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Cases No: A3/2010/2862 and A3/2011/0688

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
The Hon Mr Justice Vos and the Hon Mr Justice Mann
Claims Nos HC10C01562 and HC10C03630

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2012

Before:
THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
THE VICE-PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)

Between:

STEPHEN JOHN COOGAN

Claimant
Respondent

- and -

(1) NEWS GROUP NEWSPAPERS LIMITED

First Defendant

(2) GLENN MICHAEL MULCAIRE

Second Defendant
and Appellant

And Between:

NICOLA PHILLIPS

Claimant
Respondent

- and -

(1) NEWS GROUP NEWSPAPERS LIMITED

First Defendant

(2) GLENN MICHAEL MULCAIRE

Second Defendant
and Appellant

Gavin Millar QC and Alexandra Marzec (instructed by Payne Hicks Beach) for the
Appellant

Jeremy Reed (instructed by **Schillings**) for the **Respondent Coogan**
(and by **Taylor Hampton**) for the **Respondent Phillips**
Thomas de la Mare (instructed by **Treasury Solicitor**) for the **the Secretary of State for**
Business Innovation and Skills, as an interested party

Hearing dates: 28 & 29 November 2011

Approved Judgment

The Master of the Rolls:

1. The issues raised on these two appeals concern the extent and effect of section 72 of the Senior Courts Act 1981 ('section 72'), which cuts down the common law privilege against self-incrimination in relation to certain types of claim. The issues arise in the context of claims brought by two individuals who allege that their mobile telephone voice messages have been unlawfully intercepted (i.e. that their phones had been hacked into) by Glenn Mulcaire, a private investigator engaged by News Group Newspapers Ltd ('NGN'), the owners of the recently closed newspaper, the News of the World.
2. The claims are brought by (i) Nicola Phillips, a former assistant to Max Clifford, the well known public relations consultant, and (ii) Stephen Coogan, the well known comedian. Mr Coogan and Ms Phillips (together 'the claimants') each allege that voice messages on their mobile telephones ('voice messages') have been unlawfully intercepted by, or on the instructions of Mr Mulcaire and/or NGN, and that they have a cause of action in breach of confidence and in misuse of private information.
3. Ms Phillips originally brought proceedings against NGN alone. However, on 28 October 2010, she applied to Mann J (i) for permission to add Mr Mulcaire as a defendant, and (ii) for an order that Mr Mulcaire swear an affidavit identifying (a) the individuals who had instructed him directly or indirectly to intercept her voice messages and the voice messages of others working for Mr Clifford, (b) the nature of the interception he was instructed to carry out, and (c) similar facts about the interception of voice messages of another employee of Mr Clifford. Mr Mulcaire did not resist being joined as a defendant, but he objected to being required to swear the affidavit as sought, on the ground that it would tend to incriminate him, because intercepting voice messages is an offence under section 1(1) of the Regulation of Investigatory Powers Act 2000 ('RIPA'). Indeed, in January 2007, Mr Mulcaire had pleaded guilty and had been sentenced to six months in prison for offences under RIPA of a similar nature.
4. In answer to Mr Mulcaire's argument based on privilege against self-incrimination ('PSI'), Ms Phillips raised two points. The first was that there was no substance in the argument on the facts, because, if he gave the information sought, Mr Mulcaire would not, in fact, be at increased risk of prosecution under RIPA. Ms Phillips's second point was that there was no substance in Mr Mulcaire's argument on the law, because section 72 removed his PSI.
5. On 17 November 2010, Mann J gave judgment on Ms Phillips's application. He rejected her first point holding that, on the facts, '*prima facie* Mr Mulcaire is entitled to invoke the privilege against self-incrimination' – [2010] EWHC 2952 (Ch), para 35. However, he concluded that Ms Phillips's second point was sound, as 'this action is one to which section 72 applies' - [2010] EWHC 2952 (Ch), para 50. He gave Mr Mulcaire permission to appeal.
6. Mr Coogan's claim was brought against both NGN and Mr Mulcaire. The relief sought by Mr Coogan in his particulars of claim included (i) an injunction restraining NGN and Mr Mulcaire from intercepting his voice messages, and from using or publishing any information which they had obtained from previous interceptions, (ii) information from Mr Mulcaire as to the identity of the individuals (a) who had

instructed him to intercept Mr Coogan's voice messages, (b) to whom he had supplied information or recordings of such messages, and (c) whom he had instructed to hack into Mr Coogan's phone, and (iii) damages from both NGN and Mr Mulcaire. In his Defence, Mr Mulcaire relied on PSI for the same reason as in the claim brought by Ms Phillips. For the same reason, he also refused to answer most of the requests for further information served by Mr Coogan.

7. On 18 January 2011, Mr Coogan (together with another claimant, Andrew Gray) applied to Vos J for a declaration that Mr Mulcaire could not rely on PSI as he sought to do, for an order that he provide full answers to the requests for further information, and for an order striking out the passages relying on PSI in his Defence. The hearing required an adjournment and was only concluded on 16 February 2011.
8. On 25 February 2011, Vos J gave judgment, in which he dealt with the section 72 issue more fully than Mann J, who, he said, 'did not have the benefit that I have had of extensive citation of relevant authority' – [2011] EWHC 349 (Ch), para 7. Nonetheless, he reached the same overall conclusion as Mann J, namely that section 72 served to deprive Mr Mulcaire of PSI; accordingly, subject to one or two small exceptions, he acceded to Mr Coogan's application – see [2011] EWHC 349 (Ch), para 120. Vos J gave Mr Mulcaire permission to appeal.
9. Mr Mulcaire now appeals against the decisions of Mann and Vos JJ, and in particular the orders requiring him to make disclosure in connection with the messages which he intercepted ('the disclosure orders'). It is common ground that, were it not for section 72, he would be entitled to rely on PSI as he sought to do in both cases. Thus, although the claimants argue that the factual basis for Mr Mulcaire's claim to PSI is weak on the facts (because the Metropolitan Police have now gathered so much evidence in relation to journalists and investigators intercepting voice messages) there is no challenge to the conclusion reached on the first point by Mann J.

Section 72 and the issues in these appeals

10. The issues which have been debated on these appeals concern section 72, which is, so far as relevant, in the following terms:
 - '(1) In any proceedings to which this subsection applies a person shall not be excused, by reason that to do so would tend to expose that person ... to proceedings for a related offence ... :
 - (a) from answering any question put to that person in the first-mentioned proceedings; or
 - (b) from complying with any order made in those proceedings.
 - (2) Subsection (1) applies to the following civil proceedings in the High Court, namely:
 - (a) proceedings for infringement of rights pertaining to any intellectual property or for passing off;
 - (b) proceedings brought to obtain disclosure of information relating to any infringement of such rights or to any passing off;

(c) proceedings brought to prevent any apprehended infringement of such rights or any apprehended passing off.

