

GOODBYE *HELLO!*
DRAWING A LINE FOR THE PAPARAZZI

DOUGLAS V HELLO! LTD (No 3)
[2003] 3 ALL ER 996

DOUGLAS V HELLO! LTD
[2003] EWHC 2629 (Ch)

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On 18 November 2000, the famous film stars Michael Douglas and Catherine Zeta-Jones married and held a reception at the Plaza Hotel, New York. This was described as ‘the showbiz wedding of the year’.¹ A wall of security was put in place to keep the paparazzi out. Invited guests were sent a coded entry card with an invisible ink design on the back, known only to the event planner. The venue was regularly swept for hidden sound or video devices. Upon arrival, each entry card was scrutinised to prove the identity of the bearer, who was then tagged with a gold wedding pin identifying them as an invited guest. Private security guards were also hired. With a security bill of around US\$66,000, the event organisers felt they had ‘locked down’ the venue about as much as possible.

At least three reasons explained these elaborate measures. First, Douglas and Zeta-Jones had unfavourably encountered paparazzi many times before.² Knowing that other celebrity weddings had been spoilt by paparazzi, what chance would Douglas and Zeta-Jones have to enjoy — and to see their family and friends enjoy — an intimate and private wedding ‘without worrying about the

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¹ By *Hello!* magazine. See *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, 1015.

² For example, Zeta-Jones gave evidence that, straight after giving birth to her first child, she had to hide under a sheet to avoid photographers as she was wheeled from the delivery suite.

media’?³ Secondly, as film stars, Douglas and Zeta-Jones were in the business of ‘name and likeness’⁴ with the effect that published photographs assumed professional, not just personal, significance. Thirdly, Douglas and Zeta-Jones had settled upon a ‘wedding strategy’ of which the security measures formed just part. Another part of the strategy was to release one official wedding photograph to all media outlets on the day of the wedding and to sell the exclusive rights to a selection of other official wedding photographs for later publication. It was thought that these actions would help to satisfy public interest in the event, offer the certainty of fair coverage and reduce the market price for any illicit photographs (of poorer quality and with fewer outlets in the market for them), thereby reducing the incentive for any paparazzi intrusion upon the wedding.

In implementing this strategy, and following a bidding war between the publishers of the rival British magazines *Hello!* and *OK!*, Douglas and Zeta-Jones signed a contract for £1 million with *OK!*. This contract gave Douglas and Zeta-Jones full control over all photographers at the wedding, the selection of photographs for publication and ‘copy, caption and headline approval’.⁵ Further, to preserve exclusivity for *OK!*, Douglas and Zeta-Jones were obliged to use their best efforts to ensure that no other media were allowed access to the wedding and that no photographs would be taken other than by the official photographers. So the elaborate security measures can be explained, at least in part, by this contractual benefit and obligation.

By all accounts the wedding was a great success. But the happy couple was in for a shock. Although they did not know it at the time, a paparazzo had penetrated the security and got in.⁶ Hours

³ *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, 1009.

⁴ *Ibid* 1052.

⁵ *Ibid* 1011.

⁶ One of the official photographs taken at the wedding showed, in the background, an unknown man in a tuxedo cradling surreptitiously a small camera in his hands below waist level and tilting it in the direction of an intended shot. No-one knows how he got in. More than two years later, the paparazzo was identified as Rupert Thorpe. He was connected with Phil Ramey, a Californian trader of paparazzi photographs, who had sold the shots to *Hello!*.

later, unauthorised photographs of the wedding were bought by *Hello!* for £125,000 before being rushed into print. Douglas, Zeta-Jones and *OK!* immediately applied for, and were granted, an injunction to prevent *Hello!* from publishing the unauthorised photographs. Two days later, on appeal, *Hello!* succeeded in getting the injunction discharged, with damages said to be a sufficient remedy.⁷ *Hello!* proceeded to publish the photographs in a ‘spoiler’ edition against *OK!*’s ‘official’ edition, which was hastily brought forward from the planned publication date. It would later be found that, in getting the injunction discharged, the *Hello!* defendants had knowingly presented a false case to the Court of Appeal.⁸

Two and a half years later, Lindsay J (in the Chancery Division of the English High Court) gave judgment on the question of liability in favour of Douglas, Zeta-Jones and *OK!* against the *Hello!* defendants.⁹ Liability was established on two grounds: breach of confidence and breach of the *Data Protection Act 1988* (UK). Lindsay J neither accepted nor rejected a claim for breach of privacy holding that, even if such a law existed, in this case Douglas and Zeta-Jones would not have fared any better than they would have done in making out a claim for breach of confidence.¹⁰

