[2015] WASC 15

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	WILSON -v- FERGUSON [2015] WASC 15
CORAM	**:**	MITCHELL J
HEARD	**:**	2 DECEMBER 2014
DELIVERED	**:**	16 JANUARY 2015
FILE NO/S	**:**	CIV 2514 of 2013
BETWEEN	**:**	CAROLINE RACHEL WILSON Plaintiff AND NEIL SCOTT FERGUSON Defendant

Catchwords:

Equity - Breach of confidence - Online publication

Remedies - Injunction - Equitable compensation - Compensation for embarrassment, anxiety and distress

Costs - Indemnity costs

Legislation:

Supreme Court Act 1935 (WA), s 25(1)
Rules of the Supreme Court 1971 (WA), O 34 r 2, O 34 r 4

Result:

Injunction granted
Equitable compensation of $48,404 awarded
Costs awarded

Category: A

Representation:

Counsel:

Plaintiff	:	Mr B Goldsmith
Defendant	:	No appearance

Solicitors:

Plaintiff	:	Goldsmiths Lawyers
Defendant	:	No appearance

Case(s) referred to in judgment(s):

Ammon v Consolidated Minerals Ltd [No 3] [2007] WASC 232
Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] HCA 63; (2001) 208 CLR 199
Australian Consolidated Press v Morgan (1965) 112 CLR 483
Cadbury Schweppes Inc v FBI Foods Ltd (1999) 167 DLR (4th) 577
Coles v Miles [2002] NSWCA 150
Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39
Concept Television Productions Pty Ltd v Australian Broadcasting Corporation (1988) 12 IPR 129
Doe v ABC [2007] VCC 281
Duchess of Argyll v Duke of Argyll [1967] 1 Ch 302
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89
Giller v Procopets [2008] VSCA 236; (2008) 24 VR 1
HK Frost Holdings v Darville McCutcheon [1999] FCA 570
Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd [2002] QSC 222
Kwok v Thang [1999] NSWSC 1034
Lord Ashburton v Pape [1913] 2 Ch 469

Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2) (1984) 156 CLR 414
Palmer Bruyn & Parker Pty Ltd v Parsons [2001] HCA 69; (2001) 208 CLR 388
Pollard v Photographic Company (1888) 40 Ch D 345
Prince Albert v Strange (1849) 1 Mac & G 25; 41 ER 1171
R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd (1992) 10 WAR 59
Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health (1990) 22 FCR 73
Smith Kline & French Laboratories (Australia) Ltd (1991) 28 FCR 291
State of Western Australia v Carlino [No 2] [2014] WASC 404
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)
Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd [2014] VSC 455
Warman International Ltd v Dwyer (1995) 182 CLR 544
West Australian Newspapers Ltd v Bond [2009] WASCA 127; (2009) 40 WAR 164

1 **MITCHELL J**: This case involves a claim by the plaintiff against the defendant alleging breach of confidence. The issue raised concerns how an Australian court exercising equitable jurisdiction should respond to the publication by a jilted ex-lover, to a broad audience via the internet, of explicit images of a former partner which had been confidentially shared between the sexual partners during the course of their relationship.

2 In this case I am satisfied that such a publication occurred in breach of an equitable obligation of confidence owed by the defendant to the plaintiff. The appropriate relief for the breach of that obligation in the present circumstances is the grant of an injunction prohibiting further publication of the images and an award of equitable compensation. The equitable compensation should include an award to compensate the plaintiff, so far as money can, for the humiliation, anxiety and distress which has resulted from the defendant's publication of the images, in breach of the obligation of confidence he owed to her.

Pleadings

3 The plaintiff alleges that, in the course of their romantic relationship, the plaintiff and defendant obtained photographs and video of each other either naked or partially naked and, in some cases, engaging in sexual activities. The defendant does not admit, but does not deny, those allegations.

4 The plaintiff also alleges that the photographs and videos were intended for the exclusive enjoyment and gratification of the plaintiff and defendant for so long as their relationship lasted. The plaintiff alleges that, by virtue of their relationship and in the circumstances, the parties owed each other a duty of confidence not to distribute or disclose the photographs and videos. The defendant denies these allegations.

5 The plaintiff alleges that, on about 5 August 2013, the defendant posted, on his Facebook page, about 16 of the photographs and two of the videos which depicted images of her. The defendant does not admit, but does not deny, this allegation.

6 The plaintiff claims, and the defendant denies, that the defendant's actions in posting the photographs and videos were intended to inflict mental harm, distress, humiliation, loss of self-esteem and embarrassment to the plaintiff as a result of her decision to terminate the relationship. The plaintiff alleges, and the defendant denies, that the defendant's actions in fact had these consequences, and further obliged her to take time off work.

7 The plaintiff claims an injunction restraining the defendant from further publication of the photographs and videos, damages and costs. The defendant denies that the plaintiff is entitled to any relief.

8 The defendant did not plead a positive defence, beyond either not admitting or denying facts pleaded in the statement of claim.

Procedure

9 As is evident above, the defendant entered an appearance and filed a defence in these proceedings. On 14 May 2014, the defendant's solicitors were granted leave to withdraw from the proceedings, following the withdrawal of their instructions. An affidavit filed by the defendant's solicitor in support of that application indicated that the defendant's last known postal address was an address in Maida Vale. Since that time the defendant has not taken any active steps in the proceedings, although there is evidence that he has been served with various documents.

10 On 8 October 2014, the court's listing office wrote to the defendant at his Maida Vale address, requesting that he provide his unavailable dates for trial by 15 October 2014. The defendant did not respond to that correspondence. On 22 October 2014 a listings supervisor advised the plaintiff's solicitors, in a letter copied to the defendant at his Maida Vale address, that the trial had been listed for hearing on 2 December 2014.

