

## **Guidance on answering the discussion questions in the book**

### **Para 17.16**

**Write down three types of information you think of as confidential. Review your answer after reading to the end of para 17.28.**

Examples could be your past and present personal relationships; your financial status; and proposed new products to be launched by a business. More problematic might be details of business contacts built up by you while with an employer, and details of a proposed Government policy. Consider paras 17.34-17.43.

### **Para 17.27**

**Is posting on social media the equivalent of speaking to a friend on the phone? How well can established principles be adapted to new technology?**

In a phone call, there are only two parties involved (setting aside the possibility of phone tapping, see *Malone v Commissioner of Police of the Metropolis (No 2)* [1979] Ch 344. also discussed in Chapter 7). Information is shared only with the other party (see para 17.19) and the information can therefore be confidential.

In contrast, posting on social media is open: there are no restrictions, or limited membership restrictions, upon who can enter some social networking sites for example. Accordingly, even

if participants are prepared to be frank, and feel as if they are involved in a private conversation, they are not (particularly given that some social networks enable posts to be shared by others than the original poster). It is difficult to argue, therefore, that certain social media posts should be treated as confidential. Do you think this should be the case even if they update their privacy settings? What if they need to do this very regularly and forget or indeed the provider did not make their privacy policy clear in the first place?

If information is shared under clear labels that it is confidential, and if a rigorous security procedure is required to enter the site, then it is likely that this would meet existing requirements for confidentiality. But this will not always be the case. Can you think of new technologies that may pose a challenge to breach of confidence principles (e.g. the internet of things)?

Established principles may also be considered beside community norms on the internet: such norms may require that the information is not to be disclosed outside the web space. This could in time become analogous to the more conventional situations of confidence considered in this chapter. Can you think of examples of online communities where participants adhere to their own rules of behaviour?

### **Para 17.30**

**Plans for the University of Edingow to take over the University of Glasburgh (which are being met with riots in the street) are posted on a blog clearly described as ‘Private to Members of the University of Edingow’, but which required no password. Ross, a student at Sydbourne, a separate institution, finds the information and sends it to**

**Hamish at a newspaper. Was Ross under an obligation of confidence? If so how wide was this obligation?**

This builds on the discussion point above at 17.27. Information is readily accessible but is clearly described as private to a group which does not include Ross. This scenario is to some extent analogous with the classic examples of the paper in the dustbin or the laptop found on the bus. On the other hand, the information is freely available on a space on which one might expect to be able to find information available for use. If it could be established that this practice of marking blogs as “private” was a regular and respected one, satisfying the *Coco v Clark* objective test, then Ross may be under an obligation of confidence. Consider paras 17.28-17.29. In the circumstances, the obligation would be not to make any use of the information (see para 17.30).

Note that this analysis assumes that the information on the blog is more detailed than that presently available to the rioting masses. Otherwise, the information could not have the necessary quality of confidence (see paras 17.18-17.19). Looking later in the chapter, a public interest defence may be available to Ross if he does disclose. This would depend upon the likely impact of educational change on the nation’s future (see paras 17.59-17.60). Given the facts, it is likely that disclosure to the press would be acceptable (see para 18.60).

**Para 17.87**

**Do you think that the breach of confidence (with its human rights modifications) and the accompanying information legislation, result in the UK meeting its obligations under TRIPS and the Paris Convention? Devise a scenario when the UK could be**

**challenged at the World Trade Organization (WTO) Dispute Settlement Body (see note 203) in respect of Article 39.**

This could involve a challenge by a country at the behest of a well-known business, concerned at the application of the public interest and freedom of expression defences which meant that information about problems with the business's new fuel efficient car, such that it in fact increased carbon dioxide emissions, were published in a UK based newspaper and on their website and the court found there to be no breach of confidence. Could the complaint include arguments that different approaches are taken to this, directly and indirectly, for example as in Case C-266/09 *Stichting Natuur*? Would this be relevant to the balancing acts?

Or an example could involve a health regulator deciding to release immediately details of possible cures for a virulent disease when a business provides the data for regulatory clearance. Is this unfair commercial use? Would it matter if it was disclosed to a business?