4 July 2012

PRESS SUMMARY

Phillips (Respondent) v Mulcaire (Appellant) [2012] UKSC 28

On appeal from [2012] EWCA Civ 48

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Kerr, Lord Clarke and Lord Dyson.

BACKGROUND TO THE APPEALS

This appeal arises out of what has become known as the "phone-hacking scandal". During 2005-6 the Appellant, Mr Glenn Mulcaire, worked as a private investigator, often engaged by staff on the News of the World newspaper, then published by News Group Newspapers Ltd ("NGN"). During that period, Mr Clive Goodman was employed by NGN as a reporter on the News of the World with responsibility for news about the royal family and household. In January 2007, Mr Mulcaire and Mr Goodman pleaded guilty to offences relating to the interception of voicemail messages of the royal household and were sentenced to six and four months' imprisonment respectively. During 2008-10 a large number of civil claims were brought by individuals against NGN and, some against Mr Mulcaire, claiming that messages on their mobile phones had been unlawfully intercepted. **[3]-[5]**.

On 10 May 2010, the Respondent, Ms Nicola Phillips, began proceedings against NGN in relation to voicemail messages left on her mobile phone **[6]**. Ms Phillips worked for Max Clifford Associates ("MCA"), the corporate vehicle of the well-known public relations consultant, Max Clifford. Her responsibilities included trying both to place favourable stories and to prevent the placing of unfavourable stories in the media about MCA's clients **[2]**. Part of her case was that the contents of voicemail messages left by clients on her mobile included "*factual information, some of which is private information and some of which is commercially confidential information, including that relating to her clients' personal lives and relationships, health, finances, incidents in which the police have become involved, personal security or publicity issues, commercial business transactions, professional relationships and future career plans*" **[6]**.

On 12 October 2010, Ms Phillips applied to add Mr Mulcaire as a defendant and for an order that he serve a witness statement disclosing information under several heads, including the identity of the person instructing him to intercept the messages. He opposed the order for disclosure relying on privilege against self-incrimination, that is, on the basis that he could not be required to disclose that information as to do so would tend to expose him to prosecution. Against that, Ms Phillips relied on s.72 of the Senior Courts Act 1981 ('the Act') as excluding the privilege **[8]**. That section applies to, among others, proceedings for infringement of rights pertaining to any intellectual property and, when it applies, it excludes the privilege if the offence to which the person would tend to be exposed is a related offence **[9]**. The High Court and Court of Appeal considered that both of these conditions were made out. Mr Mulcaire therefore could not rely on the privilege and he was ordered to provide the requested information.

The issues on this appeal are therefore: (i) whether information left in voicemail messages on Ms Phillips's mobile is "*technical or commercial information*" within the definition of "*intellectual property*" such that the proceedings are "*for infringement of rights pertaining to any intellectual property*"; and (ii) whether, on

the footing that Mr Mulcaire would expose himself to a charge of conspiracy in providing the information ordered, such proceedings would be for a "*related offence*" within the meaning of s.72(5) **[1]**.

JUDGMENT

The Supreme Court unanimously dismisses Mr Mulcaire's appeal. S.72 of the Act excludes his privilege against self-incrimination: the proceedings brought by Ms Phillips are *"proceedings for…rights pertaining to…intellectual property"* and the conspiracy proceedings to which Mr Mulcaire would expose himself on disclosure of the information amount to a *"related offence"*.

Lord Walker gives the leading judgment with which Lords Hope, Kerr, Clarke and Dyson agree.

REASONS FOR THE JUDGMENT

Where Parliament has left no room for doubt that it intends the privilege to be withdrawn, there is no need for the Court to lean in favour of the narrowest possible construction of the reach of the relevant provision. An important part of the legislative purpose of these provisions is to reduce the risk of injustice to victims of crimes. That purpose might be frustrated by an excessively narrow approach **[14]**. Various definitions of "intellectual property" were put before the Court but they are not particularly helpful because there is no universal definition of the term **[18]**. The starting point must be the language of the definition in s.72(5). For present purposes the essential point is that the definition in s.72(5) contains the words "technical or commercial information". The meaning of those words must be something in which a civil claimant has rights capable of being infringed. The fact that technical and commercial information ought not, strictly speaking, to be described as property cannot prevail over the clear statutory language. Whether or not confidential information can only loosely, or metaphorically, be described as property is simply irrelevant **[19]-[20]**. Not all technical or commercial information is confidential **[23]**. Conversely a secret about a person's private life is not naturally described in normal usage as technical or commercial, even if it could be turned to financial advantage by disclosing it, in breach of confidence, to the media. **[24]**. Purely personal information is not "other intellectual property" within the meaning of s.72(5). The purpose of s.72 was to prevent remedies against commercial piracy from being frustrated, not to cover the whole of the law of confidence **[28]-[29]**. While there may be commercial value in personal information and this may lead to some difficult borderline cases, it is not a reason for adopting an unnatural construction of the definition **[31]**. On the facts pleaded in this appeal there is no great difficulty as to "mixed messages", where some of the information is commercial and some is not. Ms Phillips's pleading is to the effect that the voicemail messages left by her clients contained commercially confidential information. There is no reason to suppose that the commercial information was not significant **[32]**.

There must be a sufficient connection between the subject-matter of the claimant's civil proceedings and the offence with which the defendant has a reasonable apprehension of being charged. Pursuant to s.72(5) the offence must be committed by or in the course of the infringement to which the proceedings relate unless the offence involves fraud or dishonesty, in which case a looser connection is sufficient **[34]**. It is well established that conspiracy is a continuing offence. While the offence is committed as soon as the unlawful agreement is made, the conspiracy continues until the point when the agreement is terminated by completion, abandonment or frustration **[43]**. If Mr Mulcaire conspired to intercept messages on mobile phones, an offence was committed when the unlawful agreement was made. But the offence continued so long as the agreement was being performed. Every interception pursuant to the unlawful agreement would be in the course of the offence **[45]**.

References in square brackets are to paragraphs in the judgment