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LOGOS AND NO-GOS

PERSONAL OR COMMERCIAL?

The Supreme Court, in *Philips v Mulcaire [2012] UKSC 28*, rules on the scope of privilege against self-incrimination.

Glenn Mulcaire has remained at the forefront of the "phone-hacking" scandal and last month lost his appeal to the Supreme Court in relation to the interception of client voicemail messages left on the mobile phone of Nicola Phillips, PA to the PR consultant Max Clifford.

The Supreme Court dismissed Mr Mulcaire's appeal from the Court of Appeal and held that he could not rely on the common law privilege against self-incrimination as a defence to an application by Ms Phillips for an order requiring Mr Mulcaire to disclose who instructed him to intercept the voice messages and the nature of the interception.

Lord Walker delivered the judgment, with which the four other members of the Supreme Court concurred. The key issue addressed related to section 72(2)(a) of the Senior Courts Act 1981 (the 1981 Act) which provides a derogation from the privilege against self-incrimination for civil *"proceedings for infringement of rights pertaining to any intellectual property…"* and Lord Walker examined the meaning of "intellectual property" in this context.

PRIVILEGE AGAINST SELF-INCRIMINATION

Lord Walker explained that the 1981 Act is just one of numerous statutory provisions in which Parliament has thought it right to restrict privilege against self-incrimination in order to avoid the injustice of victims being deprived of an effective civil remedy. However, he made it clear that the 1981 Act was not introduced as part of any *"wider legislative scheme"*. The 1981 Act was enacted in light of the House of Lords finding (in *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 280) that "Anton Piller" orders, now known as search orders, could not be made in an infringement of copyright case (relating to copied video cassettes) because of the defendant's potential exposure to a charge of conspiracy to defraud.

"INTELLECTUAL PROPERTY"

As to the meaning of *"intellectual property"* within the context of section 72(2)(a) of the 1981 Act, Lord Walker first looked to the various definitions of the phrase and noted that there is no universal definition and that therefore Parliament had adopted a variety of definitions for different situations. Lord Walker explained that while there is no particular "potency" (where a definition may give words a meaning different from their own meaning) about the expression "intellectual property" and there is a general consensus as to its core content (e.g. patents for inventions, trade marks, artistic copyright, design rights), there is no general consensus as to its limits.

The definition of "intellectual property" in section 72(5) of the 1981 Act contains the words *"technical or commercial information"* and so Parliament has made it clear that for the purposes of section 72 such information is to be regarded as intellectual property. Lord Walker confirmed that the finding by the House of Lords, in *Boardman v Phipps* [1967] 2 AC 46, that technical or commercial information should not strictly be defined as property, does not prevail over clear statutory language.

As to the meaning of *"technical or commercial information"*, Lord Walker noted that the definition in section 72(5) does not refer to *"confidential information"* and that not all technical or commercial information is confidential. Conversely, he explained, not all confidential information can be described as technical or commercial. As Vos J noted in the connected case of *Coogan* [2011] 2 WLR 1401, it would be stretching the section 72(5) definition too far to hold that it included confidential private information.

In the Court of Appeal, Lord Neuberger had found that personal information did fall within the definition of intellectual property on the basis that the Act was enacted in the context of the law of confidence. He took the view that it would be surprising if the privilege could be invoked in relation to breach of confidence for private information but not for commercial information especially as the same information could be private in one person's hands and commercial in another's.

Lord Walker disagreed with this analysis and found that the draftsman of the definition of intellectual property in section 72(5) intentionally limited its ambit to technical and commercial information. He found that the legislative purpose of section 72 was to prevent remedies against commercial piracy being frustrated by privilege against self-incrimination and its central purpose was to fortify remedies against unlawful trading practice, not to cover the whole of the law of confidence. This is the case even if the court may be presented with some difficult borderline cases as to the meaning of commercial information and the fact that information may in some instances be commercial to one person but personal to another is not a reason for adopting an unnatural construction of the definition as a whole.

In any event, Lord Walker confirmed that this analysis was not needed in Ms Phillips' case because the voicemail messages from her clients were both confidential and of a commercial nature and so her claim was clearly for proceedings related to intellectual property within the meaning of section 72 of the 1981 Act and as a result Mr Mulcaire could not rely on privilege against self-incrimination.

IMPLICATIONS

The media has been very interested in this judgment because it suggests that Mr Mulcaire will be forced to identify who instructed him to intercept the voicemails and the nature of the interception.

The judgment is interesting from an intellectual property law perspective because it clarifies the definition of *"intellectual property"* under the 1981 Act and provides that as confidential personal information does not fall within *"technical and commercial information"*, it is not considered intellectual property in this context. As a result it seems that a defendant in infringement of purely personal confidential information proceedings can rely on privilege against self-incrimination, whereas he can't if the information is of a commercial nature.

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