11 On 4 November 2014, the defendant sent an email to the court indicating that he was unable to attend the trial on 2 December 2014 due to work commitments. On 6 November 2014, the plaintiff's solicitors wrote to the defendant indicating her reluctance to consent to an adjournment and requesting certain information about the defendant's work commitments.

12 On 7 November 2014, my associate responded, at my request, to the defendant's email, indicating that the court would not grant an adjournment of the trial without a hearing in the absence of consent by the plaintiff. The email proposed dates for a directions hearing at which an adjournment application could be considered, and noted that, if necessary, the application could be heard by telephone or video link. My associate asked both parties to advise him by 4.00 pm on 10 November 2014 whether any of the proposed dates for a directions hearing were unavailable. He indicated:

> If I do not hear from the defendant by 4pm on Monday 10 November 2014 I will assume that the application for an adjournment is not being pursued.

13 Neither the court nor the plaintiff's solicitors heard from the defendant after that email was sent.

14 The defendant did not appear at trial.

15 I took the view that the trial should proceed in the defendant's absence, in the exercise of my discretion under O 34 r 2 of the *Rules of the Supreme Court 1971* (WA), without granting an adjournment of the trial under O 34 r 4 of those Rules. It was clear that the defendant was aware of the trial dates and made a conscious decision not to attend. The defendant was given an opportunity to make an application for an adjournment of the trial, which he did not take up. The defendant has not taken any active part in the proceedings since filing a defence, and has not complied with various programming orders. In those circumstances, it was my view that the trial should proceed as scheduled.

Evidentiary rulings

16 Because the defendant was not present at the trial it was important that the evidence adduced at trial was properly admissible. During the course of the trial I made a number of evidentiary rulings excluding evidence which I regarded as inadmissible. My reasons for those rulings are set out in an appendix to these reasons.

Facts

17 The evidence of the plaintiff was not contradicted, and I found her to be an honest and forthright witness. The facts which I have found below are based on her evidence, and supporting evidence of Steven Maxwell and Carmen Dougall.

18 The plaintiff was, at the time of trial, a 31-year-old woman who had never been married and has no children. Since May 2011 she has been employed as a mobile plant operator at the Cloudbreak minesite (Cloudbreak) operated by Fortescue Metals Group.

19 The plaintiff met the defendant in May 2011, shortly after she started working at Cloudbreak. The defendant was also employed at Cloudbreak and worked in the same crew as the plaintiff.

20 The plaintiff and defendant began to date as boyfriend and girlfriend in November 2012. After a few weeks the plaintiff moved into the defendant's home, which he was purchasing, in Maida Vale. Aside from the defendant's children from a former relationship, who would stay from time to time, the plaintiff and defendant were the only people residing at

the Maida Vale house. During this time the plaintiff paid rent to the defendant and was responsible for paying for certain domestic items and services.

21 As 'fly-in/fly-out' workers at Cloudbreak, the plaintiff and defendant worked shifts of eight days on and six days off. They would stay together at the defendant's Maida Vale house every fortnight or so. While at Cloudbreak, the plaintiff and defendant were allocated separate bedrooms on-site.

22 During the course of their relationship the plaintiff and defendant would send each other photographs of a sexual nature depicting each other naked or partly naked. The photographs were taken and sent using their mobile phones. The defendant initiated the exchange by sending an explicit photograph of himself to the plaintiff. The plaintiff responded by sending an explicit photograph of herself to the defendant. Similar photographs were exchanged on occasions over the course of the relationship. The defendant also took explicit photographs of the plaintiff with her knowledge and consent. The various photographs of the plaintiff were taken while she was in a bedroom at the Maida Vale house or in her private room at Cloudbreak.

23 The plaintiff also used her mobile phone to take videos of herself nude and, on at least one occasion, engaging in sexual activity. At some time after the videos were taken, the plaintiff left her mobile phone in the lounge room of the Maida Vale house while the defendant was present. She left the room for a time and, on her return, the defendant handed the plaintiff her phone and told her that he had taken her phone and used it to email the videos to himself. The plaintiff became angry and upset with the defendant and an argument ensued. The plaintiff asked the defendant why he 'went into' her phone and emailed the videos to himself. The plaintiff also asked the defendant to make sure that nobody else saw the videos, which were just for him. At that time the defendant agreed that no one would see the videos.

24 The plaintiff did not give evidence of any discussions between the parties about the photographs of the plaintiff at or about the time the photographs were taken or sent. However, she did give evidence of text messages which she sent to the defendant to the effect 'that he wouldn't be showing them to his friends or anything like that'. She also gave evidence of her understanding that there was a trust between the parties that the photographs would be private and that other people would not see the photographs. Prior to 5 August 2013, the plaintiff had never shown the

photographs or videos to anyone other than the defendant or published them in any way.

25 The plaintiff gave evidence, which I accept, of arguments which she and the defendant had during their relationship in which the defendant threatened to post photographs of the plaintiff on Facebook and YouTube. On these occasions the plaintiff would beg the defendant not to carry out the threat and would try to calm him down. The defendant did not, to the plaintiff's knowledge, publish or distribute any of the photographs or videos to any third person prior to 5 August 2013.

26 The relationship between the plaintiff and defendant began to deteriorate. On 5 August 2013, while the plaintiff was working at Cloudbreak and the defendant was in Perth, they argued via text message. The plaintiff suspected that the defendant had been cheating on her. At about 11.49 am she sent the defendant a text message saying that she knew he was cheating on her and saying that she wanted nothing to do with him.

27 After the plaintiff sent that message the defendant posted 16 explicit photographs and two explicit videos depicting the plaintiff on his Facebook page. The photographs and videos were those exchanged between the plaintiff and defendant in the manner described above. The defendant included the comment 'Happy to help all ya boys at home.. enjoy!!'. At some time on that day he also posted a note which read 'Let this b a fkn lesson.. I will shit on anyone that tries to fk me ova. That is all!'

