 - b. this includes information ascertainable by his own inquiry and experience (*Del Casale*)
 - If the confidential information can be readily distinguished from an employee's general know-how and is not ascertainable by enquiry or experiment then it is more likely to be treated as confidential (*Del Casale*)
- 4. *Relevant factors*:
 - a. Extent to which information is known, both within and outside business (*Del Casale*);
 - b. extent to which information was guarded;
 - c. value of information, both to plaintiff and others (e.g. competitors) (*Del Casale*);
 - d. ease/cost with which information is acquired or duplicated and originality of process (*UWA v Gray*);
 - e. whether confidentiality was plainly made known;
 - f. whether confidentiality is industry practice (*Wright v Gasweld*)
- v. *Duty of confidence to subsequent clients*:
 - 1. Fiduciary relationship between solicitor and client comes to an end with the termination of the retainer – both in contract and equity (*Bolkiah v KPMG*)
 - a. Duty to preserve the confidentiality of information imparted during the retainer continues
 - b. Court should intervene unless it's satisfied there's no risk of disclosure – risk must be a real one and not merely fanciful or theoretical
- vi. *Government information*: Government cannot have a duty of confidence owed to it unless disclosure to it will injure the public interest (*Cth v John Fairfax*)
 - 1. Injunction could only be granted if the government proved that the publication would harm public interest
 - 2. *Public interest test*: unless disclosure is likely to injure the public interest, it will not be protected
 - a. There is a clear public interest in enabling public discussion of government affairs, unless this is counterbalanced by prejudice to (*Cth v John Fairfax*)
 - national security;
 - relations with foreign nations; or
 - ordinary business of government; but not
 - mere embarrassment
 - b. Information that would be confidential in the hands of a private company may not be so in the hands of the government as the government is not a private company with its own interests (*Cth v John Fairfax*)
- c. **[3] The information must have been received in circumstances importing an obligation of confidence:**
 - i. *General test*: two distinct elements (Campbell JA in *Del Casale* applying Megarry J's test in *Coco v AN Clark*)
 - (a) imparted in circumstances where a reasonable person would realise on reasonable grounds that they were not free to deal with the information as their own, or
 - (b) Must have realised that he/she could deal with the information within certain limitations
 - 1. Obligation can be express or implied (*Del Casale*), and may arise where:
 - (a) *Giving cases*: implied from the relationship between the parties (*Coco v AN Clark*);
 - a. E.g. fiduciary relationship, doctor-client, lawyer-client, banker/accountant-client, principal-agent, director-company, trustee-beneficiary
 - (b) *Taking cases*: information obtained surreptitiously or improperly (*ABC v Lenah Game Meats*)
 - a. Also consider whether any protection was provided for the information (e.g. taking steps to attempt to protect the information or prevent breach of confidentiality) (*Franklin v Giddins*)
 - 2. No quality of confidence where communicated in public (*Coco v AN Clark*)
 - 3. *Third parties*: Obligation attaches to third parties who know or ought to know of the confidentiality of the original communication (*ABC v Lenah Game Meats*) – see further below under "Defences"
 - a. If a person suffering from breach can get to the third party in time they can place the obligation of confidence on that third party (*Wheatley v Bell*)
 - 4. *Former clients*:
 - a. Professional has a continuing duty to preserve the confidence of information of former clients even after termination of their fiduciary relationship by terminating the retainer (*Bolkiah v KPMG*);
 - b. where lawyer, party may seek remedy under court's inherent jurisdiction to supervise the conduct of its own officers for proper administration of justice (*Kallinicos v Hunt*)
- d. **[4] Actual or threatened misuse of confidential information without consent:**
 - i. Neither actual unauthorised use nor detriment is necessary, what is necessary is an actual or apprehended unauthorised use
 - ii. *Misuse*: Where (a) information was actually disclosed, even if the defendant took all reasonable steps to avoid disclosure; or (b) there is a real (need not be substantial) risk of disclosure (*Bolkiah v KPMG*)
 - 1. May be sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism (*Cth v John Fairfax*)

2. Actual misuse; breach of contractual obligation of confidence (*Optus v Telstra*)
- iii. **Without consent:** No breach if the plaintiff provided informed consent to disclosure (*AG v Heinemann*)
 1. Includes implicit consent based on past conduct (*Campbell v Mirror Newspapers*)
 - a. E.g. where plaintiff has put information on the confidential subject into the public domain (*Lennon v News Group*)

