

Case Bulletin

HRH The Prince of Wales v Associated Newspapers Ltd

The decision in *HRH Prince of Wales v Associated Newspapers* (17 March 2006) examines the balance between protecting confidential information and copyright on the one hand and the extent of press freedom on the other, particularly where the information relates to a well known person. It follows the recent UK decision in *McKennitt v Ash* [2005] and the decision of the European Court of Human Rights in *Von Hannover v Germany* on the extent to which public figures are entitled to a private life.

Background

This case concerned an application by HRH The Prince of Wales (claimant) for summary judgment against Associated Newspapers Limited (defendant) for breach of confidence and infringement of copyright in respect of articles published by the defendant in *The Mail on Sunday* on 13 November 2005.

The articles in question were based upon and contained extracts from a Journal hand written by the claimant on his visit to Hong Kong during the formal handover of Hong Kong to the Republic of China (the "Journal").

Seven other journals concerning overseas tours belonging to the claimant were also acquired by the defendant but claims in respect of these journals have been ordered to proceed to trial.

Breach of confidence

The claimant contended that the Journal set out his private and personal thoughts and that as these matters were not in the public domain (at least prior to publication), they therefore constituted confidential information. The defendant argued that the information in the Journal was not confidential as it was of a political nature and related to the claimant's public life in office, in which there was powerful public interest. Furthermore, the claimant could have no reasonable expectation that the Journal would be kept from the public as the claimant had previously authorised copies to be made and distributed to a number of selected recipients.

In deciding whether there had been a breach of confidence, Blackburne J first considered whether the claimant had a reasonable expectation of privacy in respect of the contents of the Journal. It was held that the Journal was not in the public domain before publication by the defendant and that there was no evidence to suggest that it was intended to be generally available to others outside of the claimant's Private Office. Furthermore, all staff who may have encountered the Journal were subject to confidentiality undertakings which would clearly have



extended to the contents. Therefore, the claimant did have an expectation of privacy in respect of the Journal. The mere fact that the contents of the Journal could be considered political in a wider sense and that the claimant had a history of courting public attention by speaking out about his views, did not prevent him having a reasonable expectation of privacy in respect of handwritten thoughts that he had not intended for public scrutiny.

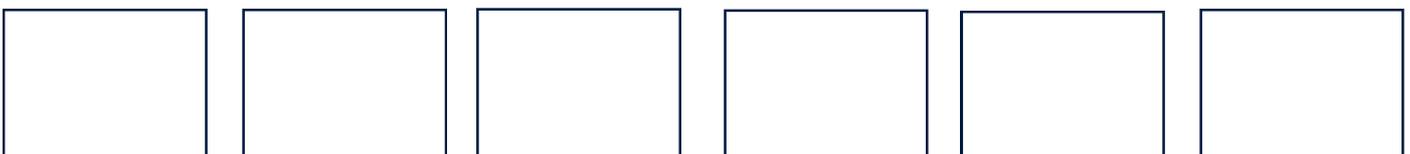
Blackburne J then had to carry out a 'balancing exercise' between Article 8 of the European Convention on Human Rights ("ECHR") (right to respect for private life) and the Article 10 right to freedom of expression. The defendant argued that the legitimate aim of interfering with the claimant's Article 8 right was the protection of the electorate's right to receive information regarding the claimant's political views and conduct both as an important lobbyist and Heir to the Throne. It was held however that this should not override the claimant's countervailing right to confidentiality in respect of his own private thoughts, regardless of the nature of those thoughts.

With regards to the defendant's Article 10 right, the court noted that, under Article 10(2), such a right may be subject to '*preventing the disclosure of information received in confidence*', which would clearly include the right to protect the confidentiality of the Journal. It was held that the strong public interest in preserving the confidentiality of journals and communications within private offices justified the interference with the defendant's right to freedom of expression.

The Judge referred to the recent decision of *McKennitt v Ash* [2005] where Eady J had held that where there is a genuine public interest, alongside a commercial interest in the media in publishing articles or photographs, sometimes such interests would have to yield to the individual citizen's right to the effective protection of private life.

Copyright infringement

The claimant further alleged that: (i) the Journal constituted an original literary work within the meaning of the Copyright Designs and Patents Act 1988; (ii) the copyright belonged to himself as the original author; and (iii) by reproducing extracts from the Journal in *The Mail on Sunday*, the defendant had infringed copyright. The defendant denied infringement on the grounds that its use was not of a substantial part and in any event, it amounted to fair dealing for the purposes of reporting current events or criticism and review.



