

OK! What Have You Bought Now?

The decisions of the trial judge in the action brought by Michael Douglas and Catherine Zeta Jones together with OK! Magazine against Hello! Magazine and others have been in part upheld and in part reversed by the court of Appeal. While the Court of appeal decision has clarified and extended the law of privacy and probably the ability to obtain privacy injunctions, it has brought real uncertainty to the law of commercial confidence and the distinction between privacy rights and confidentiality rights and what rights can be sold.

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 was a great success 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 Original Court of Appeal Injunction Decision 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, saying that the Claimants were likely to get substantial damages at trial and damages were an adequate remedy. Hello! published the unauthorised photographs on the same day as OK!, which published parts of the full authorised portfolio of photographs covering the event, approved by the Douglases, for which it had paid.

The Judge's ruling on liability 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".

The judge also found that subterfuge and surreptitious means had been used in obtaining of the photographs in breach of the Press Complaints 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 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. There were 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.
2. The sale by the Douglases of exclusive rights in information to OK! did not affect or reduce the level of protection.
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).
4. The information and photographs being were a valuable commercial trade secret in the hands of OK.
5. It was not necessary to consider a law of privacy, since the traditional law of confidence would suffice.

The Assessment of Damages

At the assessment the Judge declined to assess damages on the basis of a notional licence fee (which is frequently used in copyright and patent case), but said that if this was the correct basis then the figure would be £125,000. Instead, he awarded £14,500 to the Douglases for distress and inconvenience and £1,026,706 to OK for loss of profit and exploitation.

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The Court of Appeal Decision

The Court of appeal has made a number of significant and controversial rulings

First it has held that photographs are not merely a method of conveying information that is an alternative to verbal description.

"They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts".

Secondly insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it. An injunction can be granted to restrain further publication in appropriate cases.

Thirdly a personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph. It is quite wrong to suppose that a person who authorises publication of selected personal photographs taken on a private occasion, will not reasonably feel distress at the publication of unauthorised photographs taken on the same occasion. These three points echo the decision in the ECHR Princess Caroline of Monaco case and follow and extend the principles set out in the seminal House of Lords decision in Naomi Campbell -v- MGN establishing misuse of private information as a species of a claim for breach of confidence. What is significant is that the Court of Appeal have expressly adopted the Princess Caroline case when many thought it would be ignored or sidestepped.

Fourthly the Court of appeal upheld the trial judge and some earlier authority in ruling that being prepared to sell privacy should not affect the privacy protection. "Where an individual ('the owner') has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner. We have used the term 'the owner' loosely."

Fifthly and most bizarrely, while the court has held that selling privacy does not matter, it has also held that you cannot assign or transfer privacy rights.

"We have concluded that confidential or private information, which is capable of commercial exploitation but which is only protected by the law of confidence, does not fall to be treated as property that can be owned and transferred".

The Court of appeal has also held, again controversially, that OK! had no claim against Hello! and the £1 million award from the trial judge was overturned. The Court also rejected the (common sense) contention that privacy damages should be assessed on a notional licence fee basis and upheld the damages award from the trial judge of £13,500. The Trial Judge and Court of Appeal both agreed that if such a basis were appropriate then damages of £125,000 was the right amount.

Following these rulings, the Court of Appeal has found, without being addressed on the point and without being asked, that the Douglasses should have obtained an injunction at the outset and that there was no genuine public interest and no defence to such a claim and that in the light of the decision of Campbell in the House of Lords and Princess Caroline in the European Court of Human Rights summary judgment should have been granted at the outset. It has also held that (such) damage as they now have allowed are plainly an inadequate remedy and this is a factor when considering whether to grant an injunction. Accordingly, if the persons were now to apply for an injunction in similar circumstances, then they would succeed, and the magazine would not need to be a party to the claim, even though they had "bought" the rights.

Conclusion

This decision could have significant impact on the validity of many confidential agreements and also on many commercial publishing agreements. It is certainly not clear now what trading and/or selling privacy means and potential buyers of exclusive stories should consider what they are buying.

The decision also makes it crystal clear that with damages (£14,500) being about 10% of the appropriate fee (£150,000) there is no disincentive and every incentive to give no prior notice to the victim, then publish the material and even if damages are paid it will be 90% cheaper than doing it by agreement. In any event following this decision you can not buy privacy rights in the first place.

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The House of Lords will need to sort out this mess and provide clarity and adequate remedies for invasion of privacy, failing which the UK will (again) be in breach of its obligations to provide effective remedies.

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