PRIVATE INVESTIGATOR UNABLE TO RELY UPON PRIVILEGE AGAINST-SELF INCRIMINATION

HOGARTH CHAMBERS

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Phillips v. Mulcaire

[2012] UKSC 28

In a Judgment handed down on 4 July 2012, the Supreme Court confirmed that the private investigator, Glenn Mulcaire, could not rely on the privilege against self-incrimination ("PSI") to justify a refusal to provide information regarding his phone hacking activities to Ms Phillips in her civil proceedings against him and News Group Newspapers ("NGN").

In news terms, the case is of great interest in that Mr Mulcaire will now have to disclose (to Ms Phillips) information such as the identity of those who instructed him to intercept her voicemails, details of the information he intercepted, and the identity of the persons to whom he provided it.

In legal terms, the case is of interest for its guidance as to the extent to which s.72 of the Senior Courts Act 1981 removes PSI in civil cases where breaches of confidence are alleged. It sends yet another invitation to Parliament to deal with this issue in a less piecemeal way than at present.

The background

Ms Phillips claims that Mr Mulcaire and NGN breached her confidence by hacking into her voicemail messages. In the course of those proceedings, she sought an order that Mr Mulcaire disclose the identity of the person(s) on whose instructions he had acted, and so on. He refused to answer, asserting PSI. She countered by arguing that his right to rely on PSI had been removed by s.72. She succeeded at first instance before Mann J and before the Court of Appeal.

The issues before the Supreme Court

In the Supreme Court, Lord Walker (with whom the other Supreme Court judges agreed) considered the following issues:

(1) Whether the proceedings brought by Ms Phillips were "proceedings for infringement of rights pertaining to any intellectual property" within the meaning of s.72? And, if so,

(2) Whether, on the assumption that Mr Mulcaire would tend to expose himself to criminal proceedings for conspiracy if he complied with an order for disclosure, such criminal proceedings would or would not be a "related offence" within the meaning of s.72.

If the answers to both these questions was "yes", then Mr Mulcaire could not rely on PSI.

Rights pertaining to any intellectual property

Under s.72, the removal of PSI applies to "*proceedings for infringement of rights pertaining to any intellectual property*". For these purposes, s.72(5) provides that " *'intellectual property' means any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property*".

Given this definition, the Court of Appeal held that s.72 applies to all breach of confidence claims - claims regarding technical or commercial confidential information (because these are expressly mentioned) but also claims regarding other forms of confidential information including what may be called "private" information (because these were "other intellectual property"). In the Supreme Court, Lord Walker concluded that it applies to technical or commercial confidential information but not to other forms of confidential information. The following points arise from his judgment.

- Although "information" is not, strictly, a form of property, Parliament had chosen to include technical and commercial information within the definition of "intellectual property" for the purposes of s.72 (at [20]).
- Nevertheless, the information had to be something in which the claimant had rights which could be infringed (at [20]). Thus, although the word "confidential" is not used in s.72, the reference to technical or commercial information must be a reference to technical or commercial information that is *confidential* in nature.
- S.72 did not, however, apply to other forms of confidential information – including private information. Given the clear wording of s.72(5), confidential information can only be treated as "intellectual property" for the purposes of s.72 if it is of a technical or commercial nature (at [27]). This reflected the fact that the purpose of s.72 had not been to cover the whole of the law of confidence but rather to prevent remedies against commercial piracy being frustrated and "to fortify remedies against unlawful trading practices" (at [10], [28] and [29]).

What is technical or commercial information?

Whilst it is hard to see any particularly compelling reason why PSI should be excluded in the case of technical or commercial confidential information but not in the case of personal confidential information, that distinction is now clearly established. The question of most interest to practitioners will therefore be what constitutes "technical or commercial" confidential information for these purposes.