(3) ... [N]o statement or admission made by a person:

(a) in answering a question put to him in any proceedings to which subsection (1) applies; or

(b) in complying with any order made in any such proceedings,

shall, in proceedings for any related offence ... , be admissible in evidence against that person ...

(5) In this section:

“intellectual property” means any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property;

“related offence”, in relation to any proceedings to which subsection (1) applies, means:

(a) in the case of proceedings within subsection (2)(a) or (b):

(i) any offence committed by or in the course of the infringement or passing off to which those proceedings relate; or

(ii) any offence not within sub-paragraph (i) committed in connection with that infringement or passing off, being an offence involving fraud or dishonesty;

(b) in the case of proceedings within subsection (2)(c), any offence revealed by the facts on which the plaintiff relies in those proceedings;

...’.

11. The following arguments, which appear to be of some general significance, were relied on in this court by Mr Millar QC, who appeared with Ms Marzec, for Mr Mulcaire, to justify the contention that the disclosure orders should not have been made:

i) Information obtained by Mr Mulcaire from intercepting the voice messages of Ms Phillips and/or Mr Coogan was not ‘intellectual property’ and therefore section 72 cannot apply;

ii) If the information in question was ‘intellectual property’:

(a) Mr Mulcaire would, if he were required to provide all the information ordered by Mann J, and some of the

information ordered by Vos J, be at risk of being prosecuted for an offence which is not a 'related offence', so section 72 does not apply;

- (b) Section 72 is inconsistent with Article 6 of the European Convention on Human Rights ('the Convention'), and the court should accordingly make a declaration of incompatibility.

12. In relation to these arguments, the Coogan claim has taken a somewhat curious course. In the skeleton argument lodged on behalf of Mr Mulcaire in the Coogan claim, (when he was not represented by Mr Millar QC, but by different leading counsel), there appeared to be no challenge to the conclusions reached by Vos J on issue (i)(a), namely that section 72 deprived Mr Mulcaire of PSI, and the principal point pursued was whether the section was incompatible with Article 6 of the Convention ('Article 6'), issue (ii)(b). However, although he maintained Mr Mulcaire's case on Article 6, Mr Millar's primary arguments on both appeals were on issue (i)(a), which was the main point in the two cases below, and on issue (ii)(a), which was not even raised in either case below.
13. I shall consider the three issues set out in para 11 above in turn, and will then deal shortly with two more case-specific issues which Mr Millar also has raised. Before doing so, however, it is right briefly to consider the nature of PSI.

Privilege against self-incrimination

14. PSI is a very long and firmly established feature of the common law. It was described by Goddard LJ in *Blunt v Park Lane Hotel Ltd* [1942] 2 KB 253, as a 'rule ... that no one is bound to answer any question if the answer ... would ... have a tendency to expose the deponent to any criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for.' In civil proceedings, the rule is preserved expressly in section 14(1) of the Civil Evidence Act 1968.
15. The nature of the risk which must be present before PSI can be invoked was described by Lord Denning MR in *Rio Tinto Zinc Ltd v Westinghouse Electric Co* [1978] AC 547, 574 as 'a real and appreciable risk as distinct from a remote or insubstantial risk'. It appears that PSI can be asserted not only if the risk claimed is that the evidence sought will or may be used directly to support a prosecution, but also where the risk claimed is that such evidence 'may set in train a process which may lead to discovery of real evidence of a criminal character' to quote from Lord Wilberforce in *Rank Film Distributors Ltd v Video Information Centre (a firm)* [1982] AC 380, 443E – and see per Beldam LJ in *Sociedad Nacional de Combustiveis de Angola UEE v Lundquist* [1991] 2 QB 310, 322B, and per Waller LJ in *Den Norske Bank ASA v Antonatos* [1999] QB 271, 289B.
16. In a number of disparate statutory provisions, Parliament has cut down PSI. For instance, section 31 of the Theft Act 1981 and section 13 of the Fraud Act 2006 each remove the right to claim PSI in connection with offences under the Act in which they are respectively contained; section 98 of the Children Act 1989 removes the right in relation to evidence on applications relating to the care, supervision or protection of a child; sections 43A and 44 of the Insurance Companies Act 1982, section 433 of the

Insolvency Act 1986 and section 434 of the Companies Act 1985 (as amended in each case by section 59 of, and schedule 3 to, the Youth Justice and Criminal Evidence Act 1999) remove PSI in relation to certain statutory company investigations; and section 2 of the Criminal Justice Act 1987 and para 5 of schedule 6 to the Terrorism Act 2000 also remove the right in certain circumstances. Like section 72, all these statutory provisions have prohibitions on any evidence thereby disclosed being used in any subsequent criminal proceedings.

17. There have been a number of relatively recent judicial observations from authoritative sources, criticising the appropriateness of PSI in modern circumstances. Thus, Sir Nicolas Browne-Wilkinson V-C in *Lundquist* [1991] 2 QB 310, 338G suggested that ‘Parliament [should] consider, as a matter of urgency, ... remov[ing] the privilege against self-incrimination in relation to all civil claims relating to property (including claims for damages)’. And, in characteristically robust terms, Lord Templeman described PSI in civil proceedings as ‘an archaic and unjustifiable survival from the past’, a characterisation supported by Lord Griffiths - see *AT&T Istel Ltd v Tully* [1993] AC 45, 53B-D and 57G-58F. More recently, Sedley LJ in *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1125, [2010] 1 All ER (Comm) 1029, paras 33-39 doubted the justification for PSI in the present day, on the basis that its ‘real mischief ... is the suppression of crucial evidence’.
18. I would take this opportunity to express my support for the view that PSI has had its day, provided that its removal is made subject to a provision along the lines of section 72(3). Whether or not one has that opinion, however, it is undoubtedly the case that, save to the extent that it has been cut down by statute, PSI remains part of the common law, and that it is for the legislature, not the judiciary, to remove it, or to cut it down.

