

# Hello! to personality rights?

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2007

# Hello! To Personality Rights?

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The celebrity wedding of Michael Douglas and Catherine Zeta-Jones has occupied the English courts ever since it took place in New York in 2000. The latest decision relating to that event, handed down by the House of Lords in May this year, appears to be opening the gate for so-called 'image' or personality rights. This is a form of intellectual property which, notoriously, does not attract straightforward legal protection on these shores in its own right, although trade mark law and the law of passing off may be of assistance under certain limited circumstances. It is possible for the rich and famous to protect their 'image', including photographic images of themselves, from being exploited commercially without permission in many jurisdictions. Germany, for example, protects such rights as they are linked to an individual's personality.

Consequently, Oliver Kahn, the former goal-keeper of the German national football team successfully claimed damages from a computer games business who used aspects of Kahn's physique in a new game without his permission. More recently, the heir of actress Marlene Dietrich was equally successful against an advertiser who used the image of Dietrich without permission.

The House of Lords decision in *Douglas v Hello!*<sup>1</sup> concerned the £1 million-plus claim in damages made by OK! Magazine against rival Hello! for spoiling OK!'s coverage of the celebrity wedding. OK! had paid the couple for an exclusive licence to publish photographs of the event. The couple had reminded their guests that it was prohibited to take photographs. In addition, security staff was hired to enforce this ban. The Court of Appeal had overturned OK!'s claim which had been granted by Lindsay J at first instance. By a majority by 3-2 the House of Lords reinstated the latter decision on the basis of the law of confidence.

## **The majority opinion**

Lord Hoffmann delivered the leading judgment of the majority, to which Lord Brown and Baroness Hale concurred. Since OK! had paid £1 million to the Douglasses to make sure the obligation of confidence by their guests was obeyed, the magazine proprietors should have a legal avenue to enforce this obligation: "Unless there is some conceptual or policy reason why they should not have the benefit of that obligation, I cannot see why they were not entitled to enforce it. And in my opinion there are no such reasons. Provided

that one keeps one's eye firmly on the money and why it was paid, the case is, as Lindsay J held, quite straightforward."<sup>2</sup>

Since OK!'s claim was one of commercial confidentiality, the traditional three-step test established by Megarry J in *Coco v AN Clark (Engineers) Ltd*<sup>3</sup> applied: "First, the information itself ... must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorized use of that information to the detriment of the party communicating it."<sup>4</sup> The interpretation of the law of confidence established in *Campbell v MGN Ltd* was not to be considered because OK!'s claim was not one based on privacy.

The paparazzo who took the unauthorised photographs of the wedding and Hello! Which published them were in breach of the obligation of confidence. That the confidential information came in the shape of photographic images did not pose a particular problem to Lord Hoffmann who argued that "(i)f OK! was willing to pay for the right to be the only source of that particular form of information and did not mind that others were free to communicate other forms of information about the wedding, then I think the Douglasses should be able to impose a suitably limited obligation of confidence."<sup>5</sup> His Lordship also countered the argument that such an interpretation of the law of confidence would allow for the protection of image rights. He supported his stance rather forcefully, maintaining that

"(t)here is in my opinion no question of creating an "image right" or any other unorthodox form of intellectual property.

The information in this case was capable of being protected, not because it concerned the Douglasses' image any more than because it concerned their private life, but simply because it was information of commercial value over which the Douglasses had sufficient control to enable them to impose an obligation of confidence. Some may view with distaste a world in which information about the events of a wedding, which Warren and Brandeis in their famous article on privacy "*The Right to Privacy*" (1890) 4 Harvard LR 193 regarded as a paradigm private occasion, should be sold in the market in the same way as information about how to make a better mousetrap. But being a celebrity or publishing a celebrity magazine are lawful trades and I see no reason why they should be outlawed from such protection as the law of confidence may offer."<sup>6</sup>

Finally, each photograph enjoyed protection under confidence separately and in its own right, and confidentiality was not lost after the publication of the unauthorised shots who essentially showed the same events. Why else would Hello! have paid the paparazzo handsomely for photos which essentially were already in the public domain after publication in OK! magazine?

### **Strong voices of dissent**

That the positive outcome for OK! was on a knife-edge is illustrated by the strongly-worded counter-arguments by Lord Walker and Lord Nicholls. The former in particular was not convinced by Lord Hoffmann's generous application of the law of confidence, and by his emphasis on Hello!'s readiness to pay £1 million for the unauthorised photos in particular, stating that "Lord Hoffmann suggests, in an appeal to economic realities, that if "OK!" thought that it was worth paying £1m for its "exclusive" contractual right (and "Hello!" was willing to pay the same price) then there is no reason why there should not be an obligation of confidentiality. But the confidentiality of any information must depend on its nature, not on its market value."<sup>7</sup> If this was to be the case, the law of confidence would be stretched too far and create "an unorthodox and exorbitant form of intellectual property."<sup>8</sup> Lord Nicholl added that both sets of photographs contained the same information, and once the first set was in the public domain, confidentiality in that information was lost:

"The first step is to identify the "secret". The secret information cannot lie in the differences between the unapproved photographs and the approved photographs. The secret cannot lie there, because the six unapproved photographs contained nothing not included in the approved photographs. That is common ground. This being so, the inevitable differences, in expression and posture and so on, cannot constitute "confidential" information for the purposes of this equitable principle. The expression of the bride in one wedding photograph compared with her expression in another is insufficiently significant to call for legal protection. It has not been suggested that the unapproved photographs were embarrassing in any way, or that they were detrimental to the Douglasses' image.

Accordingly, once the approved pictures were published, albeit simultaneously, publication of the unapproved pictures was not a breach of confidence. "OK!" sought to avoid this difficulty by defining the commercial secret in wider terms. The secret comprised photographic information about the entire wedding as an event, and not just the particular wedding photographs "OK!"

was permitted to publish.

Publication of the approved photographs did not destroy the confidentiality of the remainder of the information.

Let me assume, without deciding, that this generic class of information was confidential at the outset. Even so, this formulation of the commercial secret leads nowhere, for the same reason as applies to the narrower formulation of the secret: the unapproved pictures contained nothing not included in the approved pictures, and the approved photographs were published at much the same time as the unapproved photographs."<sup>9</sup>

### **Confidence as 'dustbin'?**

Where does this judgment leave the law of confidence? Lord Hoffmann may well be of the opinion that his judgment merely adheres to the economic realities of the trade in celebrity information.

However, it appears to be inevitable that individuals will seek to protect something akin to their image or personality on the basis of this decision. Whether there should be protection of such rights is not the issue here, but whether these should be protected under the law of confidence certainly is. This area of law was first meant to protect private information and trade secrets from falling into the public domain, and *Coco* summarised the legal principles into a three-step test. Then, the law of confidence was developed to protect the privacy of individuals under certain circumstances in the *Campbell* litigation, stipulating non-Coco conditions. After this test, we may still use the Coco test to *commercial* information, but whether or not such information is protectable appears to hinge on the amount of money people are prepared to pay for it. While one of the advantages of legal actions based on common law is the flexibility which furthers its development through judicial interpretation on the basis of new realities that are prevalent in modern society, it remains to be seen whether it is wise to keep on stretching this particular area of law.

Footnotes:

1 Reported as *OBG Ltd v Allen* [2007] UKHL21.

2 At paragraph 117.

3 [1969] RPC 41.

4 *Ibid.* at 47.

5 At paragraph 119.

6 At paragraph 124.

7 Paragraph 299.

8 Paragraph 297.

9 Paragraphs 257-259.