BREACH OF CONFIDENCE

Step 1 - Introduction

- [P] may argue that they have an action against [D] for breach of confidence (BoC) for [describe information disclosed: personal / commercial / technical] [describe how the information was conveyed: verbal / in writing / videos / personal secrets].
- For [P] to have a successful claim for BoC, they must satisfy four elements (*Coco v AN Clark*; *Smith Kline*):
    1. The information must be specific (*O'Brien v Komesaroff*).
    2. It must have a quality of confidence (QoC).
    3. The recipient has knowledge of the confidentiality restrictions / duty of confidence.
    4. There is a breach of the duty of confidence – actual / threatened misuse of the confidential information.

Step 2 - Element 1: Information Must be Specific

- Equity will not protect a claim of BoC where confidential information (CI) is unable to be identified. The court needs to know what information was conveyed and what part of it was not common knowledge (*O'Brien v Komesaroff*).
- The information relating to [list information sought to be protected] can be specifically identified and it is not common knowledge [explain why it is not common knowledge].

  [OR]
- These facts pertain to a high quantity of documents/information, it is prudent to narrow the field so the BoC claim doesn't fail for lack of specificity (*Ocular Sciences*). This analysis will focus on [information], as this is the information which seems to have a QoC.
    - The information must be identified with specificity and not merely in global terms (*Ocular Science*).
    - A court won't allow a BoC case to be used as a means of to oppress or harass a competitor (*Ocular Science*).
    - The scope of CI must be specific and certain for the application of an injunction and for the D to be able to prove the information has previously been published (*Ocular Science*).

Step 3 - Element 2: Information Must Have the Necessary Quality of Confidence

- Information must have the necessary QoC (not common/public knowledge) (*Coco v AN Clark*). QoC if formed on information being sufficiently secret and sufficiently valuable or important (*O'Brien v Komesaroff*).
- [P] appears to be concerned with the disclosure of [list relevant information: personal/private information / commercially valuable information / trade secrets / iniquity].

Discuss Burden of Proof - Iniquity

- [D] could be argued that their disclosure relates to an iniquity which would strip the information of QoC (*Smith Kline*). [D] may need to prove the information relates to an iniquity.

Non-commercial information

- Equity will protect non-commercial information if it is so fundamental to the maintenance of social order as to be valuable and worthy of protection (*Foster v Mountford*) (sacred and restricted Aboriginal knowledge).
- Equity will protect non-commercial information if disclosure or observation of the information or conduct would be highly offensive to a reasonable person of ordinary sensibilities (*ABC v Lenah*).
- Equity will protect information about sexual activity as it is intimately personal (*Giller*; *Wilson*).

- Equity is more likely to protect which the plaintiff had taken steps to protect (*ABC v Lenah*).

Step 3A - Sufficiently Valuable or Important / Confidential Information

- [P] may argue their [CI / trade secrets] **[OR]** [personal information] is sufficiently valuable, not trivial tittle-tattle, and therefore eligible for equity's protection (*Coco v AN Clark*).
    - To establish the second element, several matters may combine together to create a QoC.
- The nature of the relationship between the parties imports confidentiality:
    - Lawyer-client relationships inherently confidential (*Lord Ashburton v Pape*).
    - Doctor-patient relationship e.g. medical records held by doctors (*W v Egdell*)
    - Banker-customer relationship: financial information held by banks.

Trade Secrets (secret formulae or confidential commercial information)

- Something can be a trade secret (and confidential) although it wouldn't qualify for patent or copyright protection (*Talbot v GTV*) (TV concept).
- A trade secret may include a parent tree for a formulated species. It would be like a safe holding copy of a formula for making a nectarine tree with special characteristics which make it specifically valuable (*Franklin v Giddins*).
- Per *AG (UK) v Heinemann*, the court will consider:
    - An express claim of confidentiality (not conclusive).
    - The extent to which it is known outside that business.
    - Labour & costs required to develop it.
    - Measures taken to guard its secrecy.
    - Its value to both the confider and competitors.
    - The ease/difficulty required to acquire/duplicate it.
- There is a sufficient degree of skill and ingenuity in compiling business information to make it confidential (*Link 2*).
- Something constructed solely from materials in the public domain may possess the necessary quality of confidentiality through skill and ingenuity of the human brain (*Coco v AN Clark*).
- Novelty depends on the thing itself, and not upon the quality of its constituent parts (*Coco v AN Clark*).
- An obligation of confidence may exist where there is no contractual relationship between the parties (*Talbot v GTC*).
- Commercial info can be divulged to parties for limited purposes and retain its confidential nature (*Talbot v GTC*).

