

## Developments in Privacy: Douglas, Peck & Cream Holdings

### Introduction

The Human Rights fog is slowly lifting. The action brought by Michael Douglas and Catherine Zeta Jones together with OK! Magazine against Hello! Magazine and others has made significant steps in clarifying how far a claim in confidence can be applied and if necessary stretched to protect privacy to the circumstances in this case even where the Douglases had sold exclusive rights in the pictures of their wedding and reception. Unlike many of the recent decisions (including the early stages of the Douglas litigation itself) which were concerned with interim injunctions, this is a judgment given following a lengthy trial after full argument.

The tabloid press not only mis-reported the trial proceedings but also misrepresented the outcome of the action. The Claimants won their case against Hello! The Judge, Mr Justice Lindsay, did not rule on any claim in privacy as suggested. In fact the Judge applied and possibly extended the law of confidence to protect the Claimants. He did not find for them in privacy because he did not need to. They had already won a confidence claim covering the same ground.

### The Facts of the Douglas Case

The well-known film stars Michael Douglas and Catherine Zeta-Jones married at the Plaza Hotel in New York on the 18th November 2000. Extensive security arrangements had been made, intended to ensure that access to the ceremony and reception would be denied to all but the family members and friends who had been invited and the attendant staff, who had been put on terms to keep the wedding confidential. The bride and groom hired their own selected photographers and it was made plain that other photography was not to be permitted. In making such arrangements the bride and groom were doing as they were bound by contract to do as they had sold exclusive photographic rights of the event to OK! magazine, although they had retained control over the selection of such pictures.

The wedding apparently passed off without incident but, unknown to any as the events unfolded, it transpired that one intruder, a photographer, had surreptitiously taken relatively poor photographs which were then bought for publication in OK!'s rival magazine, Hello!

The Douglases and OK!, quickly applied in England for and obtained an injunction to restrain publication. However, the Court of Appeal later lifted the injunction, leaving the Claimants to a claim in damages(1). Hello!

published the unauthorised photographs on the same day as OK!, which had to bring its arrangements forward, and which published parts of the full authorised portfolio of photographs covering the event, approved by the Douglases, for which it had paid.

It was subsequently discovered that some important parts of Hello!'s evidence before the Court of Appeal were seriously misleading and that critical Hello! documents had been destroyed(2).

It also turned out that Hello! had previously attempted to obtain the exclusive rights from the Douglases and when this failed they sought to obtain photographs by other means and made arrangements with paparazzi to get such photographs.

### The Judge's ruling at trial in Douglas

The full trial of the Douglases claim was heard in 2003 by Mr Justice Lindsay. The Judge held that, because of the exceptional, special nature of a wedding and the elaborate and expensive security measures adopted by the Douglases, the event was private in nature and that the images of the couple were confidential. The exclusivity deal with OK! Magazine was a legitimate and reasonable way to control and limit the press exposure, and resulted in the information becoming a valuable "commercial trade secret(3)".

The judge also found that subterfuge and surreptitious means had been used in obtaining the photographs in breach of the Press Commission's Code, and that Hello! and the photographer must have been aware of the private and confidential nature of the events at the wedding ceremony and reception. He also found that the Claimants had suffered detriment and damage, including the genuine distress in the realisation that someone had invaded and taken pictures of their wedding ceremony. The Judge granted a permanent injunction, with damages to be assessed at a later hearing. It appears from his ruling that those damages could well be very substantial. Although the additional makeweight conspiracy claims were dismissed, the Douglases claim to set aside the Court of Appeal verdict as a result of the false Hello! evidence was adjourned for further submissions and this could result in reversing the substantial costs order obtained as a result of Hello! overturning the injunction granted by the High Court judge.

## Developments in Privacy: Douglas, Peck & Cream Holdings

There are a number of important aspects of Lindsay J's ruling:

- 1 Even if the Douglases were public figures who had previously welcomed publicity, the confidentiality of their wedding was still protected. This can be contrasted with previous statements to the contrary in cases involving interim injunctions(4). In the words of the judge:

'A wedding is an exceptional event to any bride and groom and I do not hold that Mr and Mrs Douglas' position as public figures or as persons who had, as to other events, no doubt been tolerant of or even welcoming to publicity, as lessening their right, as any might have, to complain of intrusion at their wedding or of the consequences of that intrusion. It was an intrusion against which elaborate steps had been taken. I have in mind, too, that the steps taken by the Douglases were not taken solely for reward or as "hype" but were taken in a genuine and reasonable belief that thereby an offensive media frenzy would be avoided.'

