

BRIEFINGS

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Commerce & Technology Briefings

Confidential Information: when is there a breach of confidence? (Douglas v Hello)

Michael Douglas and Catherine Zeta-Jones entered into a contract worth £1 million with OK magazine, granting it exclusive rights to publish photographs of their wedding which took place on 18 November 2000. A freelance photographer secretly took photographs of the wedding and then sold them to Hello who published the photographs.

In a majority decision of 3-2, the Law Lords recently decided that OK magazine did have a cause of action against Hello for breach of confidence following Hello's unauthorised publication of photographs of the wedding (*Douglas v Hello! Limited and others [2007] UKHL 21, 2 May 2007*). Hello was held to be fully liable for the losses of OK magazine due to the publication of the unauthorised photographs, notwithstanding the fact that the photographs were also published in the national press.

The case impacts on all rights-owners, not just celebrities, who own commercially valuable information but anyone who is looking to have exclusive rights to deal with such information.

The case confirmed the following legal principles when establishing whether information is subject to a duty of confidence:-

- The information must be of a confidential nature.
- It is imparted in circumstances in which an obligation of confidence arises.
- There is a breach of that confidence by the person receiving the information to the detriment of the person imparting it.

Applying these principles, it was found that:-

- The photographs of the wedding were confidential information because they were not publicly available.
- An obligation of confidence arose because the Douglases had made it clear to anyone present at the wedding not to make or communicate photographic images. The obligation of confidence was imposed for the benefit of OK as well as the Douglases. The duty was binding on Hello who were aware of OK's exclusive contract and knew that the photographs offered to them were unauthorised. Hello had broken what it knew to be a secret.
- The use of the photographs was to the detriment of OK.

The key factors which contributed to OK's successful claim against Hello for breach of confidence were:-

- The commercial value of the photographs - the fact that OK had paid £1 million for the exclusive right to publish the photographs which should in turn be protected

should a third party intentionally destroy that right.

- The control that the Douglasses exercised in relation to the photographs – the stringent security measures at the wedding – was sufficient to enable them to impose an obligation of confidence over the information.

The judgement confirmed that there was no suggestion that “image rights” or any other unorthodox form of intellectual property arose in the photographs.

The decision illustrates that the law of confidence and protecting your confidential information is a complex area and can often be confused with other issues such as privacy and the creation of some form of image right – the latter right has consistently been rejected under English Law.

However, the decision does clarify the basic legal principles which must be applied when assessing whether you owe or are owed an obligation of confidence over your commercially valuable information, whatever the subject matter.

Examples of confidential information include trade secrets, customer lists and contact information, know-how, marketing plans and other forms of intellectual property.

We recommend that you contact us for advice on any issues concerning protecting your confidential information; in particular we can advise on and prepare confidentiality agreements to avoid similar disclosures.

If you have any queries or require advice, please contact either:

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