Defences

When determining whether a 'substantial part' of the Journal had been reproduced by the defendant, it was noted that many of the extracts taken verbatim were those which touched upon the claimant's opinion and which therefore were of most interest to the newspaper's readers. Blackburne J held that, when taken together, the extracts quoted formed a substantial part when assessed in a qualitative sense. He also noted that at 15% of the total Journal, the extracts taken were equally likely to be substantial in quantitative terms.

The court rejected the s.30(2) CDPA 1988 defence of 'fair dealing for the purposes of reporting current events' for several reasons. First, the articles published by the defendant were not confined to dealing with current events. Secondly, the overall theme of the articles, and the use of extracts from the Journal therein, appeared to be solely for the purpose of reporting on the revelation of the contents of the Journal as an event in itself.

The s.30(1) CDPA 1988 defence of 'fair dealing for the purposes of criticism and review' also failed. A requirement of that defence is that the copyright work has already lawfully been made available to the public, which in this case it had not.

The court also rejected the public interest defence set out in s.171(3) of the CDPA on the basis that to succeed, specific clear public interest considerations would be required over and above those set out in the s.30 'fair dealing' defences. In this case, there were none.

In summary, the court held that the defendant had no real prospect of establishing that it had not used a substantial part of the Journal or that the fair dealing or public interest defences could apply.

As a result the application in respect of the Hong Kong Journal succeeded, however as regards the seven unpublished journals the claim would have to proceed to a full trial as no evidence of their content was before the Court and consequently it was not possible to decide whether or not there was a real prospect of the defendant successfully defending the claim.

For further information contact:

Peter Brownlow
+44 (0)20 7415 6178



BIRD & BIRD

www.twobirds.com

Beijing

3614 China World Trade Centre,
Tower 1
1 Jianguomenwai Dajie
Chaoyang District
Beijing 100004, PRC
Tel: +86 10 6505 6667
Fax: +86 10 6505 9469

Brussels

Avenue d'Auderghem 22-28
1040 Brussels
Belgium
Tel: +32 (0)2 282 6000
Fax: +32 (0)2 282 6011

Düsseldorf

Karl-Theodor-Strasse 6
40213 Düsseldorf
Germany
Tel: +49 (0)211 2005 6000
Fax: +49 (0)211 2005 6011

The Hague

Parkstraat 31
2514 JD The Hague
P.O. Box 30311
2500 GH The Hague
The Netherlands
Tel: +31 (0)70 353 8800
Fax: +31 (0)70 353 8811

Hong Kong

33 Floor
Three Pacific Place
One Queens Road East
Hong Kong
People's Republic of China
Tel: +852 2248 6000
Fax: +852 2248 6011

Frankfurt

Taunusanlage 1
60329 Frankfurt am Main
Germany
Tel: +49 (0)69 74222 6000
Fax: +49 (0)69 74222 6011

London

90 Fetter Lane
London
EC4A 1JP
UK
Tel: +44 (0)20 7415 6000
Fax: +44 (0)20 7415 6111

Lyon

23 boulevard Jules Favre
Lyon
69006
France
Tel: +33 (0)4 78 65 6000
Fax: +33 (0)4 78 65 6011

Madrid

Jorge Juan, 8 - 1^o
28001 Madrid
Spain
Tel: +34 91 790 6000
Fax: +34 91 790 6011

Milan

Via Montenapoleone, 10
20121 Milan
Italy
Tel: +39 02 30 35 6000
Fax: +39 02 30 35 6011

Munich

Pacellistrasse 14
80333 Munich
Germany
Tel: +49 (0)89 3581 6000
Fax: +49 (0)89 3581 6011

Paris

Centre d'Affaires Edouard VII
3 square Edouard VII
75009 Paris
France
Tel: +33 (0)1 42 68 6000
Fax: +33 (0)1 42 68 6011

Rome

Via di San Sebastiano, 9
00187 Rome
Italy
Tel: +39 06 69 66 7000
Fax: +39 06 69 66 7011

Stockholm

Norrandsgatan 15
Box 7714
SE-103 95 Stockholm
Sweden
Tel: +46 (0)8 506 320 00
Fax: +46 (0)8 506 320 90