'To hold that those who have sought any publicity lose all protection would be to repeal Article 8's application to very many of those who are likely most to need it. I would accept that a claimant who has himself publicised a certain area of his private life (for example his sexual proclivities and activity) might well lose the protection otherwise available to him in that area or, possibly, even more generally, but I have not seen how that argument could serve to diminish the protection to be afforded to the unique event, not "hyped" by them, of the Douglas wedding.'(5)

- 2 The sale by the Douglases of exclusive rights in information to OK! did not affect or reduce the level of protection, although this was contrary to the recent PCC decision in Attard(6);
- 3 The fact that private and confidential photographs were about to be published by OK did not reduce protection under the law of confidence (but this plainly was a factor in considering whether to grant an injunction)(7);
- 4 Pursuant to Section 12 of the Human Rights Act 1998 (HRA), the Court had to have regard to the PCC's Code and it was, in this case, applied strictly. This contrasts with the judge's approach to PCC decisions such as Attard which were merely considered, though not applied. Interestingly, it is reasonably clear that the PCC would have dismissed such a complaint by the Douglases (in particular because of the sale of the exclusive rights to OK!), but it was the PCC code that

was used to bolster the Douglases' legal claim. Another irony is that it was the press and the PCC who were widely credited as responsible for the introduction of Section 12, HRA as a supposedly special provision for the media.

- 5 The highly offensive' test referred to in the Gary Flitcroft (8) and Campbell (9) cases was held not to be applicable or necessary for a breach of confidence action. In both decisions it was suggested that the requirement that 'disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.' (10) Although Lindsay J would not have held the photographs to be offensive or highly offensive he did find that their taking and their publication in all the surrounding circumstances was likely to offend the Douglases.
- 6 Freedom of expression (the Article 10 right) had no presumptive priority over other convention rights (such as Article 8 personal privacy rights) or indeed rights in confidence. It is not always the trump card. There had been a number of conflicting judicial observations about this point (11). A similar view was taken in the recent important Court of Appeal decision in Cream Holdings v Bannerjee (12) (see below).

Contrary to press reports, Lindsay J did not hold that there was and could be no law of privacy. He found that since the law of confidence was sufficient to provide protection, he did not need to find that there was a free-standing claim of privacy. Importantly he warned that, following the very recent European Court of Human Rights decision in Peck v UK (see below), either Parliament or the Courts may be obliged to develop a privacy claim in order to provide adequate remedies for invasions of privacy, in circumstances where the law of confidence could not be used. Again, to quote the judge:

'if Parliament does not step in then the Courts will be obliged to. Further development by the Courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves protection. A glance at a crystal ball of, so to speak, only a low wattage suggests that if Parliament does not act soon the less satisfactory course, of the Courts creating the law bit by bit at the expense of litigants and with inevitable delays and uncertainty, will be thrust upon the judiciary'.

## Developments in Privacy: Douglas, Peck & Cream Holdings

Any appeal by Hello! therefore may cause more problems for the media since the Court of Appeal may find it necessary to uphold the privacy claims if there is insufficient protection under the law of confidence.

### Peck v UK (13)

This decision of the Strasbourg Court suggests that either the Courts or the legislature are going to have to establish a tort of invasion of privacy if this country is to comply with its Convention obligations. Brentwood Borough Council had installed a CCTV system for the purpose of crime prevention. They released to the media some film shot by this system to show how useful it could be. The film showed a man with a knife walking on a public street at night. In fact, Mr Peck, who was severely depressed at the time had just slashed his wrists in a suicide attempt, though this was not apparent from the film. Mr Peck tried, unsuccessfully, to obtain judicial review of the council's decision to release the film. He also complained to the BSC, ITC and PCC. The BSc and ITC upheld his complaints in privacy, while the PCC (not surprisingly) dismissed it as being inadmissible without a full hearing.

Mr Peck claimed that his Article 8 right to respect for his private life had been infringed. The Strasbourg Court upheld his claim. While in a public place, he was not a public figure or participating in a public event, and it was late at night. The exposure to which he was subjected far exceeded anything which he could reasonably have anticipated. The Court went on to conclude that, as Mr Peck had no remedy under our domestic law, the United Kingdom was in breach of its Article 13 obligation to provide Mr Peck with an effective remedy in order to provide sufficient respect for his privacy rights. The European Court also held that the English media regulators provide inadequate remedies.

In his recent presidential address to the Bentham Club at University College of London, the Master of the Rolls Lord Phillips, commented that this case:

"suggests that either the Courts or the legislature are going to have to establish a tort of invasion of privacy if this country is to comply with its Convention obligations".