The significance of this judgment lies in the analysis of the breach of confidence action as applied in the context of a paparazzo intrusion into the private sphere of celebrities. Lindsay J embarked upon a two step approach. First, he sought to establish that the three elements of a breach of confidence action, as enunciated in *Coco v A.N. Clark (Engineers) Ltd*,¹¹ could be satisfied. Secondly, if so satisfied (and assuming the confidence was no ‘mere trivial tittle-tattle’¹²), the court had to decide whether substantive (rather than nominal) relief should be provided. Relevant to this second step was the need to strike a balance between confidentiality and freedom of expression. In

⁷ *Douglas v Hello! Ltd* [2001] 2 All ER 289.

⁸ *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, 1042.

⁹ *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996.

¹⁰ *Ibid* 1062.

¹¹ [1969] RPC 41.

¹² *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, 1051.

turn, this required Lindsay J to consider the *Human Rights Act 1998* (UK) and, through this, various parts of the European Convention on Human Rights and the code of conduct in force under the British Press Complaints Commission, at least insofar as this concerned ‘privacy’.

Taking the first step, the first element of *Coco* is whether the information has ‘the necessary quality of confidence about it’.¹³ But what ‘information’ are we talking about here? Lindsay J referred to ‘that which the two rival magazines each bid a £1m or more to obtain’.¹⁴ He tagged the wedding and, ‘in particular, the reception coupled with rights to the photography of the event’, as a ‘commodity’ and a ‘valuable trade asset’.¹⁵ Its value ‘depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by Miss Zeta-Jones and Mr Douglas for the benefit of them and of the third claimant’.¹⁶ Characterised in this way, the case was concerned with a commercial, rather than a personal and individual, confidence. The wedding, when coupled with photographic rights, was a trade secret. One difficulty with this analysis of the ‘information’ in which confidence was said to subsist is that Douglas and Zeta-Jones freely released, on the night of the wedding, a wedding photograph of themselves. In response, Lindsay J seemed to lay emphasis upon the fact that this photograph did not show the bride’s dress nor the wedding cake. But, had it done so, would the ‘information’ have lost the necessary quality of confidence?

The second element of *Coco* is that the information must have been imparted in circumstances importing an obligation of confidence. This obligation extends to third parties who receive confidential information and who should realise that it must have been obtained in breach of confidence. The *Hello!* defendants were in such a position. They knew of the elaborate security arrangements at the hotel and the exclusive contract with *OK!* and, further, ‘had indicated to paparazzi in advance that they would pay well for photographs ... [knowing] the reputation of

¹³ Ibid 1044–1045.

¹⁴ Ibid 1052.

¹⁵ Ibid.

¹⁶ Ibid 1053.

the paparazzi for being able to intrude'.¹⁷ Their consciences were, according to Lindsay J, 'tainted'.¹⁸

The third element of *Coco* is unauthorised use of the confidential information to the detriment of the party communicating it. Lindsay J held that, by *Hello!* publishing the unauthorised photographs, Douglas and Zeta-Jones suffered detriment in the form of distress, inconvenience and the out-of-pocket expenses necessary to bring forward the *OK!* edition carrying the official photographs. *OK!* suffered the latter detriment as well, in addition to losing sales and the kudos of having a world exclusive (as a trade secret to the point of publication). So, a non-trivial claim for breach of confidence was made out.

Turning to the second step, Lindsay J noted that the right to freedom of expression under art 10(1) of the European Convention on Human Rights was subject to art 10(2), including 'such conditions ... as are prescribed by law and are necessary in a democratic society ... for preventing the disclosure of information received in confidence ...'; as well as the art 8 right for respect to private and family life.¹⁹ Further, the Press Complaints Commission code was squarely broken by *Hello!*, nor did *Hello!* seek to justify the intrusion by suggesting its actions were carried out in the public interest. On balance, Lindsay J found that the *Hello!* defendants' rights to freedom of expression were 'overborne by the rights of all claimants respectively under the law of confidence'.²⁰ In the circumstances of this case, confidentiality trumped free speech.