28 By posting the photographs and videos on his Facebook page, the defendant made them available to his approximately 300 'Facebook friends', many of whom worked at Cloudbreak. Those 'Facebook friends' were themselves able to download the photographs and videos and distribute them to others.

29 At about 5.20 pm on 5 August 2013, the plaintiff began to receive telephone calls and text messages from friends asking if she had seen what the defendant had posted on his Facebook page. The plaintiff (who did not have a Facebook account of her own) used the Facebook account of a friend and saw the photographs and two videos which the defendant had uploaded onto his Facebook page. The plaintiff printed the photographs, and the prints were tendered at trial. The plaintiff did not make copies of the videos, but gave evidence, which I accept, that one of

the videos was of the plaintiff nude and the other was of the plaintiff nude and masturbating.

30 At 5.20 pm on 5 August 2013, the defendant sent the plaintiff a text message with an explicit image of the plaintiff and the text 'All in fb so fk u n the fkd up shit u represent. Hahaa'. At 5.21 pm he sent a text message which read:

> Fkn photos will b out for everyone to see when I get back you slappa. Cant wait to watch u fold as a human being. Piece if shit u r.

31 At 6.08 pm the defendant sent the plaintiff a text message which said 'There's 2 vids so hopefully the lesson us learnt'.

32 At about 6.10 pm the plaintiff sent the defendant a series of text messages begging him to take the photographs and videos down. The photographs and videos were removed from the defendant's Facebook page at about 7.00 pm on 5 August 2013.

33 I infer from the timing and content of the Facebook posts and the text messages to which I have referred that the defendant posted the photographs and videos of the plaintiff on his Facebook page because he was angry at her decision to terminate their relationship and because he wanted to cause her extreme embarrassment and distress. He expected the publication of the photographs and videos to cause the plaintiff to 'fold as a human being'. I infer that the defendant was well aware that the plaintiff regarded the images of her as intensely private and confidential, and that she would be horrified at their publication. The defendant's conduct indicates that he was well aware that the images were regarded by the plaintiff as private and that he did not have her consent or authority to show them to any other person.

34 The photographs were seen by Mr Maxwell, who was also a mobile plant operator at Cloudbreak. At about 5.30 pm Mr Maxwell completed his shift and got into a vehicle with two other operators. The two operators were looking at a mobile telephone and talking about pictures on the screen, referring to 'Fergs' (a nickname by which the defendant is known) and 'Caroline' (the plaintiff's first name). Mr Maxwell was handed the phone and saw about four of the photographs of the plaintiff.

35 Mr Maxwell also gave evidence, which I accept, that Cloudbreak is a male-dominated site and the men who work there frequently talk about 'things to do with females' and frequently look at pornography. The use of Facebook by workers at Cloudbreak is quite common.

36 Mr Maxwell was also told about the photographs and videos of the plaintiff by a leading hand employed at Cloudbreak later on the night of 5 August 2013. He described hearing employees at Cloudbreak talking about the images of the plaintiff on three or four other occasions.

37 I infer from the fact that the defendant had a significant number of Facebook friends who worked at Cloudbreak, from the direct evidence of employees at Cloudbreak viewing the images, from the evidence of the posts being discussed at Cloudbreak and from evidence of the nature of the workplace that a significant number of workers at Cloudbreak accessed the images of the plaintiff and that a greater number were aware of their existence. I infer that the defendant's publication of the photographs and videos was widely discussed among workers at Cloudbreak.

38 The publication of the explicit images had the effect on the plaintiff which the defendant evidently intended. When she saw the photographs and videos the plaintiff was absolutely horrified, disgusted, embarrassed and upset. She felt particularly humiliated, distressed and anxious because she and the defendant both worked at the same site. She concluded (and I infer) that many of the parties' mutual friends and colleagues would see the photographs and videos.

39 The plaintiff was alarmed and extremely anxious at this prospect. She could not sleep for about three nights and, ever since, has slept badly. At the time of trial she was taking sleep aid tablets nearly every night to help her sleep. She has undertaken a series of counselling sessions with Carmen Dougall, a psychologist, to obtain assistance in dealing with her emotional reaction to the defendant's publication of the photographs and videos.

40 The plaintiff flew from Cloudbreak back to Perth on the morning of 6 August 2013. She immediately removed her possessions from the defendant's house at Maida Vale and moved into her parents' house. She did not feel able to return to work until 30 October 2013, taking leave without pay during this period. As a result of the time taken off work in reaction to the publication of the photographs and videos, the plaintiff suffered a loss of wages of $13,404.

41 As a result of the incident, the defendant's employment at Cloudbreak was terminated with effect from 14 August 2013.

42 The plaintiff continues to feel humiliation and anxiety as a result of the defendant's publication of the photographs and videos. She feels that

many of her work colleagues and friends smirk at the thought of what they saw on the defendant's Facebook page. She is concerned that some of the photographs and videos may have been downloaded and forwarded to persons who were not the defendant's Facebook friends.

Breach of confidence - principles

43 The principle applied by the courts in proceedings asserting a breach of confidence was described in the following terms by Mason J in ***Commonwealth v John Fairfax & Sons Ltd***,[1] adopting the language employed in ***Lord Ashburton v Pape***.[2] The principle is that the court will restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. In addition, Mason J regarded it as necessary to show that there will be an unauthorised use of the information to the detriment of the party communicating it.[3] The existence of a requirement to show detriment has been doubted in subsequent cases.[4]

44 In ***John Fairfax***, Mason J was concerned with the application of this equitable principle, which he saw as fashioned to protect the personal, private and proprietary rights of the citizen,[5] to government information. I am not concerned with that application of the general principle here, as the information which the plaintiff seeks to protect is private information comprising digital images of her naked or partly naked and, in some cases, performing sexual acts. She brings this action in response to the disclosure of that private information by the defendant, in reaction to the personal detriment (in the form of damage to reputation, embarrassment and emotional distress) which she has already suffered as the result of publication of the images, and to prevent further detriment which would flow from further publication of the images. She therefore seeks to engage the principle for the purpose for which it was fashioned.