‘Intellectual property’: the facts and the judgments below

19. I turn first to consider whether the information intercepted from the claimants’ phones was ‘intellectual property’ within the meaning of that term as defined in section 72(5). In that connection, it is first convenient to identify the nature of the voice messages which were allegedly intercepted. As to that, all parties were content to proceed on the basis of what was in the claimants’ pleaded cases and witness statements.
20. Ms Phillips had two mobile phones, each of which, she said, ‘were used both socially and for business’, and on each of which she would receive ‘voicemail messages by friends and contacts, some of which could have been very sensitive, and relate to matters of considerable newsworthiness’. Her pleaded case alleged that, in addition to family and friends, voice messages were left by ‘clients, predominantly entertainers and celebrities ...; ... newspapers ... [and] journalists from various sectors of the media...’. The information was further described as including ‘private and/or confidential information relating to her clients’ personal lives and relationships, health, finances ... personal security or publicity issues, commercial business transactions, professional relationships and future career plans.’ Ms Phillips’s pleaded case also stated that it was ‘vital to the proper performance of [her] business’ that such ‘messages will only be accessed by her’.
21. Mr Coogan had one mobile phone, on which he received private calls and calls from business contacts. He estimated that around 70% of his voice messages concerned his

‘work as an actor, writer, producer and a director of Baby Cow [Limited]’, a production company of which he is the chairman and a director. Among those who called Mr Coogan and left voice messages were his agent and personnel at Baby Cow; some of the calls related to negotiations for contracts and projects with, and involving, Baby Cow, including, for example, ‘the status of television shows and other projects’, ‘the booking of ... directors’, ‘funding for projects’ and ‘[the sale] of a stake in Mr Coogan’s company’.

22. It is clear that the only basis upon which it can be said that the information intercepted from the claimants’ phones constituted ‘intellectual property’ as defined in section 72(5) is if it is within the closing words ‘technical or commercial information or other intellectual property’.
23. In Ms Phillips’s case, Mann J, at [2010] EWHC 2952 (Ch), para 45, made the point that many of her voice messages were ‘plainly capable of being confidential’ and were ‘also capable of having real commercial value to Ms Phillips and Mr Clifford’ even though they did ‘not necessarily [convey] information which one could easily sell’, such as a trade secret. He also was impressed with the point that ‘it hardly lies in the mouth of Mr Mulcaire to say that the information was not “commercial information”’, as it ‘would have value to the person who engaged him to obtain it’. His ultimate conclusion was that, to fall within the statutory expression, information had to be ‘information which relates to commerce (or business) and within that context to have a confidential quality (so as to be properly described as “intellectual property”’). On that basis, Mann J concluded that, in Ms Phillips’s case, the information concerned was ‘technical or commercial information’.
24. In Mr Coogan’s case, Vos J said that information would only fall within the statutory expression if ‘it is confidential and can be protected by an action for breach of confidence or breach of contract or breach of another duty’ - [2011] EWHC 349 (Ch), para 80. He left open the issue of whether private information which could be sold for significant value (the example he gave was about a film star having cancer) would be within the expression - [2011] EWHC 349 (Ch), para 82. He concluded that the expression ‘technical or commercial information’ in section 72(5) applied to ‘any such information that can be protected by such an action’ - [2011] EWHC 349 (Ch), para 83. Given that Mr Coogan’s evidence was that ‘70% of his voicemails concern his professional life as an actor, writer and producer, and as a director of Baby Cow’, the Judge found little difficulty in holding that the information in question was ‘technical or commercial information’ within section 72(5) - [2011] EWHC 349 (Ch), para 89.

‘Intellectual property’: the meaning of ‘commercial information’

25. The meaning of the expression ‘technical or commercial information’ has to be assessed by reference to the purpose of section 72, the immediate context of the expression, and the natural meaning of the words.
26. The purpose of section 72 is self-evidently to remove PSI in certain types of case, namely those described in section 72(2). While there have been significant judicial observations doubting the value of PSI in civil proceedings, it would be wrong to invoke them to support an artificially wide interpretation of the expression, as it is clear that Parliament has decided that section 72 should contain only a limited

exception from the privilege. On the other hand, in the light of the consistent judicial questioning as to whether PSI is still appropriate in civil proceedings, it would be rather odd for a court to interpret such a provision narrowly. Further, the fact that PSI is an important common law right does not persuade me that the expression should be given a particularly narrow meaning. I agree with Moore-Bick LJ in *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128, [2008] 1 WLR 1144, para 36, where he said (in relation to section 13 of the Fraud Act 2006, which, as mentioned above, removes PSI in another limited class of cases) that as ‘the loss of privilege is largely, if not entirely, balanced by rendering information disclosed pursuant to the section inadmissible in [certain criminal] proceedings, I do not think that the court should be astute to construe the section restrictively.’

27. It seems clear that section 72 was introduced into the 1981 Act as something of a last minute addition, following an adverse observation on the availability of PSI by Lord Russell in *Rank Film* [1982] AC 380, 448F, in relation to infringements of copyright ‘and other analogous fields’. However, that provides no assistance in solving the problem raised in these appeals. The observation cannot provide an appropriate guide as to the meaning of section 72 as a matter of principle, and, even if it could do so, it would beg and confuse the question that we have to decide: the precise meaning of ‘analogous fields’ raises at least as many uncertainties as the meaning of the expression which we have to interpret.
28. Mr de la Mare, who appeared for the Secretary of State as an interested party, suggested that a wide meaning should be given to the expression ‘commercial information’, as section 72, together with section 31 of the Theft Act 1981 and section 13 of the Fraud Act 2006 represented a coherent code which Parliament has enacted for the purpose of cutting down PSI. I would reject that submission. Each of the three statutory provisions appears to me to embody a specific, self-contained, exception to PSI. Far from amounting to a coherent code, they constitute a piecemeal, apparently rather arbitrary, trio of exceptions to the PSI principle, and they are not even the only statutory exceptions, as is shown by the other statutory provisions referred to in para 16 above. Further, section 31 of the 1981 Act and section 13 of the 2006 Act are in statutes which are concerned with creating or defining specific criminal offences, and the sections are confined to exceptions to PSI in relation to those offences, whereas section 72 is in a civil statute, essentially concerned with procedural matters, and it relates to specific types of civil proceedings.
29. Turning to the immediate context of the expression, ‘technical and commercial information’, it is not merely stated to be an aspect of ‘intellectual property’ in section 72(5), but, curiously (at least in terms of logic), it is immediately followed by the words ‘or other intellectual property’. Further, the expression is immediately preceded by items which are familiar and conventional species of intellectual property, such as ‘patent’ and ‘trademark’. Those two points suggest that the expression is intended to refer to items which would be seen as intellectual property in the normal sense of the expression. Although ‘intellectual property’ is, at least at its margins, a term which is imprecise, it would be hard to justify it covering something which could not be regarded as property or at least as having a proprietary quality.
30. The use in section 72(2) of the words ‘rights pertaining to any’ intellectual property similarly indicate that the section is intended to apply to cases where there is ‘intellectual property’ to which ‘rights’ attach. The references to ‘passing off’ in

section 72(2)(a), (b) and (c) are consistent with this, as the nature of the damage caused by passing off is harm to the victim's goodwill. Further, the fact that passing off is clearly not treated as an infringement of an intellectual property right tends to support the view that the term 'intellectual property' is not being used by the draftsman of section 72 in a very loose way. As Mr Millar also submitted, the use of the word 'infringement' in section 72(2) tends slightly to suggest that the section is directed towards intellectual property in the familiar sense: it is a word familiarly used in the field of intellectual property (e.g. infringement of a patent or infringement of copyright), whereas 'breach' is the more normal word outside the field, at least in ordinary domestic cases (e.g. breach of contract or breach of common law or statutory duty).

