

## 2) Applications of Conscience

### BREACH OF CONFIDENCE

#### STEP 1: Is there a contract – with a contractual obligation of confidence?

- **[YES]**
  - There is a **contractual promise** to keep information confident because there is an:
    - Express promise to keep information confidential (contractual agreements, NDAs, employment contracts)
    - Implied promise to keep information confidential (in retainer of a lawyer, accountant, banker)
  - That contractual obligation has been **breached** because \_\_\_\_ [e.g., the information has been used for a purpose other than the particular purpose for which it was disclosed].
  - **Remedies:**
    - Contractual obligation of confidence:
      - Under **contract**, this breach will result in contractual damages, provided that the promisee suffered loss from the breach.
      - However, relief may also be granted in **equity's auxiliary jurisdiction**, including an injunction to prevent the continuance of breach.
        - **[Go to 'Injunction']**
    - Equitable duty of confidence:
      - It is possible that there is also an equitable duty of confidence that has been breached, which may result in a remedy under **equity's exclusive jurisdiction**, which are more favourable than contractual remedies, including gains-based relief like an account of profit.
      - While contract protects information that was promised under the contract to not be disclosed, whether or not it was confidential, equity only protects confidential information (**Agha v Devine**)
      - However, there is conflicting authorities (**Optus** and **Streetscape**) on whether an equitable duty of confidence will be found where there is a contractual obligation in relation to that specific information.
  - **Does Equity intervene where there is a contractual duty of confidence regarding that information?**
    - While **Optus** recognised that an equitable duty of confidence can arise even where there is a comparable contractual duty, especially where the contract envisages equitable remedies or remedies outside of contract to be available, **Streetscape** held that equity will not intervene if the contract provided equal or greater protection in relation to that specific information.
    - **[Scenario 1]** – the contract envisages equitable remedies
      - Since, like in **Optus**, the contract clearly envisaged the availability of equitable remedies because \_\_\_\_ [e.g., *it provides for an account of profits*], that there is room for equity to intervene
      - Whilst **Streetscape** suggests that equity would not intervene since the contract provides equal protection for that specific information, the facts are comparable to **Optus**, and equity would likely intervene to protect 'confidential' information.
    - **[Scenario 2]** – the contract expressly prohibits equitable remedies
      - Unlike in **Optus**, the contract has expressly ruled out the availability of equitable remedies because \_\_\_\_ [explain]. Hence, the contract would be given effect and equity would not intervene.
      - The only remedies available would be in contract.
    - **[Scenario 3]** – the contract is silent on equitable remedies
      - Unlike in **Optus**, the contract is silent on whether equitable remedies would be available.
      - Following **Streetscape**, equity would:
        - **(a)** intervene because the contract provided lesser protection than Equity, since \_\_\_\_ [e.g., *an account of profit is not available*]

- The remedy for an equitable estoppel is the 'minimum equity' necessary to do justice (*Verwayen*, 487; *Crown Melbourne*, [218]), which is not limited to reversing the detriment suffered, but also allows for the enforcement of the representation based on it being unconscionable for the representor to depart from it (*Giumelli*, [48]; *Sidhu v Van Dyke*)

### Step 2: Will equity reverse the detriment only, or enforce the representation?

- Whether equity will only reverse the detriment suffered, or enforce the representation depends on the 'minimum' required to prevent the unconscionable conduct (*Sidhu v Van Dyke*, [85]), which requires consideration of the proportionality between the detriment, and relief ordered (*Pascoe v Turner*), and the reversibility of the representee's actions in reliance (*Sidhu v Van Dyke*)
- Example: Only reverse detriment
  - Deane J's example in *Verwayen* (441-442) – where proprietary estoppel is established, but the detriment suffered was only \$100 through building a shed, but the house was worth \$1M, it would be disproportionate to enforce the promise of the house → reversing the detriment through paying \$100 is sufficient to do justice
- Example: enforce the representation
  - *Sidhu v Van Dyke* – Mrs VD's decision to not take a property settlement in divorce, and decision to not take further employment is not reversible – so the minimum equity required the enforcement of the promise of the Cottage
  - *Arfaras v Vosnakis* – Husband's decision to bury wife on her mother's land was not reversible – so the minimum equity required the enforcement of the promise of the burial licence

### Step 3: If the court decides to remedy the expectation loss (enforce the representation) – how would the court do that?