### Cream Holdings v Banerjee (Cream Holdings)(14)

The Court of Appeal decision in Cream Holdings will have a significant impact on privacy complaints even though the case concerned commercial confidences. The case involved the Claimant's attempt to restrain the publication

by its former accountant and the Liverpool Echo of certain financial irregularities by the company. The Claimant based its case on the contention that the information intended to be published was confidential. The Defendants relied, unsuccessfully in the event, upon the public interest in the disclosure of financial irregularities.

The Court conducted an analysis of the Convention Rights, numerous cases concerning freedom of expression and Section 12(3) of HRA which provides that "no relief is to be granted so as to restrain publication unless the court is satisfied that the applicant is likely to establish that publication should not be allowed". The Court of Appeal held that the threshold test for interim injunctions in confidence or privacy under Section 12(3) was not whether the Claimant was "more likely than not" to succeed at trial but rather a lower test based on whether the Claimant could show there was "a real prospect of success". To impose a higher test would give priority to Article 10 Freedom of Expression over Article 8 and there was no presumptive priority as between Convention Rights.

The decision conflicts with the much criticised Flitcroft case (15) and should make applications for interim injunctions for restraint of personal confidences or private matters easier, even where a Defendant asserts a public interest defence. Certainly it would be bizarre if commercial confidence claims which normally do not engage Article 8 considerations, would be easier to enforce than personal privacy claims where Article 8 is in play and is meant to have increased protection since the HRA came into force. The Defendants have obtained permission to appeal to the House of Lords. One essential issue in this case is what weight to give public interest claims in commercial cases, where there is no competing convention right in play and also whether the situation is different in Article 8 privacy claims.

The uncertainty of the application of public interest consideration has largely been caused by the Court of Appeal decision in Flitcroft, which set out a number of obiter guidelines concerning interim injunction for privacy claims and discussed public interest, even though public interest was not raised in that case and only touched upon in argument.

**Developments in Privacy: Douglas, Peck & Cream Holdings****Conclusion**

Most claims for invasion of privacy can be "shoehorned" into the tort of confidence but even if the law of confidentiality cannot be stretched to protect an invasion of privacy, the Court may be obliged to create a tort of privacy in an appropriate case<sup>(16)</sup>. It is expected that this issue will be considered by the House of Lords in June 2003 in the case of *Wainwright v Home Office*<sup>(17)</sup>. However the Courts need urgently to clarify the application of public interest in a clear, logical and useful way.

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**Notes**

See the Court of Appeal judgment *Douglas v Hello!* [2001] QB 967(1) And see judgment of the Vice Chancellor *Douglas v Hello!* [2003] 1 All E.R. 1087(2)

See judgment of Lindsay J. at paras 196-201 *Douglas v Hello!* [2003] EWHC 786(3)

*Woodward v Hutchins* [1977] WLR 760 and *Lennon v News Group Newspapers* [1978] FSR 573 (4)

See also *A v B & C* [2002] EMLR 371 and *Theakston v MGN Limited* [1993] EMLR 443 and Court of Appeal decision in *Campbell v MGN Limited* [2002] 2 WLR 80(5)

PCC complaint against *Manchester Evening News* dated 15/06/01, referred to in argument but not in the Judgment<sup>(6)</sup>

See the Thatcher memoirs case reported as *Times Newspapers Ltd v MGN Ltd* [1993] EMLR 443(7)

*A v B & C* [2002] EMLR 37(8)

*Campbell v MGN Limited* [2002] 2 WLR 80(9)

It has been argued that this test of offensive is not compatible with Article 8. See chapter 4 of the supplement "The Law of Privacy and The Media" Tugendhat & Christie (Eds) (2002) OUP<sup>(10)</sup>

Cases suggesting priority of freedom of expression include *Sunday Times v UK* [1979]; *Observer v UK* [1991] and *R v Central Independent Television plc* [1994] 3 WLR 20<sup>(11)</sup>

*Cream Holdings Ltd v Bannerjee and Anor* [2003] 2 All ER 318 and see *Douglas v Hello!* and *A v B and C* [2002] EMLR 371<sup>(12)</sup>

*Peck v UK* ECHR 28/01/2003<sup>(13)</sup>

[2003] 2 All ER 318. See also H Rogers and H Tomlinson "Privacy and Expression: Convention Rights and Interim Injunctions" [2003] EHRLR forthcoming, which analyses *Cream Holdings* in detail and proposes a "parallel analysis" when convention rights are in play.<sup>(14)</sup>

*A v B & C* [2002] EMLR 371<sup>(15)</sup>

See also the recent *Mary Bell* decision; *X and Y v O'Brien* (2003) EWHC QB 1101, where the Article 8 rights of *Mary Bell* and her daughter were protected by the extended law of confidence<sup>(16)</sup>

For the Court of Appeal decision, see [2002] QB 1334<sup>(17)</sup>