45 By that principle equity imposes an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained.[6]

46 Essential elements of an action in equity for breach of confidence are that the information was of a confidential nature, that it was

[1] (1980) 147 CLR 39, 50.
[2] [1913] 2 Ch 469, 475.
[3] ***John Fairfax*** (51).
[4] See ***Ammon v Consolidated Minerals Ltd [No 3]*** [2007] WASC 232 [310].
[5] ***John Fairfax*** (51).
[6] ***Moorgate Tobacco Co Ltd v Phillip Morris Ltd (No 2)*** (1984) 156 CLR 414, 438 cited in ***Smith Kline & French Laboratories (Australia) Ltd*** (1991) 28 FCR 291, 304.

communicated or obtained in circumstances importing an obligation of confidence, and that there was an unauthorised use of the information.[7]

47 It is clear that the equitable doctrine may be applied to images of a person, even where the images were created by the person sought to be restrained from disclosing the images.

48 One of the earliest cases in which the courts asserted a jurisdiction to restrain the publication of confidential information independently of contract, ***Prince Albert v Strange***,[8] concerned images, in the form of etchings, created by Queen Victoria and Prince Albert for their own use and not for publication. Prints of the images were surreptitiously taken from the original plates and came into the possession of the defendants in that case. The defendants were restrained from publishing both the prints themselves and a catalogue describing the prints.

49 The equitable principle was applied, in the 1888 decision of North J in ***Pollard v Photographic Company***,[9] to restrain disclosure of images of a plaintiff. In that case, Mrs Pollard had paid to have her photograph taken in a commercial photography shop. Subsequently, the photographer used the negative to produce a Christmas card and a Christmas advertisement which was placed in the shop window. The case was decided on two bases: an implied contractual term not to use the negative for such purposes and on the ground that the sale and exhibition of the photograph was a breach of confidence. As to the second ground, North J said:

> The object for which he [the photographer] is employed and paid is to supply his customer with the required number of printed photographs of a given subject. For this purpose the negative is taken by the photographer on glass; and from this negative copies can be printed in much larger numbers than are generally required by the customer. The customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer: and in my opinion the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands merely for the purpose of supplying the customer.

50 North J granted an injunction restraining the publication of the images by the photographer. The case shows that the equitable obligation of confidence can attach to an image which a plaintiff has allowed the

[7] ***West Australian Newspapers Ltd v Bond*** [2009] WASCA 127; (2009) 40 WAR 164 [41].
[8] (1849) 1 Mac & G 25; 41 ER 1171.
[9] (1888) 40 Ch D 345.

defendant to create in circumstances which indicate that the image created is confidential.

51 ***Prince Albert*** and ***Pollard*** were applied in 1967 by Ungoed-Thomas J in ***Duchess of Argyll v Duke of Argyll***.[10] In that case the court was prepared to restrain the disclosure of confidential personal information disclosed, in circumstances attracting an obligation of confidence, in the course of a marriage. The court recognised that the nature of the communications, by which mutual confidences were shared between the married partners, was implicitly confidential, and held that confidences shared between husband and wife were not excluded from the court's protection. The case establishes that the intimate nature of a personal relationship between two people may give rise to a relationship of trust and confidence such that, without express statement to that effect, private and personal information passing between those people may in certain circumstances be imbued with an equitable obligation of confidence.

52 More recently, in ***Kwok v Thang***,[11] Austin J continued an interlocutory injunction restraining publication of video images of the plaintiff which were taken in a hotel room by the use of a hidden camera. While the issue was only whether there was a serious question to be tried, Austin J did not doubt that the 'orthodox ground that equity should intervene in support of the plaintiff's equitable right to restrain a breach of confidence'[12] could be applied to the video images.

53 Similarly, in ***Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd***,[13] Gleeson CJ observed that a private image, surreptitiously obtained, may constitute confidential information. Recognising that no bright line could be drawn between what is private and what is not, he suggested that "[t]he 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'.[14]

54 The principle on which the plaintiff relies was also applied by the Victorian Court of Appeal in ***Giller v Procopets***.[15] In that case the respondent had videotaped the parties engaged in sexual activity in the

[10] [1967] 1 Ch 302, 320 - 232.
[11] ***Kwok v Thang*** [1999] NSWSC 1034.
[12] ***Kwok*** [38].
[13] [2001] HCA 63; (2001) 208 CLR 199 [34] - [35].
[14] ***Lenah Game Meats*** [42].
[15] [2008] VSCA 236; (2008) 24 VR 1.

privacy of a bedroom. Some of the video had been taken without the appellant's knowledge but the appellant was aware of later video recordings. When the relationship ended, the respondent distributed and attempted to distribute copies of the videotape to the appellant's family and others, and sought to persuade the recipients to view what was depicted in the tape. The contentious legal issue in that case concerned whether an action for monetary compensation was established (an issue to which I return below). In reaching an affirmative answer to that question, the Court of Appeal accepted that the publication of the videotape amounted to a breach of confidence.

Breach of confidence in this case

55 In my view, the conduct of the defendant in posting the photographs and videos of the plaintiff to his Facebook page, from which they were accessible to a large number of people including employees at the plaintiff's workplace, involved a breach of his equitable obligation, owed to the plaintiff, to maintain the confidentiality of the images.

