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LOGOS AND NO-GOS

HACKING-OFF ALAN PARTRIDGE

This recent Court of Appeal judgment considers the law of privilege against self-incrimination (PSI) and whether the notorious private investigator Glen Mulcaire could rely on PSI in light of an exception in section 72 of the Senior Courts Act 1981 which provides that where proceedings involve the infringement of intellectual property rights, privilege against self-incrimination cannot be relied upon. The Court of Appeal carried out an interesting analysis of the meaning of "intellectual property" in this context.

PHONE HACKING

Coogan v News Group Newspapers Ltd & Another is the latest in a string of claims brought in the wake of the infamous phone hacking scandal which dominated the media for most of last year. In this case Nicola Phillips, a former assistant to PR agent Max Clifford, and Steve Coogan, the well-known comedian, each brought claims for breach of confidence and misuse of private information on the basis that their mobile telephone messages had been hacked by or on the instructions of Mr Mulcaire and or News Group Newspapers, the owners of the News of The World.

As part of their claims Ms Phillips and Mr Coogan sought an order requiring Mr Mulcaire to provide certain information identifying the individuals who told him to intercept their messages and details about the nature of the interception he was instructed to carry out. Mr Mulcaire objected to this on the ground that it would tend to incriminate him because intercepting voice messages is an offence under the Regulatory of Investigatory Powers Act 2000. Ms Phillips and Mr Coogan argued that section 72 of the Senior Courts Act 1981 (the Act) removed Mr Mulcaire's PSI.

LOSING PSI

The rule of PSI in respect of civil proceedings is set out in section 14(1) of the Civil Evidence Act 1968 and provides that a person can refuse to answer any question or produce any document if to do so would "tend to expose" that person to proceedings for a criminal offence or criminal penalty.

However, section 72 of the Act identifies certain types of civil proceedings in the High Court to which PSI does not apply. These include s72(2)(a) "proceedings for infringement of rights pertaining to any intellectual property or for passing off". "Intellectual property" is defined, at section 72(5), as "any patent, trade mark, copyright, design right, registered design, **technical or commercial information or other intellectual property**" (emphasis added).

Section 72, in other words, has the effect of preventing a defendant from relying on PSI where claims involve the infringement of intellectual property rights and passing off. The provision was introduced to reflect concerns that PSI would otherwise operate to frustrate the use of search orders in intellectual property piracy claims. The Act also provides that the answers given in such claims shall not be used in any related criminal prosecution.

At first instance, Ms Phillips and Mr Coogan's applications were heard separately but both Mann J and Vos J held that section 72 did apply and that Mr Mulcaire could not rely on PSI to resist disclosing the information sought by the claimants. Mr Mulcaire then appealed to the Court of Appeal.

CONFIDENTIAL INFORMATION – HOT PROPERTY?

The Court of Appeal examined the character of the voice messages. Ms Phillips described her voice messages as containing private and confidential information relating to her clients' personal lives and relationships, health, finances, personal security, publicity issues, commercial business transactions, professional relationships and future career plans. Mr Coogan described his as containing information about his work as an actor, writer and producer and also his role as chairman and director of a production company and related business transactions, contracts and funding.

Ms Phillips and Mr Coogan argued that this information was "technical or commercial information or other intellectual property" for the purposes of the definition of intellectual property in section 72(5) of the Act. Mr Mulcaire in turn argued that this information was not "intellectual property" and that therefore section 72 of the Act did not apply and that accordingly he could rely on PSI to resist disclosure of the information sought by Ms Phillips and Mr Coogan.

In his judgment, Lord Neuberger (Master of the Rolls) accepted that the use of the words "or other intellectual property"in s72(2)(a) meant that Section 72 only covered items that "would be seen as intellectual property in the normal sense of the expression". He therefore had to consider the meaning of intellectual property, as defined in the Act and specifically whether confidential information constituted intellectual property.

He started from the premise that the information had to be confidential in order to be protected by law or arguably even to qualify as intellectual property. He found that the definition covered both commercial and personal confidential information (which was "other intellectual property") and that it did not matter that all of the intercepted messages were not confidential, as long as some of them were.

Lord Neuberger accepted that it would be hard to justify "intellectual property" as "covering something which could not be regarded as property or at least as having a proprietary quality." He therefore had to consider whether confidential information can be classified as "property" of any kind and he examined a number of relevant authorities. He noted the statement by Lord Walker in the seminal case of *Douglas v. Hello! Ltd*[1] that *"the equitable jurisdiction to restrain … breach of confidence … does not depend on treating confidential information as property, although it is often referred to, loosely or metaphorically, in those terms"* which appears to go against the assertion that confidential information can be classified as property. He also referred to the case of *Phipps v Boardman*[2], where the House of Lords split 3–2 in favour of the view that confidential information was not property.

However, Lord Neuberger also pointed out that the statement by Lord Upjohn in the Phipps case that "the real truth is that [information] is not property" was in fact immediately followed by the words "in the normal sense". He then quoted from Stanley on the Law of Confidentiality: a Restatement (2008), that "[i]nformation, even if not property, is certainly capable of being … appropriately regarded as an 'asset'", and "[i]t is often natural to use property language in relation to information, in a metaphorical sense, for instance to "say that information is trust property or partnership property'". On reflection therefore, Lord Neuberger felt able to conclude that "while the prevailing current view is that confidential information is not strictly property, it is not inappropriate to include it as an aspect of intellectual property".

In his judgment, Lord Neuberger also considered what was meant by the "intellectual" aspect of "intellectual property" (although he noted that the concept seems to have developed "so as to render it unsafe to place much meaning on the natural meaning of each of the two words"). He referred to the statement in Cornish, Llewellyn and Aplin on Intellectual Property (2010) that intellectual property "protects information and ideas that are of commercial value" and said that, whilst it would be dangerous to treat this is a definition, this was a "useful short and simple guide".

In light of the above, Lord Neuberger concluded that the draftsman of section 72 intended confidential information of a commercial nature and confidential private information to be included in the definition of intellectual property for the purposes of section 72. Having reached that conclusion it is unsurprising that Lord Neuberger found that the information taken from the Ms Phillips and Mr Coogan's phones fell within that definition and the effect of section 72 was to deprive Mr Mulcaire of the right to rely on PSI. Accordingly, Mr Mulcaire's appeal was dismissed and he was ordered to provide the information sought by the claimants.

EXPANDING THE SCOPE OF "INTELLECTUAL PROPERTY"

The judgment in the *Coogan* case attempts to clarify the extent to which "intellectual property" can include both commercial and personal confidential information in relation to the Act's carve out for PSI. This analysis may have significant consequences for breach of confidence claims. For example, in the subsequent case of *Jones v IOS (RUK) Limited (in members' voluntary liquidation) and another*[3], Judge Hodge QC applied Lord Neuberger's analysis of "intellectual property" in support of his conclusion that, in a breach of confidence claim, the test was not whether the claimant "owned" the relevant commercial information but whether it had made a sufficient contribution to the creation of that information to entitle him to maintain an action to restrain its unauthorised dissemination or use.

Mr Mulcaire has indicated that he intends to appeal the decision to the Supreme Court.

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[1] [2007] UKHL 21

[2] [1967] 2 AC 46

[3] [2012] EWHC 348 (Ch),2 March 2012

CONTACT DETAILS

If you would like further information or specific advice please contact:

GEOFF STEWARD

DD: +44 (0)20 7849 2341

geoff.steward@macfarlanes.com

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MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com