BREACH OF CONFIDENCE

The three limbed Coco test from *Coco v Clarke* will determine whether or not there has been a B/C.

The three limbs are as follows:

1. Does the information have the quality of confidence?
2. Was the information communicated in a way that implies an obligation of confidence?
3. Was there unauthorised use of the information to the detriment of the person imparting the information?

**Limb 1: Part 1- was the information in the public domain?**

Information in the public domain cannot be private – *Coco v A.N Clark Engineers Ltd*

If information is partly private and partly public, the two types must be divided and only the private parts considered – *Coco v A.N Clark Engineers Ltd*

Obligation of confidence remains even if information later becomes public – *Coco v A.N Clark Engineers Ltd*

Something constructed on materials in the public domain may be confidential if it has been created by the applicant with skill and ingenuity – *Coco v A.N Clark Engineers Ltd*

Information must have the basic attribute of inaccessibility – *Spycatcher* - cited in *Stephens v Avery*

Two people knowing about their relationship does not mean the information is in the public domain – *Stephens v Avery*

The information only ceases to be capable of protection when it is in fact known to a substantial number of people – *Stephens v Avery*

It will be harder to protect if the information has been made available to a limited part of the public, but it is still capable of being protected – *Stephens v Avery*

Inaccessibility in terms of whether the relevant public is aware – *Hellewell v Chief Constable of Derbyshire*

Courting in public or lessening the degree of privacy has a negative effect on the level of the protection of the information – *A v B* (Queens Bench)

Even if people are in a relationship and seen being intimate, the relationship can still be kept confidential if the fact that they are engaged in sexual intercourse is only known to them – *A v B* (Queens Bench)

**Limb 1: Part 2- Is the information of a quality that should be protected?**
If information is too trivial/ minor it will not be protected: “Trivial Tittle-Tattle” – *Coco v A.N Clark Engineers Ltd*

Mere simplicity doesn’t prevent confidentiality – *Coco v A.N Clark Engineers Ltd*

Something made up of information or materials in the public domain can be confidential as long as there is an element of originality – *Coco v A.N Clark Engineers Ltd*

Information that is grossly immoral will not be confidential, however it is hard to determine what is immoral in today’s society (*M and N v MacKenzie and News Group Newspapers Ltd* judge held that a homosexual affair was grossly immoral, but *Stephens* judge didn’t agree) – *Stephens v Avery*

To most people the details of their sexual lives are high on their list of those matters which they regard as confidential – *Stephens v Avery*

Photographs can be of a confidential nature and protected

“…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, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found of stolen a letter or diary in which the act was recounted and proceeded to publish it” – *Hellewell v Chief Constable of Derbyshire*

Photos taken of a private activity from a distance will be subject to Breach of Confidence – *Hellewell v Chief Constable of Derbyshire*

A mugshot can be subject to B/C as mugshot portrays that person is known to the police, which gives negative connotations – *Hellewell v Chief Constable of Derbyshire*

Information regarding criminal history can be protected – *Hellewell v Chief Constable of Derbyshire*

A photograph cannot be used for purposes other than those for which it is taken – *Pollard* cited in *Hellewell v Chief Constable of Derbyshire*

The information that P had been treated at a psychiatric hospital has the necessary quality of confidence about it- therefore medical information is likely to be confidential – *P v D*

An unsubstantiated rumour will not be protected by a duty of confidence – *P v D*

False information might be protected – *P v D*

Spectrum of relationship attracts different levels of confidentiality depending on length/ circumstances- i.e. higher expectation of privacy the… stronger a relationship – *A v B* (Queens Bench)

When one person in a relationship wishes to keep it confidential while the other wants to make it public, this does not remove the quality of confidence but does undermine it – *A v B* (COA)
**Limb 2: Part 1 - Was there an express agreement?**

Where commercial information is given in a business like setting, for a common undertaking, there is almost always a presumption of confidentiality – *Coco v A.N Clark Engineers Ltd*

There can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances, which negative any duty of holding it confidential – *Coco v A.N Clark Engineers Ltd*

In the absence of an express agreement of confidentiality an implied statement will suffice – *Stephens v Avery*

Certain relationships presume an obligation of confidence, but relationships are not the determining factor (eg: doctor/patient, lawyer/client) – *Stephens v Avery*

There does not have to be a pre-existing relationship or an express agreement to establish an obligation of confidence – *Hellewell v Chief Constable of Derbyshire*

Where there is no consent, an obligation of confidence is expected (element of fiduciary relationship) – *Hellewell v Chief Constable of Derbyshire*

Where you know information was received by the confider in circumstances importing confidence, then the obligation of confidence extends to you – *P v D*

If a person strings together a conclusion that may or may not be true from gossip, observations and rumours then they are not obliged to keep that information confidential – *P v D*

**Limb 2: Part 2 - Reasonable person test**

Would the reasonable person in the shoes of (y) have realised that (the information) received from (x) was confidential and shouldn’t have been passed on?

Test: Reasonable person (If a reasonable person standing in the shoes of the recipient of the information would have realised from the circumstances that the info was being given to them in confidence, this is sufficient to impose an obligation of confidence) – *Coco v A.N Clark Engineers Ltd*

Information can’t be blurted out in public – *Coco v A.N Clark Engineers Ltd*

The relationship between the parties is not a determining factor (it doesn’t have to be a doctor-patient style relationship) – *Stephens v Avery*

If there is an intrusion of privacy, the information gained from this intrusion is protected unless the intrusion is justified – *A v B* (COA)
A duty of confidence will arise when the recipient of the information knew or ought to have known that the information was confidential – *A v B (COA)*

A private conversation in a public place has a reasonable expectation to not have the information recorded or broadcasted – *A v B (Queens Bench)*

If the information could only have come from someone in a position of confidence these are confidential circumstances – *P v D*

A third party is under an obligation of confidence, if it is obvious to them that the information is confidential – *P v D*

A third party (including an intruder) who receives information in circumstances where that person knew or should have known that it had been divulged in breach of an obligation of confidence is bound to respect that confidence – *P v D*

A person’s relationship with the police is confidential – *Hellewell v Chief Constable of Derbyshire*

When information is taken with no consent by the police, there is an obligation of confidence – *Hellewell v Chief Constable of Derbyshire*

**Limb 3: Part 1- Was there unauthorized use of the information?**

If there is an authorization to disclose then no duty of confidentiality exists – *Coco v A.N Clark Engineers Ltd*

Police may make reasonable use of information obtained for the purposes of preventing and detecting crime – *Hellewell v Chief Constable of Derbyshire*

**Limb 3: Part 2- was there detriment to the person imparting the information?**

Detriment may not be necessary in order to establish breach of confidence – *Coco v A.N Clark Engineers Ltd*

Detriment can extend to others – *Coco v A.N Clark Engineers Ltd*

Detriment can extend to relationships – *Coco v A.N Clark Engineers Ltd*

Detriment can include potential loss of income – *Coco v A.N Clark Engineers Ltd*

Detriment does not have to be financial – *Stephens v Avery*

Detriment can be humiliation, loss of job or mental distress – *Stephens v Avery*

**1. Public Interest defence**

Established in *Hellewell v Chief Constable of Derbyshire* - in certain cases this defence can overrule a successful Coco test if public interest outweighs obligation of confidence