31. So what is meant by 'technical or commercial information'? Subject to what was said by Lord Lowry in *AT&T* [1993] AC 45, 64H-65A, which I shall discuss below, it seems to me that the expression means confidential information which is technical or commercial in character. As for the confidential aspect, in order to be protected in law, and to be even arguably characterised as 'intellectual property' information must be confidential, or, to use the well-known expression of Megarry J in *Coco v A N Clark (Engineers) Ltd* [1968] RPC 41, 47, it must 'have the necessary quality of confidence about it'.
32. As a matter of ordinary language, just as 'technical information' means information of a technical nature, it seems to me that 'commercial information' means information which is commercial in character, rather than information which, whatever its nature, may have a value to someone. In other words, the word 'commercial' appears to be a description of the character of the information rather than the fact that it has value. Furthermore, the expression is unlikely to have been intended to cover all 'confidential information', as, if that had been the legislative intention, one would have expected Parliament to use those two familiar words rather than the expression 'technical or commercial information'.
33. However, Mr Millar's contention is that confidential information is not intellectual property, as a matter of law, and therefore cannot be within the concept of 'commercial information or other intellectual property', particularly in the light of the preceding items in the definition which are all properly characterised as intellectual property. The argument which has to be faced, therefore, is whether the expression 'technical and commercial information' in section 72(5) can extend simply to information, on the ground that information is not regarded as intellectual property at all.
34. In *Douglas v. Hello! Ltd* [2007] UKHL 21, [2008] 1 AC 1, para 276, Lord Walker said that 'the equitable jurisdiction to restrain ... breach of confidence ... does not depend on treating confidential information as property, although it often referred to, loosely or metaphorically, in those terms.' He then mentioned an article by Professor Finn, which described the dispute as to whether confidential information was property as 'the most sterile of debates', The topic is discussed in paras 2-32 to 2-60 of *Toulson and Phipps on Confidentiality* (2006), which concludes that confidential information is not property, but shows that it has features which could be seen as being property-like. This is the view adopted also in *Stanley on the Law of Confidentiality: a Restatement* (2008) pp 148-150. In *Phipps v Boardman* [1967] 2 AC 46, the House of Lords seems to have split 3-2 in favour of the view that

confidential information was not property (although that was not part of the ratio of the decision).

35. However, the oft-cited observation, referred to by Lord Walker at [2008] 1 AC 1, para 277, of Lord Upjohn in *Phipps* [1967] 2 AC 46, 127, that ‘the real truth is that [information] is not property’ was immediately followed by the words ‘in the normal sense’. Further, as is pointed out in *Stanley (op cit)*, p 150, ‘[i]nformation, even if not property, is certainly capable of being ... appropriately regarded as an “asset”’, and ‘[i]t is often natural to use property language in relation to information, in a metaphorical sense’, for instance to ‘say that information is trust property or partnership property’ – a point reflected by what Lord Walker said at [2008] 1 AC 1, para 282.
36. It is also to be noted that leading textbooks on ‘Intellectual Property’ always cover confidential information fully, while normally agreeing with Lord Upjohn’s view - see e.g. *Cornish, Llewellyn and Aplin on Intellectual Property* (2010), where confidential information is fully covered as a discrete topic, in paras 8-01 to 8-56, and the question whether it is property is discussed at paras 8-50 to 8-54. Later, at para 9-20, the authors say that the effect of that discussion is that the question ‘[h]ow far, if at all, the general right to confidence can be regarded as proprietary ... remains obscure’.
37. So far, I have concentrated on the word ‘property’, but it is right briefly to consider the word ‘intellectual’. It can fairly be said that the natural meaning of ‘commercial information’ would include much material which had scarcely, if any, ‘intellectual’ content, when compared with, say, patents, copyright or design rights. However, the concept of ‘intellectual property’ appears to have developed so as to render it unsafe to place much weight on the natural meaning of each of the two words, in order to decide whether a particular right is within its ambit. As is pointed out in *Cornish (op cit)*, para 1-01, ‘[t]here is no single generic term that satisfactorily covers’ all rights which comprise intellectual property, some purists would contend it does not even include copyright, and ‘it scarcely describes trade marks and similar marketing devices, but it has now acquired international acceptance’.
38. At para 1-04, the editors attempt a general definition, almost *en passant*, saying that intellectual property ‘protects information and ideas that are of commercial value’. I doubt that one could do much better than that, although I consider that it would be dangerous to treat that as a definition; rather, it is a useful short and simple guide. No real help is to be found in any case, not least perhaps because the first attempt at a statutory definition appears to be in section 72(5) itself.
39. In my view, the upshot of this summary of the position as discussed in the cases and the books is that, while the prevailing current view is that confidential information is not strictly property, it is not inappropriate to include it as an aspect of intellectual property. Accordingly, unless there is binding authority to the contrary, I am of the view that, given the normal meaning of ‘commercial information’, the draftsman of section 72 intended confidential information of a commercial nature to be included in the definition of ‘intellectual property’.
40. Quite apart from this, it is hard to see what ‘technical or commercial information’ adds to the definition of ‘intellectual property’ in section 72(5) if it does not have that

meaning. Mr Millar suggested that it might be limited to trade secrets, but they are a subset of confidential commercial information. Alternatively, he suggested that it might refer to some digital and computer rights which are not expressly referred to in the definition. It is unnecessary to consider the nature of such rights, as, in my view, they are clearly included in the words ‘or other intellectual property’. Although it is true that my conclusion has the advantage of attributing a purpose to the words ‘technical or commercial information’, it is only fair to add that it is a point of limited value, as it could be said that the references to ‘patents’ and ‘trade marks’ are unnecessary, as they would be included in those closing words of the definition.