Confidential nature of the images

56 The intimate images of the plaintiff clearly had the necessary quality of confidence about them. The explicit nature of the images was itself suggestive of their confidential character. Intimate photographs and videos taken in private and shared between two lovers would ordinarily bear a confidential character, and be implicitly provided on condition that they not be shown to any third party. In the present case that character was confirmed by the discussions between the plaintiff and defendant, in which the plaintiff emphasised the deeply personal nature of the images. The images were not in the public domain in any sense prior to the defendant's publication of them. Preservation of the confidentiality of the images was clearly a matter of substantial concern to the plaintiff,[16] and would have been regarded as highly offensive to any reasonable person of ordinary sensibilities. The defendant appreciated this.

Circumstances in which the images were obtained

57 The circumstances in which the defendant obtained the images of the plaintiff were such as to impose on the defendant an obligation of conscience to maintain the confidentiality of the images. The fact that the defendant emailed copies of the sexually explicit videos to himself from the plaintiff's phone without her knowledge or consent would of itself ordinarily be sufficient to import an obligation of confidence. This was

[16] ***Moorgate Tobacco Co*** (438).

confirmed by the plaintiff's reaction to being informed of what the defendant had done, and the defendant's agreement to make sure nobody else saw the photographs.

58 The nature of the photographs and the circumstances in which they were obtained or provided were such as to make it obvious to any reasonable person standing in the shoes of the defendant that the images were for his viewing only and were not to be shared with any other person. Any disclosure of the images to third parties would be likely to cause immense embarrassment and distress to a person in the plaintiff's position. The defendant appreciated this, and was in fact motivated by the embarrassment and distress which publication of the photographs would cause to the plaintiff. If the images had not been of a deeply private and confidential character then the defendant's purpose in publishing them could not have been achieved. The statements made by the plaintiff to the defendant about the images prior to their disclosure also made it clear that the images were provided on the basis that they would not be shared with others.

Misuse of the images

59 It is also established that the defendant misused the images by posting them on his Facebook page, so that they were accessible to hundreds of his 'Facebook friends', many of whom worked with both the plaintiff and defendant. He did not do so for any innocent purpose, but was actuated by the motive of causing embarrassment and distress to the plaintiff in response to the plaintiff ending the relationship. His response to the end of his romantic relationship with the plaintiff was to seek to hurt her by using private information obtained in confidence during the course of the relationship. To the extent that it is necessary for the plaintiff to show that the disclosure was to her detriment, she has proven that the publication of the images was deeply distressing to her and resulted in her having to take time off work and undertake counselling to assist her in dealing with her distress.

Remedies - injunction

60 It is well established that a court exercising equitable jurisdiction may restrain the publication, or further publication, of information in breach of an equitable obligation of confidence. ***Prince Albert***, ***Pollard***, and ***Duchess of Argyll*** are all examples of the exercise of that jurisdiction.

61 In the present case there is no discretionary reason to deny the plaintiff the injunctive relief which she seeks. The past conduct of the

defendant in publishing the images of the plaintiff gives rise to a reasonable apprehension that the conduct might be repeated. While there has been a prior publication by the defendant, it was for a short period of time. Allowing for the fact that third parties may have obtained copies of the images, there is no evidence that the distribution of the images has been so widespread that the grant of injunctive relief would serve no utility at this stage, or that the images have lost their confidential character by reason of the extent of their publication so that the grant of an injunction would not prevent further detriment to the plaintiff.[17] The plaintiff has not unreasonably delayed seeking injunctive relief and has not been shown to have engaged in any conduct which would otherwise provide a basis for exercising my discretion to refuse relief.

62 A failure by a party to comply with an injunction is a serious matter. A response to such a breach may be an exercise by the court of its jurisdiction to punish the non-complying party for contempt of court. It is important that an injunction be cast in terms that clearly identify the conduct which is prohibited by the court's order. This requirement serves both the interests of the restrained party and the party seeking the restraint. From the perspective of the restrained party, it is important that the person be able to understand what conduct is prohibited so as to know what action he or she can, and cannot, take without exposing himself or herself to punishment. From the perspective of the party seeking the restraint, his or her capacity to enforce the court's order by motion for contempt may turn on whether the undertaking is sufficiently clear.[18]

63 The terms of the injunction sought by the plaintiff in the writ of summons would restrain the defendant from publishing 'any of the photographs and videos'. Following the trial the plaintiff (by leave) submitted an alternative form of injunction which identified the photographs and videos referred to. The alternative form proposed by the plaintiff was:

> An order restraining the defendant, either directly or indirectly, from publishing in any form any photographs or videos of the plaintiff that are the same or similar to those posted by him on Facebook on or about 5 August 2013 other than:
>
> (i) As may be required by law;

[17] As to which see ***John Fairfax*** (54); ***Concept Television Productions Pty Ltd v Australian Broadcasting Corporation*** (1988) 12 IPR 129, 136.
[18] See ***Australian Consolidated Press v Morgan*** (1965) 112 CLR 483, 506, 515; ***R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd*** (1992) 10 WAR 59, 68 - 70, 83.

(ii) To professional advisers for the purpose of obtaining professional advice;

(iii) With leave of this Honourable Court; or

(iv) With the express written consent of the plaintiff.

64 I have two concerns about that alternative form of order. First, it turns on the identification of the photographs and videos of the plaintiff which were posted on Facebook on or about 5 August 2013. The transitory nature of that electronic medium may make it difficult to ascertain which videos were published on that date. There is no evidence that the defendant is now able to recall or ascertain the identity of all photographs of the plaintiff which he posted on or about those dates. Casting the order in those terms may present difficulties both for enforcement of and compliance with the order. Secondly, the proposed order would restrain publication of not only those photographs and videos in fact posted to Facebook on those dates but also photographs and videos which are 'similar'. The proposed order does not indicate the respects in which the photographs and videos must be similar.