In finding liability, Lindsay J drew a line on the ground across which paparazzi (and those dealing with them with knowledge) could not — at law — cross. But since paparazzi are not renowned for respecting legal boundaries,²¹ what price would be paid for crossing the line?

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid 1046.

²⁰ Ibid 1055.

²¹ Ibid 1001: 'In varying degrees, as may become necessary for them to obtain the photographs they seek, they turn to deception, to intrusion and, occasionally, to unlawful behaviour'.

In November 2003, Lindsay J came to assess damages in *Douglas v Hello!*,²² the trial having been split as to questions of liability and damages. The *Hello!* defendants were found liable in the sum of £1,047,756. Reflecting the commercial arrangements by which *OK!* acquired the trade secret, *OK!* was awarded £1,033,156 — most of which related to the loss of reasonably expected revenue from the *OK!* publications as originally planned. For breach of confidence, Douglas and Zeta-Jones were each awarded £3,750 for distress caused by publication of the unauthorised photographs (which had to be separated from the distress from learning that an intruder was at the wedding, which was not compensable), and £7,000 (combined) for out-of-pocket expenses caused by their involvement in bringing forward publication of the ‘official’ edition of *OK!*. For liability under the *Data Protection Act 1998* (UK), Douglas and Zeta-Jones were each awarded nominal damages of £50. In striking the total figure, Lindsay J said:

... looking at this substantial award in a general way ... I would not regard it, given the resources of *Hello!*, as of a size that is likely materially to stifle free expression and yet, without its going beyond the compensatory and into the penal, it is, I would expect, such as may make *Hello!* alive to the unwisdom of its acting as it did.²³

Turning to the implications of the judgments on liability and quantum, four things might be drawn from the case. First, much turns upon characterising the private wedding, coupled with the photographic rights, as a commercial confidence. This is the novel point of the case. The foundation for this finding was the status of Douglas and Zeta-Jones as famous actors and celebrities. In other words, they had ‘star power’ and sought ‘to manage their publicity as part of their trade or profession’.²⁴ If the information (or event) had been found to have the quality of personal and private, rather than commercial, confidence then that quality of confidence might well have been lost by the action of Douglas and Zeta-Jones releasing and selling official photographs. However, such selective release and sale is a

²² [2003] EWHC 2629 (Ch) (7 November 2003).

²³ *Ibid* [59].

²⁴ *Douglas v Hello! Ltd (No 3)* [2003] 3 All ER 996, 1053.

common means by which trade secrets are commercially exploited.

Traditionally, separate approaches have been taken to personal, as distinct from commercial, secrets. This case marks a new approach, perhaps confined to those with celebrity status, by which the personal and private nature of the information or occasion itself is the reason this acquires value as a commodity. Lindsay J postulates a ‘hybrid kind’ of confidence in which, ‘by reason of it having become a commodity, elements that would otherwise have been merely private become commercial’.²⁵ Does it follow, at least for those celebrities having greatest ‘star power’, that all personal and private aspects of their lives are commodities and trade assets with a market value? Probably it does, if the current content of much media material is any guide. The benefit of this to celebrities is that the law now recognises that they — as trade secret holders — have control over whether and, if so, how and to what extent, that commercial value is realised.

But is it a question of ‘celebrity’ or one of ‘commodity’? In other words, might there be occasions where non-celebrities could also make a claim based upon characterising a personal or private confidence as a trade secret? Typically, of course, there is no commercial interest from media outlets and paparazzi in an ordinary, ‘suburban’ wedding. But, for example, might this status change if the private wedding of a non-celebrity happens to include home video footage of the effects of a natural disaster (such as an earthquake) or a terrorist attack? Perhaps here, something which was ‘personal and private’ acquires the status of a ‘commodity’? From Lindsay J’s formulation, it seems that whilst ‘celebrity’ and ‘commodity’ will commonly go together, the threshold question is whether personal and private information acquires status as a ‘commodity’, rather than whether the subject acquires status as a celebrity. In answering this question, perhaps the law of confidence could borrow from that well-known copyright adage to the effect that, ‘what is worth [taking] is prima facie worth protecting’?²⁶

²⁵ Ibid.

²⁶ *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, 610.

In formulating damages for breach of a commercial confidence, it is interesting that Douglas and Zeta-Jones were awarded damages for ‘distress’ — ahead of damage commonly associated with breach of personal and private confidences. The thing that Douglas and Zeta-Jones had bargained for under their contract, but lost, was ‘copy, caption and headline approval’ together with a high level of quality assurance with the photographs taken at the wedding. In other words, they lost direct control over what was published. The ‘distress’ seems to be tied to the consequences of the unauthorised publication which, in turn, flowed from that loss of control.