41. As already mentioned, the view that ‘commercial information’ covers all confidential information of a commercial nature has to be reviewed in the light of what was said by Lord Lowry about the meaning of ‘commercial information’ in section 72(5) in the course of his speech in *AT&T* [1993] AC 45, 64H-65A. He said that

‘[T]he concluding words, “or other intellectual property”, show that the “commercial information” which the definition contemplates must be information of the same type (“*eiusdem generis*”) as the other examples of intellectual property which are listed in subsection (5). The information with which this case is concerned does not pass that test and this action is not concerned with the infringements of any rights relating to intellectual property.’

42. In the course of his judgment, [2011] EWHC 349 (Ch), para 78 (and see also paras 12, 13, and 75), Vos J cast doubt on that observation, and held that he was not bound by it as it was *obiter*. I do not agree. Lord Lowry was explaining why he was rejecting ‘a submission based on section 72’ – see at [1993] AC 45, 64E, so the observation must therefore be part of the ratio of his speech. Further, it seems clear that all the other Law Lords agreed with his view (see [1993] AC 45, 58G, per, respectively, Lord Griffiths and Lord Ackner, with whom Lord Templeman and Lord Goff agreed - [1993] AC 45, 57F and 64A).
43. Nor do I agree with Vos J that, even if it was open to us or to him to depart from what Lord Lowry said, it would be right to do so. The only criticism which can, I suppose, be made is that, if, by using the Latin expression, Lord Lowry was relying on the *eiusdem generis* rule, as understood by Chancery draftsmen in days of yore, when many lawyers thought there were technical and mechanistic rules of interpretation, then he would have been wrong for the reasons given by Vos J. However, I do not think such a criticism would be fair: the point Lord Lowry was making was that there is a *genus* in the definition of intellectual property in section 72(5), and that that *genus* is intellectual property properly so called.
44. Having said that, I agree with Vos J’s ultimate view, in that it does not seem to me that Lord Lowry’s observation undermines the conclusion I would otherwise have reached. In *AT&T* [1993] AC 45, the plaintiffs were contending that a contract had been procured fraudulently by the defendants, and were arguing that section 72 removed the defendants’ right to invoke PSI so as to avoid disclosing information relating to dealings with certain assets and producing documents evidencing such dealings. The claim had nothing to do with rights to intellectual property, and it appears that there was no claim based on confidential information. As I see it, the point that Lord Lowry was making in the first sentence of the passage just quoted was

that, just because the information which was being sought by the plaintiffs was commercial in nature did not mean that it was ‘commercial information’ within section 72(5). In particular, as I have mentioned, there was no apparent claim that the information was protected by the law of confidence. And his point in the second sentence was that, even if confidential commercial information was involved, the plaintiff’s claim was not for ‘infringement of rights pertaining to any intellectual property’, within section 72(2).

‘Intellectual property’: personal information and ‘other intellectual property’

45. Having decided that ‘commercial information’ in section 72(5) means confidential information of a commercial nature, it is necessary to consider whether non-commercial (in particular personal) information, which would be protected in law on the ground of confidentiality, would also be within the ambit of ‘intellectual property’ as defined in section 72(5). At first sight, it might seem that the answer is no, as the draftsman of the definition limited its ambit to ‘technical and commercial information’. However, I have reached the conclusion that, as a matter of both principle and practice, non-commercial confidential information is within the ambit of the definition, because of the words ‘or other intellectual property’.
46. First, if confidential commercial information is within the ambit of the definition of ‘intellectual property’, it seems to me hard to resist the logic of the view that confidential information is therefore being treated as being intellectual property by the draftsman of the definition, so that non-commercial confidential information is ‘other intellectual property’. However, this argument has to address the point that, if the draftsman had intended all confidential information to be included in the definition, he would simply have referred to ‘confidential information’ rather than ‘technical and commercial information’: it seems rather odd to have used a combination of the latter expression and the sweeping-up words ‘and other intellectual property’ to bring in all non-commercial confidential information into the ambit of the definition.
47. In my opinion, the reason why it is understandable that the draftsman adopted this approach is that, at the time that section 72 was enacted, the law of confidential information was routinely invoked in a commercial and technical context, and was only very rarely applied to personal or other non-commercial relationships. Although the law of confidence was famously invoked in what may be said to have been a personal context (albeit that it was precious close to copyright) in *Prince Albert v Strange* (1849) 2 De G & Sm 652, and what was undoubtedly a personal context in *Argyll (Duchess) v Argyll (Duke)* [1967] Ch 302, these were relatively unusual cases. Further, it is clear that, at least until 2000, a claim to protect personal privacy could not succeed unless the claimant could establish a claim in breach of contract or breach of confidence – see *Kaye v Robertson* [1991] FSR 62.
48. Of course, since the coming into force of the Human Rights Act 1998 (‘the 1998 Act’), the law protecting personal privacy has mushroomed, in the light of Article 8 of the Convention (‘Article 8’). As claims for relief to protect rights of privacy and personal autonomy have been brought before the courts, judges have had to refashion and extend the common law (including equity) so as to ensure that it complies with Article 8. Although in *Douglas v. Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125, para 96, the Court of Appeal referred to privacy being ‘shoehorn[ed]’ into the law of confidential information, it is probably fair to say that the extent to which privacy is to

be accommodated within the law of confidence as opposed to the law of tort is still in the process of being worked out.

49. In my view, it is (fortunately) unnecessary to enter into that difficult area in this case. It seems to me clear that, under the law as it had been developed well before the 1998 Act came into force, personal information which was of sufficient significance to attract the notice of the courts, which had been, for instance, left on a person's telephone answering machine, and was clearly intended to be confidential as between the caller and that person, would have attracted protection under the law of confidential information. While 'trivial tittle tattle' (*Coco v Clarke* [1969] RPC 41, 48) would not, information of a personal private information would in principle have been protected by the law of confidence (at least if it was not in public knowledge) – see the cases referred to in para 48 above, a view supported by the reasoning and conclusion in *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892.
50. Further, following Lord Goff's authoritative observations in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281, it is clear that, if information had come into a person's hands by happenstance, and that person should have appreciated that it was confidential, he will be bound by the confidence. *A fortiori* where the person intentionally obtains the information knowing that he was not intended to receive it, and even more so where he uses unlawful means to obtain it – see again *Francome* [1984] 1 WLR 892. While it may nonetheless have been arguable (if, in the view of many people, illogical) that, prior to the 1998 Act coming into force, that principle would not have applied to personal confidential information (in the light of *Kaye* [1991] FSR 62), such an argument is no longer maintainable in the light of Article 8 and *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.
51. There are also practical reasons why 'intellectual property' in section 72(5) should include personal confidential information if it also includes commercial confidential information. It would be surprising if PSI could be invoked by a defendant in relation to a breach of confidence claim which related to personal information, but not where the nature and circumstances of the claim were identical, save that it related to commercial information. Although the statutory provisions which remove PSI appear somewhat piecemeal, that is no reason for concluding that a particular provision should be interpreted so as to lead to an arbitrary result.
52. Further, the same information could be commercial in one person's hands and personal in the hands of another. A good example may be found in *Douglas* [2006] QB 125, where wedding photographs were held to be the subject of a personal confidential claim by the happy couple, but of a commercial confidential claim by the magazine to whom they had sold the exclusive publication rights – and see in the House of Lords per Lord Hoffmann at [2009] 1 AC 1, para 118. Equally, as *Cornish (op cit)* points out at para 8-39, 'some people want privacy largely so that they can turn it to their own financial advantage'. If commercial information, but not personal, information is within section 72, then the applicability of the section could, in some cases, turn on how the claim is pleaded – a most unattractive result.