65 In my view the injunction is better cast by reference to the 'activities' which are pleaded in par 3 of the statement of claim as being the subject of the photographs and videos. That is, the injunction should prohibit the defendant from publishing photographs or videos of the plaintiff engaging in sexual activities or in which the plaintiff appears naked or partially naked (including with breasts exposed). There is no suggestion in the evidence that the defendant is in possession of any photographs or videos of that character to which an obligation of confidence does not attach.

66 Subject to hearing any further submissions as to the precise form of the order, I propose to grant a permanent injunction in those terms.

Remedies - equitable compensation

67 The plaintiff also claims what the statement of claim refers to as 'Damages, including aggravated, punitive and special damages'. In oral submissions counsel for the plaintiff confined this to a claim for the exercise of the court's equitable jurisdiction to award equitable compensation in respect of loss sustained as a result of the defendant's breach of his equitable obligation of confidence. Counsel disclaimed any reliance upon s 25(10) of the *Supreme Court Act 1935* (WA) (which is the Western Australian emanation of *Lord Cairns' Act*) and abandoned the claim for punitive damages. As the plaintiff does not seek 'personal injury

damages' the provisions of the *Civil Liability Act 2002* (WA) regulating the award of such damages are not presently applicable.

68 It appears in Australia that equitable compensation is an available remedy, in an appropriate case, for a breach of an equitable obligation of confidence.

69 In ***Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health***,[19] Gummow J referred to the court's 'inherent jurisdiction to grant relief by way of monetary compensation for breach of an equitable obligation, whether of trust or confidence'. Other single judge decisions have recognised the jurisdiction to award equitable compensation on a claim of breach of confidence.[20] This position reflects that reached by the Supreme Court of Canada in ***Cadbury Schweppes Inc v FBI Foods Ltd***.[21]

70 The purpose of an award of equitable compensation for breach of confidence has been said to be to put the innocent party in the position he or she would have been in had the misuse of the confidential information not occurred.[22]

71 A question which arises in the present case is whether equitable compensation can be awarded to compensate a plaintiff for non-economic loss comprising the embarrassment and distress occasioned by the disclosure of private information in breach of an equitable obligation of confidence.

72 There are two conceptual hurdles facing the plaintiff's submission that an affirmative answer should be given to this question. The first is the common law approach that damages for emotional distress falling short of a recognised psychiatric or psychological injury are available only in very limited circumstances.[23] The second is that equitable compensation in Australian cases has, until recently, been awarded only to compensate for economic loss. In my view the second of these hurdles is the more significant, as the former is an aspect of the common law's approach to the award of damages rather than equity's approach to the award of compensation. Restrictions of the common law are not to be automatically applied in the exercise of the court's equitable jurisdiction.

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[19] (1990) 22 FCR 73, 83.
[20] ***Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd*** [2002] QSC 222 [13]; ***HK Frost Holdings v Darville McCutcheon*** [1999] FCA 570, [73]; ***Vasco Investment Managers Ltd v Morgan Stanley Australia Ltd*** [2014] VSC 455 [294] - [295].
[21] (1999) 167 DLR (4th) 577.
[22] ***HK Frost Holding*** [73].
[23] ***Giller*** [141].

73 The question I have identified was considered by the Victorian Court of Appeal in ***Giller***, which is the only decision of an Australian superior court considering the issue that I have been able to locate. In that case the Victorian Court of Appeal held that monetary compensation for emotional distress caused by the release of confidential personal information was available both in the exercise of the Court's equitable jurisdiction to award equitable compensation and under the Victorian version of *Lord Cairns' Act*.

74 The decision in ***Giller*** might be distinguished in this State so far as it was based on the Victorian version of *Lord Cairns' Act*, which was cast in materially different terms to s 25(10) of the *Supreme Court Act 1935* (WA). However, that aspect of the Victorian Court of Appeal's reasoning based on the inherent equitable jurisdiction to award compensation for breach of an equitable obligation cannot be distinguished.

75 In ***Farah Constructions Pty Ltd v Say-Dee Pty Ltd***,[24] the High Court held that intermediate appellate courts and trial judges in Australia should not depart from decisions in intermediate appellate courts in another jurisdiction in relation to non-statutory law unless they are convinced that the interpretation is plainly wrong.

76 I do not consider that the decision in ***Giller*** can be said to be plainly wrong. It does, in my view, represent a development in the equitable doctrine in Australia. The Court referred to only one other decision, an unreported judgment of the Victorian County Court,[25] in which equitable compensation has been awarded for non-economic loss, occasioned by a breach of confidence. I have not been able to locate any other Australian cases in which such an award has been made. However, prospective developments in the equitable doctrine of breach of confidence to protect privacy values were contemplated by at least some members of the High Court in ***Lenah Game Meats***.[26]

77 The development effected by ***Giller*** is consistent with the way in which the law has developed in the United Kingdom,[27] albeit under the influence of the *Human Rights Act 1998* (UK) and jurisprudence of the European Court of Human Rights which have no Australian counterparts.

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[24] [2007] HCA 22; (2007) 230 CLR 89 [135].
[25] ***Doe v ABC*** [2007] VCC 281. In that case the plaintiff suffered psychiatric injury, extending beyond embarrassment and distress, as a result of the disclosure.
[26] ***Lenah Game Meats*** [40], [132].
[27] Discussed by Neave J in ***Giller*** [409] - [418], [423].