Secondly, it is worth considering what might have happened if Douglas and Zeta-Jones had not sold the photographic rights or otherwise released any wedding photos to the public. On Lindsay J’s analysis, they would still be left sitting on a valuable, although not commercially exploited, trade secret. They would, of course, still have been free to exploit that trade secret — by selectively selling or releasing wedding photographs — at any time in the future. Two consequences might have been different. One is that Douglas and Zeta-Jones would have found it much easier to justify and hold the interim injunction — preventing unauthorised publication in the first place — which was the primary remedy sought. Their decision to commercially exploit their wedding was significant in the Court of Appeal setting aside the interim injunction on the ground that damages would be a sufficient remedy. A second consequence is that substantial damages or an account of profits, reflecting the market value of unauthorised photographs, would have been awarded directly to Douglas and Zeta-Jones, the trade secret not having been sold.

Thirdly, it is worth reinforcing just how adverse the consequences of ‘crossing the line’ were for the *Hello!* defendants. The financial consequences were not limited to the substantial damages directed at making ‘*Hello!* alive to the unwisdom of its acting as it did’. In addition, one should not discount the substantial costs and inconvenience caused to the *Hello!* defendants as well as the costs liability associated with losing the action.²⁷ What is more, the case served to expose the

²⁷ In addition to their own costs, which must have been substantial over more than three years, the *Hello!* defendants were ordered to pay the claimants’

conduct, knowledge and practices of the *Hello!* defendants. It was the fear of such exposure — perhaps reflecting their ‘tainted consciences’ as found — which led to a trail of lies and deceit and attempts to cover-up. Much of this conduct was directed towards distancing the *Hello!* defendants from the paparazzo and knowledge of what occurred, with the effect that a defence could be mounted that those defendants were bona fide purchasers for value without notice (ie free from ‘taint’). Such a device, by which ‘go-betweens’ are inserted between the paparazzo and the publisher, may succeed in scuttling future claims based on breach of confidence. The whole action turns upon finding a defendant with a ‘tainted’ conscience.

Finally, the first step of Lindsay J’s analysis in the judgment on liability might readily translate to Australian law, which also adopts the test enunciated in *Coco v A.N. Clark (Engineers) Ltd*²⁸ as the framework for establishing a breach of confidence action. It is only at the second step of the analysis that Australian law diverges. That is, the step where the *Human Rights Act 1998* (UK), the European Convention on Human Rights and the code of conduct of the British Press Complaints Commission come into play. So, on this analysis, Australian courts would not be bound or constrained by these instruments in deciding whether, and how much, substantive relief should be provided, although it is clear that the same sort of balancing exercise with freedom of speech would need to be performed. Looking at the larger picture, the *Hello!* litigation forms part of the current developments in Australia,²⁹ New Zealand³⁰ and the United Kingdom³¹ which are generating a good deal of momentum towards profound changes in the law relating to breach of

costs as to: (a) 100%, on an indemnity basis, in relation to an interlocutory hearing before the Vice Chancellor where the deceitful and misleading conduct of the *Hello!* defendants was exposed; (b) 75%, at the standard rate, in relation to the judgment on liability; and (c) 85%, at the standard rate, in relation to the judgment on quantum – *Douglas v Hello! Ltd* [2004] EWHC 63 (Ch).

²⁸ [1969] RPC 41.

²⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; *Grosse v Purvis* [2003] QDC 151 (16 June 2003).

³⁰ *Hosking v Simon Runtig* [2004] NZCA 24 (25 March 2004).

³¹ *Campbell v MGN Limited* [2004] UKHL 22 (6 May 2004).

confidence and privacy. Generally, judges seem disposed towards stretching the boundaries of legal protection.

Nevertheless, despite the long-running battle fought out in *Douglas v Hello! Ltd*, the barrier created for the paparazzi by the law of confidence is still no Iron Curtain. Self-help security measures are required to establish a physical barrier and to clothe the information or occasion so contained with the necessary quality of confidence. Even so, beyond the limits and effectiveness of their own security measures, celebrities are now able to warn the paparazzi (and those supplied by them) against the serious legal consequences of ‘crossing the line’.