EIP

Exceptions to the privilege of self-incrimination

On 4 July in Phillips v Mulcaire [2012] UKSC 28 the Supreme Court of the United Kingdom gave judgment on two key issues regarding the privilege against self-incrimination. The first issue to be considered was what was meant by " proceedings for infringement of rights pertaining to ... intellectual property" in s.72(2)(a) of the Senior Courts Act 1981 ("The Act"). The second issue was whether the appellant in this action (Mr Mulcaire) would be exposing himself to criminal proceedings for a related offence through compliance with an order of Mr Justice Mann to provide certain information to the court.

By way of background, the common law exempts a person from being compelled to produce documents or provide information which might incriminate him or her in potential or current criminal proceedings in England and Wales. This exemption is known as the privilege against self-incrimination. Section 72 of the Act limits the privilege in actions involving the infringement of "intellectual property" rights, where the self-incrimination is for a "related offence". This statutory limitation was necessary following a decision of the House of Lords in Rank Film Distributors v Video Information Centre [1982] AC 380 which found that a search order (then an Anton Piller order) could not be granted against the defendants as it would potentially expose them to a charge of conspiracy to defraud.

Turning to the case at hand, Mr Mulcaire had previously been charged with six counts of conspiracy to intercept communications (relating to interception of voice mail messages of the Royal household and Mr Max Clifford). Mr Mulcaire subsequently pleaded guilty on all accounts. Thereafter a number of civil suits (often referred to as "phone hacking" claims) had been issued against News Group Newspapers (whose staff had engaged Mr Mulcaire as an investigator) and in some instances, Mr Mulcaire himself. The Claim in

this action was brought by Ms Nicola Phillips, an employee of Max Clifford Associates, whose claim related to the interception of her voicemail messages which she asserted
p2 contained commercially confidential information. The claim was initially brought against News Group Newspapers, but Mr Mulcaire was later joined as an additional defendant. Ms Phillips sought an order that Mr Mulcaire serve a witness statement disclosing particular information. Mr Mulcaire resisted relying upon the privilege against self-incrimination.

As noted above, Mr Mulcaire's case raised questions over the meaning of intellectual property within s.72, more precisely whether the information asserted as confidential in the voicemail messages in issue was confidential information and thus intellectual property for the purposes of the Act. The Supreme Court found that confidential information needed to be "technical or commercial information", as recited in the Act, to fall under the heading of "intellectual property" and that confidential information about a person's private life would not fall under the heading of "commercial information", even if it had commercial value. Commercial information was information of a commercial character, not merely information that, whatever its nature, would have a value to someone. Nevertheless, in this particular case the voicemails that were alleged to have been hacked were found to also contain commercial information in addition to non-commercial information about a person's private life, so in this case the requirement for rights pertaining to intellectual property was satisfied.

The second question was whether charges for a criminal conspiracy to intercept messages would amount to a related offence. If such a conspiracy were not a related offence, then the privilege against self-incrimination could be relied on, regardless of the fact that there may have been charges on other offences which were related offences. A reasonable apprehension of being charged with a single non-related offence would be enough to preserve the claim to privilege.

The court held that there must be 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. The Act requires that the offence must be committed by or in the course of infringement, unless the offence involves fraud or dishonesty, in which case a looser connection is sufficient. In this case, there were a series of infringements occurring every time confidential information of a commercial character was intercepted on a voicemail, and the potential offence of a criminal conspiracy to intercept messages would have been committed in the course of infringement. Such a conspiracy would therefore be a related offence under the Act, and so the privilege against self-incrimination could not be relied on.

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