In this regard, Lord Walker quoted with apparent approval the comment of Lord Neuberger MR in the Court of Appeal that

> "As a matter of ordinary language, just as 'technical information' means information of a technical nature, it seems to me that 'commercial information' means information which is commercial in character, rather than information which, whatever its nature, may have a value to someone. In other words the word 'commercial' appears to be a description of the character of the information rather than the fact that it has value".

On this basis, information in the nature of a trade secret will clearly fall within s.72. This will encompass information as to products and services and a "wide range of financial information about the management and performance of a business and plans for its future" (at [22]). More difficult is the position as regards confidential information about a person's private life. As Lord Walker made clear (at [25]), such information cannot be classed as *commercial* information simply because it could be turned to financial advantage by being disclosed, in breach of confidence, to the media. However, his comments (at [30]-[31]) clearly recognise that there may be occasions when information that would be private in the hands of one person will nevertheless be commercial information in the hands of someone else. Indeed, he stated (at [31]) that "[f]or a few celebrities, their colourful private lives are part of their stock in trade" and although he referred to these as "borderline cases", it is hard to see why such information would not be treated as commercial information. This may be contrasted with a case of a celebrity such as Ryan Giggs who has not sought to commercialise his private life and where information about that life although extremely valuable to the media could not be called commercial information. A more difficult case may be one similar to *Douglas v*

Hello! where a person is willing to commercialise a part of their private life. Given the extent of the arrangements to commercialise the Douglas wedding, it may well be that the information there could properly be classed as commercial information even in the hands of the celebrity.

In the case of Ms Phillips, the Supreme Court recognised that whilst her voicemail would have contained some private confidential information, it would also have contained a not insignificant amount of commercial confidential information. Lord Walker referred in particular to voicemail messages from clients containing commercially confidential information as to finances, incidents involving the police, personal security or publicity issues, business transactions, professional relationships and career plans. Interestingly, some on these would appear to be matters of a private nature, which, nevertheless were accepted in this context as having a commercial character.

Related offences

Of course, s.72 only excludes PSI where the only criminal proceedings to which the defendant might be exposed are for a "related offence" – meaning either (i) an offence committed "by or in the course of" the infringement to which the proceedings relate or (ii) any other offence committed "in connection with" that infringement and involving fraud or dishonesty. The test under (ii) requiring a looser connection than that under (i) (see [34]).

In this regard, Lord Walker made clear that the courts are only concerned with offences for which the defendant has a reasonable apprehension of being charged and that they have to proceed "on a realistic assessment of what charges are likely in practice, rather than possible in theory" (at [34]-[35]).

On the facts in the Phillips case, the Supreme Court concluded that in complying with the order, the only proceedings to which Mr Mulcaire was realistically likely to be exposed would be proceedings for conspiracy. Conspiracy is, as Lord Walker pointed out, a "continuing offence" – one which is committed when the unlawful agreement was made but which continues until that agreement was discharged by completion of its performance, or by abandonment or frustration. On this basis is was a "related offence" within (i) above, being an offence committed by or in the course of the infringement complained of.

Conclusion

In summary, the Supreme Court upheld the order for Mr Mulcaire to make the disclosures sought by Mr Phillips. However, by making clear that such an order would not have been made if the claimant's case had been based on purely private confidential information, the Court has fully exposed the unsatisfactory nature of s.72. There seems to be little reason why the different forms of confidential information should be treated differently but unless and until Parliament intervenes to extend s.72, a defendant in a confidential information claim will be able to assert PSI unless the claimant has pleaded that at least some of the information that is the subject matter of the claim for breach of confidence has some technical or commercial character.

Jeremy Reed of **Hogarth Chambers** was led by **Michael Beloff QC** of **Blackstone Chambers** representing the successful Respondents.

If you would like to speak to someone about this news release, please contact:

Nicholas Caddick QC: NCaddick@hogarthchambers.com or
Briget Harrison, Chambers' Director: BHarrison@hogarthchambers.com
or call Hogarth Chambers on **+44 (0)207 404 0404**
www.hogarthchambers.com