- Equity would remedy the expectation loss, but can do so by either actually enforcing the promise (such as in *Crabb*; *Pascoe v Turner*), or instead, through equitable monetary compensation of the value of the promise (such as in *Giumelli*; *Sidhu*)
- This depends on the 'minimum equity' required to do justice, and requires consideration of the practical considerations of enforcing the promise, including the impact and injustice on other parties, and the defendant's conduct (*Giumelli*), and whether a lesser remedy such as monetary compensation could remedy the unconscionability (*Arfaras v Vosnakis*).
- Impact and injustice for 3<sup>rd</sup> parties
  - *Giumelli* – parents' promise to give son the land was not enforced, since the parent's other children had also made significant improvements to the land
  - *Sidhu* – Ms S was a joint tenant of the land to be subdivided, and the order of transfer of Oaks Cottage to Ms VD would be depriving Ms S of her property
- Defendant's conduct
  - *Crabb* – the easement was upheld (Council's promise enforced), and Crabb did not need to pay for the easement → Council acted quite high-handedly (e.g., tore down gate and left the Plaintiff's land land-locked for 6 years)
  - *Pascoe v Turner* – ordered actual conveyance of property to Ms P, and not just a licence to stay on it → since Mr T had shown himself to be quite ruthless in the way he behaved, which meant that a licence would leave Ms P vulnerable (Mr T could undermine the value of the licence by transferring the land to another person who not be bound by the licence – licences are purely personal rights)
- Can money remedy the unconscionability?
  - *Arfaras v Vosnakis* → ordered mother-in-law to transfer the burial licence (of the land next to her daughter's grave) to her son-in-law (daughter's husband), and not the money value of the licence → money could clearly not remedy the unconscionability (husband wanted to be buried next to his wife, and no money could help with this)

### Step 4: If the court decides that the 'minimum equity' is an award of monetary compensation, then how does the Court determine the money value?

- If the defendant could have obtained specific performance against the plaintiff, then this favours a grant of specific performance to the plaintiff (**Beswick**)

### Step 5: Would the court exercise discretionary factors to refuse specific performance?

- Furthermore, since all equitable remedies are discretionary, the court has discretion to refuse the grant of specific performance, especially based on grounds of hardship.
- The court must balance the potential hardship to the defendant that would result if specific performance were granted with potential hardship to plaintiff if specific performance were refused (**Dowsett v Reid**)

#### [4] Discretion/Hardship

##### (a) Vague Terms (defendant)

- Specific performance will be refused if the terms of the order are too vague, and the order cannot be expressed clearly enough to allow the defendant to know what it needs to do – because that would create hardship for the defendant who is at risk of being in contempt (imprisonment) whilst not knowing what it must do (**Brace v Wehnert**)
  - **Brace v Wehnert** – contract to build a house to a specific value → specific performance not ordered because the order would create hardship for the Defendant, as it is too hard for the Defendant to know what sort of house will be built

##### (b) Impossibility (defendant) – *equity does not act in vain*

- Specific performance will not be ordered if it is impossible for the defendant to comply with the order, even if the impossibility arises due to the Defendant's own conduct (**Brown v Heffer**)
- Third party consent needed
  - If consent by a 3<sup>rd</sup> party is required for the defendant to perform, the court can grant specific performance that is conditional on the receipt of that 3<sup>rd</sup> parties' consent (**Brown v Heffer**)
  - **Brown v Heffer** – Council consent is required to build → if builder refuses to perform but owner wants specific performance – order of specific performance on the condition of Council's consent

##### (c) Futile

- Specific performance will not be ordered if it would be futile (**New Brunswick**)
- Plaintiff already in breach
  - If the plaintiff is already in breach, an order of specific performance would not be ordered because it would be futile, since the defendant can terminate the contract immediately (**New Brunswick**)
  - **New Brunswick** – lease not created, but the tenant already breached the covenant → it was futile to order specific performance to create a lease, since landlord could immediately terminate for breach

##### (d) Grave hardship – not mere unfairness (defendant)

- The court has discretion to refuse specific performance for hardship, but will only do so if there is 'grave hardship' (**Dowsett v Reid**)
  - **Dowsett v Reid** – the landlord was drunk and unable to read the lease document – which required the landlord to accept low rent, and complete land work for the tenant → there was grave hardship
  - **Hope v Walter** – contract to buy house, which included a shop that was leased to a tenant (who ran a brothel) – hardship results since buyer required to become landlord for a brothel
- Mere unfairness or imbalance to the defendant is not sufficient to avoid specific performance – unfair terms will still be enforced (**Axelsen v O'Brien**) – unless there is grave hardship (**Dowsett v Reid**)
  - Example:
    - Contract for sale – seller sold to another person (who paid more money) – it is unfair to the seller to have to sell at a lower price to the original purchaser, but that is only mere unfairness
- The court must balance the potential hardship to the defendant that would result if specific performance were granted with potential hardship to plaintiff if specific performance were refused (**Dowsett v Reid**)

##### (e) Ready, willing, able to perform (plaintiff) – *he who seeks equity must do equity*

- In order to get specific performance of an agreement, the plaintiff needs to plead and prove that they are ready and willing to perform (**Bahr v Nicolay**)