Distinguishing "Know-how" and Confidential Information

- Equity does not protect 'know-how': Accumulated knowledge, skill, and experience in a particular field.
- **Test:** can info fairly be regarded as a separate part of employee's knowledge, which an ordinary honest man would recognise as the property (in loose sense) of employer, and not his to use as he likes? (*Ocular Science*).

Personal information / Privacy

- Certain kinds of information about a person: health, personal relationships, finances, may be easy to identify as private (*ABC v Lenah*).
- **Test:** The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private (*ABC v Lenah*).

- Non-commercial information that is generally accessible is not protected (*ABC v Lenah*).
- Police informant argued her name was not in the public domain due to suppression orders – was true, but duty for fair court processes mean that no duty of confidence found (*AB v CD*).
- Aboriginal religious ceremonies were obviously secret & capable of protection (*Foster v Mountford*).
- Videotape of sexual relations inherently confidential & capable of protection (*Giller v Procopets*).
- Photos and videos of sexual relations are inherently confidential and protected by equity (*Wilson v Ferguson*).

Reverse Engineering

- Reverse engineering (taking apart a product and figuring out how to reproduce yourself) is **not** a BOC.
- Even if there are close similarities between a product (engine) made by the confidant and that designed by the confider, the confider could not establish a prima facie case of infringement, as many of the components were available on the open market (*Coco v AN Clark*).

Step 3B - Sufficiently secret

- The information is not common knowledge [explain why] which infers it may be protected by equity (*Coco*).
    - Complete secrecy is not necessary. Information may be known by some and still have a QoC (*AFL*). C.f. speculation versus publication by an authorised source (*AFL*).
    - Processes which aren't secret aren't confidential just because they're carried out on private property (*ABC v Lenah*).
    - *AB v CD* discussed official confirmation of the informant's name and role.

Relevance of the Public domain

- If the [D] is the one who published the CI, a remedy is still available against the [D] despite the information being released into the public domain (*Giller v Procopets*; *Wilson v Ferguson*).

Step 4 - Element 3: Circumstances importing the Duty of Confidence

- BoC requires the information to be received by the D in such circumstances as to import the obligation of confidence (*Coco v AN Clark*) (applies to third parties).
- [D] appears to have actual knowledge that there was an obligation of confidence [Insert relevant knowledge at **Step 4A**: direct / surreptitious / wafting / clearly private].

  OR
- [D] ought to have known there was an obligation of confidence [assessment from **Step 4B**].

Step 4A - Actual Knowledge

Direct Communication (Giving Cases)

- Actual knowledge can take the form of oral communications (*Talbot v GTC*).
- Information relating to Aboriginal ceremonies could only have been supplied in confidence (*Foster v Mountford*).

Surreptitious Taking (Taking Cases)

- Equity may be invoked to protect confidential information improperly or surreptitiously obtained (*ABC v Lenah*).
    - If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act (*Hellewell v Chief Constable of Derbyshire*).

- Fairly easy to import a duty of confidence where information is stolen or taken (*Franklin v Giddins*).
    - Stealing information with the intention of using it for commercial competition is equated to betrayal of information imparted in trust and confidence (*Franklin v Giddins*).
- CI received by an employee / director relating to operations and procedures is obviously not to be disclosed or use other than for the purpose of the business (*Link 2 v Ezystay*).

Wafting (Come upon by Accident or Chance)

- An obligation of confidence extends to an obviously confidential document that is wafted out of a window into a crowded street, or is dropped in some public place, and then picked up by a passer-by (*A-G v Guardian Newspapers*).

Cases where clearly Private Information is obtained (videos of sexual relations)

- Sexual acts in private are confidential and not to be divulged to others without the consent of the parties (*Giller*).
- Emailing copies of sexual videos without consent imports an obligation of confidence (*Wilson*).
- Sexually intimate pictures are obviously confidential to any reasonable person (*Wilson*).

No Obligation of Confidence

- The identity of police informers may be protected by virtue of equitable obligations of confidence. However, cannot acquire information subject to an obligation of confidence where there is a public duty to disclose (*AB v CD*).

Step 4B - Reasonable Man Cases (also use for third party cases)

- Given it does not appear [D] had actual knowledge, the reasonable person test could be applied.
- **Test:** Whether a reasonable man standing in the [D]'s shoes would infer the information was received in confidence (*Coco*).
    - If the D is a newspaper, the test is whether a reasonable man standing in the shoes of the editor of the newspaper would infer the information was received in confidence.
- It would be difficult for the recipient of commercially valuable information given in a business context and with some avowed common object in mind to challenge an obligation of confidence (*Coco*).
- A duty of confidence applies where information has passed into the hands of a third party, itself innocent of the trespass, who threatens to publish it (*Lenah Game Meats*).