3. Defences

- a. **Receipt by third parties without notice:** equitable obligation attaches to third parties who know or become aware of the confidentiality of the original communication (*Cth v John Fairfax*)
 - i. Knowledge = actual or constructive
 - ii. Arises whether confidential information is acquired innocently or for value
 1. No defence of BFPVWN as information is not property in the sense that gives rise to the defence
- b. **Public interest:** Disclosure is permitted if it is in the public interest (*Cth v John Fairfax*)
 - i. **Government information:** There is a 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; but not (d) mere embarrassment (*Cth v John Fairfax*)
 - ii. **Personal information:** Applies to personal information where there is a strong public interest justification (*Morsley*)
- c. **Iniquity:** Disclosure is permitted if (a) the subject matter is a crime, civil wrong or serious misdeed of public importance; and (b) disclosure is to a third party with a real interest in redressing such crime, wrong or misdeed (*AFL v Age*)
- d. **Consent:** must be consent of the confider (*AG v Heinemann*)
- e. **Forced disclosure:** By statute or a court (*Womens Hospital v Medical Practitioners Board of Victoria*)
- f. **Locus standi:** only the confider may bring an action, not a third party (*Fraser v Evans*)

4. Remedies

- a. **Injunction (see following topic for details):** Plaintiff may be granted an injunction to prevent the defendant from using or disclosing the information
 - i. **Whether available:** Quia temet injunction is 'readily available' for threatened breach (*Coco v AN Clark*)
 1. Injunction is not available if the information has lost its quality of confidence through disclosure (*AG v Heinemann*) unless disclosure was limited and there is a risk of wider publication (*Johns v ASC*)
 - ii. **Springboard doctrine:**
 1. Available if (a) breach gave the defendant an unfair advantage (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*)
 2. Defendant cannot use the information for the period of the unfair advantage (*Wright v Gasweld*)
 3. Restrained from using that information as a springboard to launch into a more advantageous position
- b. **Compensation:** Plaintiff may elect to receive compensation in the form of either equitable compensation (losses suffered by plaintiff) or account of profits (gains made by defendant) (*Warman International v Dwyer*)
 - i. Equitable compensation – Equity version of damages, must prove loss of opportunity, business etc.
 1. Can be assessed for non-economic interests (*Giller v Procopets*)
 - ii. Account for profits – not usually offered by common law, not strictly net profit but not specifically in an accounting sense
 - iii. **Special:** Can receive (a) aggravated (*Giller v Procopets*); but not (b) exemplary damages (*Harris v DigitalPulse*)
 - iv. **Lord Cairn's Act damages:** Damages awarded in lieu of injunction under *Supreme Court Act* s 68
 1. Unclear whether LCA damages are available as (a) allowed by the VSCA (*he's*); but (b) wording of the NSW act differs, suggesting that LCA damages cannot be awarded in equity's exclusive jurisdiction (*Meagher, Heydon and Leeming*)
- c. **Orders for delivery and destruction:** Defendant may be ordered to deliver up property created as a result of a breach

2.2. Estoppel

Common law estoppel

1. Generally:

- a. X may assert a common law estoppel as there is a representation or assumption as to existing fact (*Silovi v Barbaro*)
- b. This (a) operates as a rule of evidence; and (b) can only be used as a shield not a sword (*Silovi v Barbaro*)

2. Types of common law estoppel:

- a. **Estoppel by representation** (*Walton Stores v Maher*)
 - i. **Requirement:** (a) Party makes a clear and unambiguous representation of an existing state of affairs; (b) other party has reasonably relied upon it and will suffer detriment if that state of affairs were departed from
 - ii. **Result:** Representer is estopped from denying the truth of the statement or asserting the existence of a different state of affairs
- b. **Estoppel by convention** (*Moratic v Gordon*)
 - i. **Requirement:** (a) Both parties have conducted their relationship on the basis of a common assumption as to an existing state of affairs; and (b) party would suffer detriment if that state of affairs were departed from
 - ii. **Result:** The other party is estopped from departing from the convention

Equitable estoppel

1. X may assert an equitable estoppel as there is a representation or promise as to future affairs, in circumstances where it would be