'Intellectual property': mixed messages

53. Where a person's voice messages are intercepted, particularly over a period, there will often be some messages which contain confidential information, and some which do

not. That could be said to lead to difficulties when it comes to applying section 72 (although the difficulties would self-evidently be far greater if section 72 only applied to commercial information). Those difficulties are, at least in theory, further compounded by the fact that, unless and until section 72 is successfully invoked, the claimant will not know which of his voice messages have been intercepted, and therefore he will not know the strength of his case on the issue of whether section 72 applies; equally, without identifying which voice messages he has intercepted (the very thing which he is trying to avoid) the defendant cannot demonstrate the strength of his case on section 72.

54. In my view, if there is evidence (which will normally, as in these two cases, be in the claimant's statement of case and/or witness statement) which establishes that a significant amount of confidential information is ordinarily (or was around the time of the interception) included in her voice messages, then that will normally be enough to justify section 72 being invoked. And in this context, I consider that 'significant' means 'more than insignificant' (cf *Palser v Grinling* [1948] AC 291, 316-320).
55. Where a defendant has intercepted the claimant's voice messages, there must be a strong presumption that at least some of the information contained in the messages is confidential: save in a very unusual case, that would be the very reason for intercepting the messages. It cannot have been envisaged that such a defendant could, for instance, contend that section 72 does not apply because, although he managed to intercept a few confidential messages, some of the messages, or even the bulk of the messages, which he intercepted were not confidential in nature. Nor can it have been envisaged that such a defendant could contend that section 72 does not apply because the claimant could not show that the bulk of the intercepted messages contained confidential information. The fact that there may be numerically more messages which are not confidential would be more than outweighed by the greater importance of the confidential messages, to the claimant and defendant, and in the eyes of the law and public interest.
56. Accordingly, if a defendant has intercepted a claimant's voice messages, it seems to me that, even where there is a significant preponderance of plainly non-confidential messages, he should nonetheless disclose them as part of the overall disclosure exercise. If, on the basis of considering the messages which he has intercepted, the defendant is able to say on oath that he has received no confidential information from the claimant (at least without the claimant's authority), then that might persuade the court that section 72 cannot be invoked. However, because there is no such evidence in the present cases, it is unnecessary to decide that point, which I would prefer to keep open.

'Intellectual property': conclusions

57. Having reached this conclusion as to the meaning of section 72(2) so far as it relates to 'commercial information and other intellectual property' in cases such as the present, it seems to me that, on the facts as described in paras 20 and 21 above, it is clear that Mann J (subject to one point) and Vos J reached the right conclusions. Unsurprisingly, bearing in mind the somewhat unsatisfactory drafting of section 72, my reasoning may not be identical to theirs in all respects, but it is pretty similar.

58. As to Ms Phillips, it appears that, in her capacity as an employee of Mr Clifford, she had a significant number of voice messages containing ‘commercial information’, including details of negotiations which she was conducting on behalf of clients, and information which was private and no doubt virtually always confidential from the client’s perspective. There was also a significant, although unspecified, proportion of personal messages, some of which will presumably have been confidential, although it seems likely that some will not.
59. There can be little doubt why Ms Phillips’s voice messages were intercepted by Mr Mulcaire, namely to get access to confidential information, and there can be little doubt but that at least some of the messages which he intercepted will have contained confidential information. Subject to one concern, I would therefore have little hesitation in holding that Mann J’s disclosure order against Mr Mulcaire should stand. My concern arises from the fact that some, possibly many, of the messages would have contained information which, while subject to rights of confidence, were not rights which Ms Phillips could claim for herself or even for her employer, Mr Clifford. I have in mind private information given to Ms Phillips or Mr Clifford by a client. I would have thought that neither Ms Phillips nor Mr Clifford would acquire any rights of confidence in relation to the information themselves: the rights would remain with the client. So it would have to be the client, not Ms Phillips or Mr Clifford, who brings any claim for breach of confidence. Accordingly, it seems to me that it may be hard to say that, in so far as it relates to the interception of such information, Ms Phillips’s claim constitutes ‘proceedings for infringement of rights pertaining to’ confidential information within section 72(2)(a).
60. Despite this concern, I have concluded that it would be right to uphold the disclosure order made by Mann J. So far as I am aware, no argument was raised before him or before us along the lines discussed in the preceding paragraph, and, even if the point is sound as far as it goes, it may be that section 72(2)(a) should be read as applying even where the right of confidence is in a third party, at least where the claimant is the agent of the third party, and the information has been improperly obtained from the claimant. In any event, even assuming that that is wrong, it seems to me that Ms Phillips had rights of confidence in relation to the commercial negotiations she was conducting, and in relation to at least a significant proportion of the personal messages.
61. Mr Coogan’s case is clearer. The effect of his evidence is that some 70% of his voicemail messages were ‘commercial’ in nature, and many, I strongly suspect most, of those contained confidential information. It also seems likely that a significant number of the remaining 30% contained personal confidential information, although it is reasonable to assume that some of those messages were not confidential, and that even some of those which could be said to be confidential were only so to a trivial extent.

‘Related offence’: the argument based on the definition

62. The next argument raised on behalf of Mr Mulcaire was that all the information which Mann J ordered, and some of the information which Vos J ordered, him to provide is not covered by section 72, in the light of para (a)(i) of the definition of ‘related offence’ in section 72(5). This argument was not raised below, but Mr Reed, who

appeared for the claimants, realistically did not seek to oppose it being raised for the first time in this court.

