WHO DIRECTED THE PHONE-HACKING?

NO PRIVILEGE AGAINST SELF-INCRIMINATION FOR PRIVATE INVESTIGATOR

HOGARTH CHAMBERS

LATEST NEWS 2 February 2012

Steve Coogan v. News Group Newspapers Ltd and Glenn Mulcaire
Nicola Phillips v. News Group Newspapers Ltd and Glenn Mulcaire
[2012] EWCA Civ 48

In a Judgment handed down yesterday, the Court of Appeal upheld orders from the High Court requiring the notorious private investigator, Glenn Mulcaire, to provide information regarding his hacking activities. The information should include the identity of those who instructed him to intercept the voicemails of Nicola Phillips and Steve Coogan, details of the information he intercepted, and the identity of the persons to whom he provided that information.

In legal terms, the decision is of interest in relation to the application of section 72 of the Supreme Court Act 1981 in cases involving claims for breach of confidence. In essence, it has reduced the opportunity for defendants to assert the privilege against self-incrimination ('PSI') to justify a refusal to provide information or documents relating to their wrongdoing.

In practical terms, the case is of interest in that it may well lead to the disclosure of the identities of those who instructed Mr Mulcaire to carry out his phone hacking activities.

The background

The appeal arose in the context of claims by Ms Phillips and Mr Coogan that Mr Mulcaire acted in breach of confidence by hacking into messages on their phones – messages containing both commercial and personal information. They applied to the court for orders that Mr Mulcaire provide information as to the voicemail interceptions that he had carried out – including the identity of the person(s) on whose instructions he had acted, and so on. Mr Mulcaire refused to answer, asserting PSI. Both claimants contended that the commercial information, at least, fell within section 72 such that Mr Mulcaire was not permitted to rely upon PSI. At first instance Mr Justice Mann and Mr Justice Vos agreed, and ordered Mr Mulcaire to provide the information. Mr Mulcaire appealed.

The issues on the appeal

The main issues considered by the Court of Appeal were:

(1) To what extent does section 72 apply to claims for **breach of confidence**?

(2) What is an **"apprehended infringement"** within section 72(2)?

(3) What is a "**relevant offence**" within section 72(5)?

(4) Is section 72, so construed, compatible with **Article 6 of the European Convention of Human Rights**?

Before dealing with these issues, the Master of the Rolls added his voice to those of many other eminent judges who have argued that, provided there are safeguards (such as that in section 72(3)) to prevent information obtained under compulsion in civil proceedings being used in criminal proceedings against the defendant, there is no need for PSI in civil proceedings. He stated that:

> "I would take this opportunity to express my support for the view that PSI has had its day, provided that its removal is made subject to a provision along the lines of Section 72(3)." (at [18]).

It will be interesting to see whether Parliament picks up this baton and runs with it by introducing legislation that would have this effect in all civil litigation, rather than maintaining the current piece-meal approach to the removal of PSI in special limited instances.

Breach of Confidence

The first issue was the construction of section 72 – which applies to "intellectual property" and in particular to "*proceedings for infringement of rights pertaining to any intellectual property*". For these purposes, section 72(5) defines intellectual property: " *'intellectual property' means any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property*".

The Court of Appeal considered the nature of property, and whether information or commercial information was property, and the nature of intellectual property. It held that the words "commercial information" meant confidential information of a commercial character. However, it went on to hold that section 72 also applied to confidential non-commercial information (what may be called "private" confidential information) on the basis that it was "other intellectual property". The effect, it would seem, is that Section 72 applies in all breach of confidence claims.

Apprehended infringements

The Court of Appeal next considered the meaning of the words "*proceedings brought to prevent any apprehended infringement of such rights*…" in section 72(2)(c). It concluded that these words only applied to claims that were exclusively *quia timet*. In other words, pleading injunctive relief in a case where there have been actual infringements did not bring the claim within the scope of section 72(2)(c).

Related offences

Of course, section 72 only excludes PSI where there is a risk of criminal proceedings for a "related offence" – which includes "*any offence committed by or in the course of the infringement…*" (see section 72(5)(a)(i)).

In this context, the Court of Appeal held that the giving of an instruction to carry out an infringing act was part and parcel of that infringing act and was, therefore, an offence committed "by or in the course of the infringement". As a result, section 72 operated to exclude PSI in relation to such an instruction. In reaching this conclusion, the Court rejected Mr Mulcaire's argument that the existence of a prior plan or instruction would have rendered him liable to prosecution for conspiracy without the safeguard of section 72(3) because such a conspiracy was of itself not an offence committed by or in the course of the infringement.

Compatibility - Article 6 of the European Convention of Human Rights

Finally, the Court of Appeal considered whether section 72, as construed, was compatible with Mr Mulcaire's Article 6 rights to a fair trial and in particular to a fair criminal trial. Having considered the Strasbourg jurisprudence, it held that there was no absolute right to PSI and it rejected the claim that Mr Mulcaire's human rights were infringed by being ordered to disclose this information.

In reaching this decision, the Court of Appeal took into account the fact that the defendant had a number of safeguards – namely, the section 72(3) protection against the use of the information in criminal proceedings for any related offence, the requirements that the decision to prosecute and the criminal trial itself be conducted in a manner that was Convention compliant and that the trial be fair in accordance with the common law (e.g. pursuant to Section 78 of PACE). It also weighed the interference with Mr Mulcaire's Article 6 rights against the interference with the claimants' Article 8 rights. The Master of the Rolls concluded:

> "…In agreement with Vos J, I do not accept that what he characterised as the claimants' claim to vindicate their right to respect for their private lives should be outweighed by Mr Mulcaire's right to a fair criminal trial, when it is not clear that there will be such a trial and, even if there is, that it would be unfair" (at [76]).

The future

Having upheld the orders requiring Mr Mulcaire to provide the information requested, the Court of Appeal refused him permission to appeal, but granted a stay provided that he lodges an application for permission to appeal with the Supreme Court by 5pm on Monday, and provided that the application and any appeal is pursued with reasonable expedition thereafter.

Of course, unless Mr Mulcaire successfully appeals to the Supreme Court, he will have to provide information to the claimants which may well show who else was implicated in his phone hacking activities.

The successful Respondents were represented by **Jeremy Reed** of **Hogarth Chambers**; the Appellants were represented by Gavin Millar Q.C. and Alexandra Marzee; the Secretary of State for Business Innovation and Skills was represented by Thomas de la Mare.

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

Nicholas Caddick QC: NCaddick@hogarthchambers.com or
Briget Harrison, Marketing & Business Development: bharrison@hogarthchambers.com
or call Hogarth Chambers on **+44 (0)207 404 0404**
www.hogarthchambers.com