78 It is also, relevant, in my view, to take account of recent technological developments in determining how the equitable doctrine of breach of confidence should be developed. In ***Giller*** the Court was concerned with events which took place in 1996. At that time the medium used to record the confidential images was the (now largely obsolete) videotape. The defendant in that case was practically confined to distributing physical copies of the tape to other persons in order to disseminate the images thereon.

79 Even as late as 1996, it would have been difficult to predict the current pervasiveness in Australian society of the internet, social media platforms utilising the internet and the portable devices which interface with the internet and those platforms. That pervasiveness is reflected in the way the plaintiff and defendant communicated with each other, often by electronic communication even for significant conversations such as that which led to the termination of their relationship. Not uncommonly for a young couple in a sexual relationship, they shared intimate images with each other using their mobile phones during their relationship. This practice has introduced a relatively new verb - sexting - to the English language.

80 The technological advances to which I have referred have dramatically increased the ease and speed with which communications and images may be disseminated to the world. The defendant was easily able to upload the images of the plaintiff to a platform where they would be readily seen by members of the parties' social group. He could have as easily uploaded the images to a platform, such as YouTube, where they would have been visible to the world. The process of capturing and disseminating an image to a broad audience can now take place over a matter of seconds and be achieved with a few finger swipes of a mobile phone. No special licence or resources are practically or legally required to achieve such a broadcast. In many cases, such as the present, there will be no opportunity for any injunctive relief to be sought or obtained between the time when a defendant forms the intention to distribute the images of a plaintiff and the time when he or she achieves that purpose.

81 The not uncommon contemporary practice of couples privately engaging in intimate communications, often involving sexual images, by electronic means, the damaging distress and embarrassment which the broader dissemination of those communications would ordinarily cause and the ease and speed with which that dissemination can be achieved should inform the way in which equity responds to a breach of the obligation of confidence. The obligation which equity recognises is not

new, dating back at least to the time of Queen Victoria's and Prince Albert's etchings. The relief which is given in response to a breach of that obligation should, however, accommodate contemporary circumstances and technological advances, and take account of the immediacy with which any person can broadcast images and text to a broad, yet potentially targeted, audience.

82 The step taken in ***Giller***, recognising that the relief available for such a breach of the equitable obligation is not confined to an injunction, but extends to monetary compensation, avoids the obligation being effectively unenforceable in many cases. The development may be seen as giving effect to the 'cardinal principle of equity that the remedy must be fashioned to fit the nature of the case and the particular facts'.[28] Given the recognised flexibility of the remedy of equitable compensation,[29] the approach taken in ***Giller*** is an appropriate incremental adaptation of an established equitable principle to accommodate the nature, ease and extent of electronic communications in contemporary Australian society.

83 I am not convinced that the decision of the Victorian Court of Appeal is plainly wrong. To the contrary, I agree with that Court's conclusion that the equitable doctrine of breach of confidence should be developed by extending the relief available for the unlawful disclosure of confidential information to include monetary compensation for the embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature.

84 In reaching this conclusion, I should not be taken to be expressing any view about whether equitable compensation for non-economic loss should be available for breach of other equitable obligations. It may well be that the nature of the equitable obligation of confidence, a purpose of which is to protect citizens from the distress which will ordinarily accompany the release of confidential information of a private and personal nature, informs the kind of relief which is available for breach of the obligation. It does not follow from the conclusion I have reached that compensation for non-economic loss will be available for breach of other equitable obligations which may be more concerned with the protection of economic interests.[30]

[28] ***Warman International Ltd v Dwyer*** (1995) 182 CLR 544, 559.
[29] ***Coles v Miles*** [2002] NSWCA 150 [63].
[30] See JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th edition 2015) [23-605].

85 Therefore, in my view, it is appropriate to award the plaintiff equitable compensation for the damage which she has sustained in the form of significant embarrassment, anxiety and distress as a result of the dissemination of intimate images of her in her workplace and among her social group. That compensation award should take account of the fact that the impact of the disclosure on the plaintiff was aggravated by the fact that the release of the images was an act of retribution by the defendant, and intended to cause harm to the plaintiff.[31] The award should also take account of the fact that the plaintiff has not sustained a psychiatric injury, and its amount should not be disproportionate to amounts commonly awarded for pain, suffering and loss of amenity in tortious personal injury cases. In my view an award of $35,000, to which should be added the plaintiff's economic loss of $13,404, is appropriate.

Remedies - damages under *Lord Cairns' Act*

86 In circumstances where I have concluded that equitable compensation can be awarded under the Court's inherent equitable jurisdiction, where the plaintiff makes no claim under s 25(10) of the *Supreme Court Act* and where I have received no submissions on that question, it is unnecessary and inappropriate for me to express any view as to whether damages could be awarded under that provision.

Costs

87 The plaintiff seeks an order that the defendant pays the plaintiff's costs on an indemnity basis. I agree that the plaintiff, having been wholly successful, should have her costs of the action. However, I do not consider that costs should be paid on an indemnity basis.

88 The principles governing the award of costs on an indemnity basis were summarised by the Court of Appeal in ***Swansdale Pty Ltd v Whitcrest Pty Ltd***.[32] In broad and non-exhaustive terms, the discretion may be exercised to award indemnity costs in cases where the unsuccessful party has engaged in unreasonable or improper conduct, such as persisting in a case which is hopeless.

89 The plaintiff relies on the defendant's failure to take any active steps in the proceedings after filing a defence, and in failing to respond to correspondence by the plaintiff (which was not in the form of a Calderbank offer) requiring the defendant to deliver up the photographs and videos and pay damages and legal costs. I am not satisfied that the

[31] See ***Giller*** [438] - [439].
[32] [2010] WASCA 129 (S) [10].

defendant's failure to admit the plaintiff's claim, either before or after proceedings were commenced, is so unreasonable as to justify an award of costs on an indemnity basis. The plaintiff was simply put to the proof of her case, and was not required to respond to an affirmative defence put up by the defendant. The fact that the defendant did not make further admissions, or concede the plaintiff's claim before the action was instituted, did not increase the costs incurred by the plaintiff in establishing her case. The failure to make further concessions has not been shown, in the circumstances of the present case, to be so unreasonable as to justify the award of costs on an indemnity basis.