63. On behalf of Mr Mulcaire, Mr Millar relied on the expression ‘by or in the course of the infringement’ in para (a)(i) of the definition of ‘related offence’ in section 72(5). He contended that, while those words of limitation would not prevent Mr Mulcaire from being required to give information as to the voice messages which he actually intercepted, they do not extend to giving information as to (i) who instructed him to intercept or (ii) whom he passed on the information he obtained by intercepting (or played recordings of the voice messages). That is said to be the case because, while the actual intercepting of the messages would have been the infringement ‘to which [the] proceedings relate’ or to have been ‘in the course of [that] infringement’, the other aspects were not.
64. As Mr Millar realistically accepted in argument, that argument is plainly wrong in relation to the information Mr Mulcaire has been ordered to give as to the persons to whom he passed on the information (or played recordings of the voice messages). Given that the information in the voice messages was confidential, and that Mr Mulcaire had obtained it in an unauthorised way, he must have committed a further infringement of the claimants’ rights if and when he passed the information on (or played a recording of the message) to an unauthorised third party. If there were any doubt about that see *Tchenguiz v. Imerman* [2010] EWCA Civ 908, [2010] 2 FLR 814, para 69.
65. The argument presents greater difficulties in relation to the requirement that Mr Mulcaire provides information as to who instructed him to intercept. At least at first sight, Mr Millar’s argument seems to have force on the basis that any offence committed at that time was not ‘in the course of’ the infringement complained of, but ‘in anticipation of’ the infringement. However, it appears to me that the concept of an action taking place ‘in the course of’ an infringement should not be too strictly interpreted. The words ‘in the course of’ in para (a)(i) of the definition of ‘related offence’ must add something to the word ‘by’ in the same definition; furthermore, bearing in mind the purpose of section 72, it would be wrong to give them a particularly narrow meaning. On the other hand, it would be wrong to give them a particularly wide meaning, especially in the light of the wording of paras (a)(ii) and (b) of the definition of ‘related offence’, which Parliament clearly intended to have a wider scope where they apply.
66. In my opinion, where a person intercepts a voice message on the instructions of a third party, the giving of those instructions can fairly be said to be part and parcel of the interception. After all, in such a case, the third party, together with Mr Mulcaire, would be liable for the interception – i.e. together with Mr Mulcaire, he would be liable for infringement of the victim’s rights in the confidential information. That would be because they were parties to the wrong pursuant to the principle of common design – see *The Koursk* [1924] P 140, 151-2, 156-7, and 159, per Bankes, Scrutton, and Sargant LJJ respectively. Given that the issues on this appeal are concerned with the interface between criminal and civil proceedings, it is not irrelevant to note that, as the Lord Chief Justice pointed out during argument, if Mr Mulcaire was guilty of an offence under section 1 of RIPA, the third party would also be guilty of participating in that offence – see section 8 of the Accessories and Abettors Act 1861, and *Mendez and Thompson v R* [2010] EWCA Crim 516, [2011] 1 Cr App R 10, para 18.

67. Accordingly, in my judgment, requiring Mr Mulcaire to identify the individuals who instructed or asked him to intercept the voice messages of the claimants did not involve the court trespassing outside the limits of section 72, even bearing in mind that the claimants rely on para (a)(i) of the definition of ‘related offence’ in subsection (5). I do not consider that this conclusion cuts across paras (a)(ii) or (b), which, as Mr de la Mare contended, are quite capable of having a wider reach.
68. Having dealt with Mr Millar’s argument based on the definition of ‘related offence’, it is right to mention two further reasons which were advanced as to meet Mr Millar’s argument based on para (a)(i) of the definition of ‘related offence’, if only to dispose of those reasons in future cases.
69. The first reason, primarily advanced by Mr de la Mare, was that para (a)(ii) of the definition applies, as the offences committed by Mr Mulcaire ‘involv[ed] fraud or dishonesty’. In my view, para (a)(ii) applies only where fraud or dishonesty is an express ingredient of the offence concerned: I do not suggest that the word ‘fraud’ or the word ‘dishonesty’ must necessarily be found in the statutory or common law definition of the offence, but there must be something akin thereto. It is true that an offence under section 1(1) of RIPA will normally involve what many people would characterise as dishonesty. However, dishonesty is plainly not an essential ingredient of such an offence (such as where a police officer carries on intercepting messages, inadvertently failing to notice that his authorisation has expired). I also consider that it would be invidious for a civil court to decide whether, on particular assumed or alleged facts, the defendant, when committing the alleged offence, was guilty of dishonesty or fraud, even though neither is a necessary ingredient of the offence.
70. The second reason, developed by Mr Reed, was that, at least in Mr Coogan’s case, para (b) of the definition of ‘related offence’ applied, as, in addition to his claim for damages and information, he was seeking an injunction to restrain future intercepting of his voice messages. Hence, it was said, Mr Coogan’s case fell within section 72(2)(c), as his claim constituted, or at least included, ‘proceedings brought to prevent any apprehended infringement of such rights’. In my view, that argument must also be rejected. Section 72(2)(c) is concerned essentially with claims for injunctions to restrain infringements which have not yet occurred – so-called *quia timet* injunctions. It is because no actual infringement will have occurred that para (b) of the definition of ‘related offence’ is cast so relatively widely. It would make no sense if a claimant could expand the scope of ‘related offence’ where the infringement has already occurred by including, as can very often be done, a claim for an injunction in the prayer for relief. In short, the word ‘apprehended’ in section 72(2)(c) does not extend to or include ‘further’.
71. Despite rejecting the claimants’ attempt to rely on paras (a)(ii) and (b) of the definition, I am accordingly of the view that Mr Mulcaire is not assisted by the fact that the claimants can only rely on para (a)(i) of the definition of ‘related offence’ in section 72(5). I turn then to the argument that section 72 is incompatible with the Convention.

The argument that section 72 is incompatible with the Convention

72. Although this appeared from the skeleton argument to be the main point on Mr Mulcaire’s appeal, it was somewhat relegated in oral argument, but it is right to record

that Mr Millar did press the point. Essentially, his contention was that, if, as I conclude, in agreement with Mann and Vos JJ, that Mr Mulcaire must give the information sought from him by the claimants, he will not have a fair trial under Article 6 of the Convention, and he seeks a declaration that section 72 is incompatible with the Convention.