Blurting

- However secret and confidential the information, there can be no binding obligation of confidence if the information is **blurted** out in public or is communicated in other circumstances which negative any duty of holding it confidential (*Coco v AN Clark*).

Step 5 - Element 4: Actual or threatened misuse of the information without consent of the Plaintiff

- There will be a BoC where there is an actual **or** threatened misuse of the information without consent of the P (*Coco*).
- Intention to misuse information is irrelevant.
- Even if the D originally obtained the information in circ of confidence, they will not be making unauthorised use if the information is obtained through their own endeavours, independent rediscovery or a public source.

Examples

- The network created a series using the same concept or idea – unauthorised use of idea (*Talbot v GTC*).
- Using CI in a way that commercially benefits D and commercially harms P (*Coco v Clark; Talbot*).
- Revealing cultural practices in a published book (*Foster v Mountford*).

- Showing video of sexual activities without the party's consent is an unauthorised distribution of information (*Giller*).
- Grafting budwood and selling fruit (*Franklin v Giddins*).
- The D misused the images by posting them on his Facebook page (*Wilson v Ferguson*).
- Assessing a generic drug application (*Smith Kline*).

What if some use is permitted?

- Where information is supplied for a limited purpose, its use beyond that purpose may be restrained (*Castrol v EmTech*) (can't use the supplied info to prosecute the confider).
- Not necessary that permitted uses be spelled out – court may infer another use unauthorised (*Castrol v EmTech*).
- If P places *some* restrictions on use, *alternative* uses may not be unauthorised (*Smith Kline*).
- D not bound by P's expectation of confidence, rather it depends on what D knew / ought to have known regarding confidence (*Smith Kline*).
    - Consider what the P did to ensure D knew or ought to have know about limitations of use.

Step 6 - Detriment

- It is no longer necessary to prove that use of the information will be to the detriment of the P, as was once thought in *Coco* (Gummow J: *Smith Kline*).
- The gov must prove that it would be detrimental to the public if information was disclosed (*Cth v John Fairfax*).

Step 7 - Defences

- [D] may attempt to mount a defence that the information was disclosed as a matter of the public interest or that it related to an iniquity.

Public Interest

- The public interest defence has been criticised (Gummow J: *Smith Kline*) however it has been considered in obiter (Gleeson CJ: *Lenah*; *Kumar*) as a possible defence that is not yet settled (*AFL*). In any event it may need to be demonstrated the information related to a matter of concern to the welfare of the public that is beyond a curiosity (*AFL*).
- [poke holes in the defence on the facts].

Iniquity Defence

- The iniquity defence requires [D] to show three things (Kellam J in *AFL*):
    1. The proposed disclosure must reveal the existence of, or real likelihood of, an iniquity that is a crime, civil wrong, or serious misdeed of public importance (assault not sufficient: *A v Hayden*).
    2. Public importance means it must affect the community as a whole or affect the public welfare.
    3. The proposed disclosure is to a third party with a real and direct interest in redressing the alleged crime, wrong, or misdeed.
- Difference between public interest and what the public may be interested in (*AFL*).
- The defence cannot be relied upon by someone who themselves has committed the iniquity (*Kumar*).
- Public interest defence will not succeed where it relates to protecting information that has a bearing on a person's potential conviction or where barring disclosure would pervert justice (*AB v CD*).

Step 8 – Remedies (See Personal Remedies Section for Detail)

- Personal equitable remedies are available in Equity's exclusive jurisdiction for BoC at the discretion of the court.
- As the information is not treated as proprietary, the remedies are limited to personal equitable remedies.
- **Injunction.**
- **Account of Profits:** disgorges D's profits attributable to the misuse of confidential information. Use for trade secrets.
- **Equitable Compensation/Equitable Damages**: Monetary remedy for loss if disclosure has already occurred:
    - *Talbot v GTV* (commercial loss); *Giller v Procopets* (mental distress).
- **Aggravated Damages:**
    - *Giller v Procopets* ($10,000).
- **Orders for Destruction and/or Delivery Up:**
    - *Franklin v Giddins:* ordered to deliver up 'productive wood' from the fruit trees.

Springboard Doctrine - Consider Springboard Doctrine only if Dealing with Competitors

- If misusing CI has caused [D] to spring ahead of a competitor [P], the courts deal with this in terms of a remedy which is limited to the period of the "head start" or "springboard".
- Even if the information is now public knowledge, a remedy is still available if the information was confidential when it was used.