Orders

90 For the reasons set out above, I would make the following orders (subject to considering any further submissions as to their precise form):

1. The defendant shall not, either directly or indirectly, publish in any form any photographs or videos of the plaintiff engaging in sexual activities or in which the plaintiff appears naked or partially naked (including with breasts exposed) other than:

   (a) as may be required by law;

   (b) to professional advisers for the purpose of obtaining professional advice;

   (c) with leave of this Court; or

   (d) with the express written consent of the plaintiff.

2. The defendant pay to the plaintiff equitable compensation in the amount of $48,404.00.

3. The defendant pay the plaintiff's costs of the action, including any reserved costs, to be taxed.

Appendix 1 - evidentiary rulings

91 During the trial of this action I made a number of rulings excluding aspects of the evidence which the plaintiff sought to tender, and reserved my ruling as to the use to which one part of the admitted evidence could be put. What follows are my rulings and the reasons for those rulings.

Plaintiff's statement [14] - [15]

92 These paragraphs described the manner in which the plaintiff's and defendant's relationship deteriorated from March 2013, giving some examples of behaviour of the defendant which could only be described as abusive to the plaintiff. In my view the evidence does not have any probative value in relation to the questions I am required to determine in these proceedings, and was potentially prejudicial to the interests of the defendant as it indicated that he had committed an unlawful assault which was not the subject of any claim in these proceedings. I excluded those paragraphs from the plaintiff's evidence admitted at trial.

Statement of Steven Maxwell [11] - [13]

93 Paragraph 11 of Mr Maxwell's statement relates a conversation which he had with a Mr Fishwick about the defendant's conduct. I admitted this paragraph as direct evidence that the posting of the photographs and videos was being discussed by employees at Cloudbreak. In that conversation with Mr Maxwell, Mr Fishwick talked about other discussions to which he was a party. In my view, evidence of what Mr Fishwick said about conversations he had or overheard in the absence of Mr Maxwell is not evidence of the truth of the fact that those conversations occurred. To use Mr Maxwell's evidence in that way would infringe the hearsay rule.

94 In support of his argument that this evidence should be admitted to prove that discussions to which Mr Maxwell was not a party occurred, counsel for the plaintiff referred to cases dealing with the 'grapevine effect'. The cases referred to by counsel concerned the extent to which a court may take into account the effect of potential republication of a defamatory statement in assessing damages for defamation.[33] Those cases do not address the question of the manner in which evidence of discussions may be led. They do not support the proposition that an out of court statement about conversations not observed by any witness in the proceedings is admissible to prove that the conversations occurred despite the hearsay rule.

[33] See ***Palmer Bruyn & Parker Pty Ltd v Parsons*** [2001] HCA 69; (2001) 208 CLR 388 [88] - [89].

95 In the end, this ruling as to the use which par 11 of Mr Maxwell's statement may be put is of little moment in this case. That is because I have inferred, from the admissible evidence, that the defendant's publication of the photographs and videos was widely discussed at Cloudbreak.

96 The second sentence of par 12 of Mr Maxwell's statement was not relied on by the plaintiff.

97 The third sentence of par 13 of Mr Maxwell's statement contains Mr Maxwell's lay opinion as to the extent to which workers at Cloudbreak would have seen or heard about the photographs and videos. That expression of non-expert evidence is not probative of any fact in issue in these proceedings, and I rule it inadmissible on that basis.

Statements of Carmen Dougall

98 During the trial I ruled that a statement and supplemental statement of Ms Dougall, a registered psychologist, were inadmissible except to the extent that they described the counselling sessions which were undertaken with the plaintiff.

99 The plaintiff sought to adduce the balance of the statements in order to prove that the publication of the photographs and videos caused anxiety, embarrassment and distress to the plaintiff, and that the time which she took off work was reasonable. Such evidence could only be admitted on the basis that it was allowed by the expert opinion rule.

100 It is trite that expert opinion evidence will not be admissible if the subject matter of the opinion is such that a person without instruction or experience in the relevant area of knowledge or human experience would be able to form a sound judgment on the matter. It is also well established that a condition of admissibility is that the subject matter of the expert opinion must form part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which would render a witness's opinion of assistance to the court.[34]

101 As Hall J has recently observed,[35] psychology in the broad sense is not a field of specialised knowledge such that any opinion offered by a psychologist is necessarily admissible. Evidence of a psychologist will not be expert opinion if it was merely a description of human behaviour

[34] See J D Heydon, *Cross on Evidence* (9th edition) [29050].
[35] ***State of Western Australia v Carlino [No 2]*** [2014] WASC 404 [16].

about which the court is capable of forming its own view. There must be something in the evidence of the psychologist that draws on a reliable body of knowledge or experience of the kind to which I have referred.

102 There was no suggestion in the evidence that the plaintiff suffers from any recognised psychiatric or psychological disorder. The subject of Ms Dougall's opinion, therefore, was the reaction of an ordinary mind to the publication of the photographs and videos. In my view, the plaintiff's reaction to the publication of the photographs and videos and the reasonableness of that reaction are matters within ordinary human experience. I do not require the assistance of a psychologist to reach factual conclusions about those matters. In my view, therefore, Ms Dougall's opinions about those matters are not admissible as expert opinion evidence.

103 Again, little turns on this evidentiary ruling in this case as the opinions expressed by Ms Dougall reflect the findings I have made based on admitted evidence.