73. In my opinion, this argument is wrong. If there is any unfairness such that Article 6 would be infringed, it would be in relation to any criminal proceedings which may or may not be brought against Mr Mulcaire in the future. It is only if such proceedings were brought, and if the information which he provided was used in the criminal trial against him (or, possibly, if the information had been used to assist the prosecuting authorities in formulating or pursuing criminal charges against him) that his Article 6 argument could come into play. At this stage, the argument simply seems to me to be far too speculative to assist Mr Mulcaire in these proceedings.
74. The Strasbourg jurisprudence does not support the argument, which is at least implicit, and probably explicit, in the contentions advanced by Mr Mulcaire, namely that Article 6 carries with it in effect an absolute PSI. In *Weh v Austria* [2004] ECHR 110, paras 39-47, the Strasbourg court explained that its earlier decision in *Saunders v United Kingdom* [1996] ECHR 65 that Article 6 was infringed was based not on the fact that Mr Saunders was required to provide evidence against his will in a civil context, but on the fact that that evidence was used against him in his subsequent criminal trial. In other words, a statutory provision which removes a defendant's right to claim PSI in order to avoid giving evidence in civil proceedings will not fall foul of Article 6, provided that it contains a provision which prevents the evidence being used against him in criminal proceedings— see for instance at [1996] ECHR 65, para 67.
75. However, it cannot even be said that every statutory provision which requires a party to furnish evidence which may then be used against him in criminal proceedings will fall foul of Article 6. In *O'Halloran v United Kingdom* (2008) 46 EHRR 21 (especially at paras 53-59) and in *Brown v Stott* [2000] UKPC D3, [2003] 1 AC 681, the Grand Chamber of the Strasbourg court and the House of Lords respectively held that section 172 of the Road Traffic Act 1988, which required the registered owner of a vehicle to identify the driver (normally at the time of an alleged offence) to the police, did not involve an infringement of Article 6, even if the identification led to a prosecution. The section was held to be proportionate, and to include sufficient safeguards.
76. As Vos J pointed out in argument in the *Coogan* case, in the instant two sets of proceedings the common law and Convention rights in play are not only Mr Mulcaire's right to a fair trial: there are also the claimants' common law and Convention rights to be told who has been responsible for intercepting their voice messages, which messages have been intercepted, and who has been told about them. In agreement with Vos J, I do not accept that what he characterised as the claimants' claim to vindicate their right to respect for their private lives should be outweighed by Mr Mulcaire's right to a fair criminal trial, when it is not clear that there will be such a trial and, even if there is, that it would be unfair. As Mr Reed pointed out on behalf of the claimants, there are many safeguards so far as Mr Mulcaire is concerned, namely section 72(3), the fact that the decision to prosecute must be Convention-compliant, and the fact that, if there is a criminal trial, the court will ensure the

fairness of the trial process at common law and under the Convention, for example pursuant to section 78 of the Police and Criminal Evidence Act 1984.

77. As Mr de la Mare, who appeared for the Secretary of State, said, the reasoning of Lord Hope in *Her Majesty's Advocate v P* [2011] UKSC 44, paras 13-14, supports this conclusion. Lord Hope pointed out that questions of admissibility of evidence are normally for the contracting states, and absolute propositions are difficult to derive from the Strasbourg jurisprudence – both of which points derive very recent and clear support from the reasoning of the Grand Chamber in *Al-Khawarja v United Kingdom* [2011] ECHR 2125.

Two other issues

78. The remaining two issues can be dealt with very shortly. First, it is said that Vos J was wrong to strike out passages in Mr Mulcaire's Defence which justified, or at least explained, his refusal to deny or admit allegations made by Mr Coogan in his Statement of Case, on the ground of PSI. This appears to me to be an arid issue, but I will deal with it.
79. In *V v C* [2001] EWCA Civ 1509, [2002] CP Rep 8, this court held that it was open to a judge to enter summary judgment in favour of a claimant, when the defendant had adduced no evidence to answer the claimant's case, even though the reason for the defendant taking that course was because he wished to invoke PSI. Waller LJ (with whom Brooke and Longmore LJ agreed) said in terms that '[i]t is not a correct invocation of [PSI] to plead the same in a defence' – [2002] CP Rep 8, para 52, which seems conclusive of the issue.
80. However, *Thanki on the Law of Privilege* (2nd edition), para 8.39, expresses doubt as to whether Waller LJ can be correct on the basis that it is proper to plead PSI as a reason for setting out one's case in order to found an application for an adjournment or a stay. I am unpersuaded that this provides a strong enough reason for departing from a clear statement of practice in a judgment in this court. It would be perfectly possible to apply for a stay or an adjournment without pleading PSI as a reason for a sparse defence, and, instead, justifying the reason in a supporting witness statement or affidavit.
81. The second point also arises in relation to Mr Coogan's case. On behalf of Mr Mulcaire, it was contended that safeguards, over and above those given by section 72(3), should be imposed if he is to be required to provide the information which he was ordered by Vos J to provide. In *AT&T* [1993] AC 45, the prosecution authorities agreed to be bound by certain safeguards which ensured that PSI was in practice ensured even though the defendant had to provide the information sought, and this was acceptable to the House of Lords – see per Lord Templeman at [1993] AC 45, 56-57.
82. In my view, we should not accede to this argument. Unlike in *AT&T* [1993] AC 45, Parliament has decided what the appropriate safeguards should be in section 72(3). While I do not consider that this means that the court cannot impose further safeguards as a matter of jurisdiction, it should only do so in where there are specific good reasons for doing so. Further, the various judicial dicta deprecating PSI do not encourage judicial extension of any statutory safeguards. Quite apart from this, the

prosecution authorities have not indicated that they would be prepared to abide by any such safeguards. The desirability of obtaining their agreement, or at least their observations, as to any safeguards before they are imposed is obvious, as is apparent from what Lord Templeman said in *AT&T* [1993] AC 45, 56-57. In those circumstances, it would seem more sensible to leave the question of any safeguards to be decided in due course (if prosecution is being considered or proceeds) by the prosecution authorities or by the criminal courts.

Conclusions

83. Accordingly, I would dismiss these appeals, as:

- i) Much of the information on the voicemail messages of the claimants which have been intercepted by Mr Mulcaire is likely to have been ‘commercial information or other intellectual property’ within section 72(5);
- ii) Although some of the information was not ‘commercial information or other intellectual property’, and, in Ms Phillips’s case, the confidence may have been that of her clients, section 72 can be relied on against Mr Mulcaire in both cases;
- iii) Para (a)(i) of the definition of ‘related offence’ in section 72(5) applies, and, while paras (a)(ii) and (b) do not, that does not assist Mr Mulcaire in resisting any aspect of the orders he is appealing;
- iv) Section 72, as so interpreted, is not incompatible with the Convention, and in particular Article 6; so the orders requiring Mr Mulcaire to give the information ordered by Mann and Vos JJ were correct;
- v) It would be inappropriate to impose any safeguards in favour of Mr Mulcaire over and above those contained in section 72(3);
- vi) Vos J’s order striking out references to PSI in Mr Mulcaire’s Defence in the proceedings brought by Mr Coogan was correct.

Lord Justice Maurice Kay:

84. I agree.

The Lord Chief Justice:

85. I also agree.