determinations, it is nonetheless a significant step towards greater recognition of the decisive nature of children's interests under the ECHR.

However, caution must be exercised in reading too much into this decision. While it is true that as far as it relates to the substantive analysis of whether an adoption should be made, the English and ECtHR approaches have moved substantially closer together, it does not reflect the situation in all children's rights cases. In particular, cases that concern the procedural rights of parents to be adequately involved in the decision-making process or private family law disputes (both of which dominate the majority of complaints under article 8) remain unaffected by this decision and still retain the traditional "of particular importance" approach to children's rights. It appears that although the ECtHR has been happy to sideline parental rights when dealing with abuse and neglect of children and the need for alternative care, it is less likely to do so in questions relating to, for example, contact, residence and relocation (see *Neulinger and Shuruk v Switzerland* (Application no. 41615/07) (2012) 54 E.H.R.R. 31). It is in these areas that the differences in approach to decision-making between the English courts and the ECtHR are most prominent, and the contrasting starting points for judicial reasoning of greatest importance. This issue has yet to be grappled with by the ECtHR, or to any real effect by the English courts, and the academic objections to the compatibility of the different approaches remain in this context as cogent as ever.

Nevertheless, *YC v the United Kingdom* has importance for the increasing weight placed by the ECtHR on children's rights in public law cases. The European rulings now comply more fully with the requirement under the United Nations Convention on the Rights of the Child that where adoption is concerned, the child's interests should be paramount, rather than simply primary. The debate may not be over concerning paramountcy and the ECHR, but in relation to public law adoption cases at least, a reconciliation may be approaching.

CLAIRE SIMMONDS

WHAT IS "INTELLECTUAL PROPERTY"?

THERE has been a dramatic, though largely unnoticed, shift in the function of the concept of intellectual property over the last forty or so years. In 1981, when Professor Cornish authored the first edition of his pioneering textbook on intellectual property, he spent a little time explaining that "intellectual property" was a category of distinct laws (copyright, patents, trade marks, designs etc.) that had developed somewhat by analogy with the general legal rules of property in

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tangible movables: *Intellectual Property: Patents, Copyright Trade Marks and Allied Rights* (London, 1981) ix, 3–4. In this context, the gathering together of these fields was as much for educational convenience as anything else: certainly, there was little sense that the various regimes shared a single coherent framework. As Cornish explained, "[t]he various aspects of the subject differ in purpose and in detailed rule. Nonetheless there is good sense in studying them together".

However, "intellectual property" has rapidly moved from being a category of laws developed for the convenient presentation of distinct legal regimes into a legal concept – a category in law. The concept of intellectual property is now ritually used by law-makers at international, regional and national levels: the WTO-TRIPs Agreement requires Contracting Parties to provide various remedies for infringement of "intellectual property rights"; the EU's Enforcement Directive 2004/48 (O.J. [2004] L 157/45, as corrected by O.J. [2004] L 195/16) likewise requires Member states to offer certain procedures and remedies in relation to "intellectual property rights"; the Access to Documents Regulation 1049/2001 (O.J. [2001] L 145/43), which entitles citizens to examine documents held by the EU institutions, provides an exemption from disclosure where it would undermine the protection of "commercial interests of a natural or legal person, including intellectual property"; and Article 17(2) of the EU's Charter of Fundamental Rights even declares that "[i]ntellectual property shall be protected". Today, whether something constitutes intellectual propertycan have significant legal implications. See, for example, *Vestergaard Frandsen S/A and Ors v Bestnet Europe Ltd* [2011] EWCA Civ 424 at [56].

What, then, is "intellectual property"? In *Phillips v Mulcaire* [2012] UKSC 28, the Supreme Court was asked to rule on the meaning and scope of the concept of "intellectual property". The issue arose in the context of an exception to the privilege against self-incrimination contained in section 72 of the Senior Courts Act 1981. That section provides that a person is not excused from answering a question put in proceedings or complying with an order on the basis that to do so would tend to expose that person to proceedings for a related offence if proceedings are civil proceedings "for infringement of rights pertaining to any intellectual property or passing off". Subsection 5 defines "intellectual property" as "any patent, trade mark, copyright, design right, registered design, technical or commercial information or other intellectual property". Although the provision requires disclosure in such cases for the purpose of civil proceedings, the defendant's privilege is preserved to the extent that no statement or admission so obtained can be relied on in proceedings for any related offence.

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The background to the case relates to the notorious *News of the World* "phone-hacking scandal". Nicola Phillips, an employee of Max Clifford, the famous publicist, alleged that her phone had been hacked and confidential information obtained by Glenn Mulcaire on behalf of News International. She brought a civil action for breach of confidence and sought disclosure of documents held by Mulcaire to support her case. Mulcaire argued that disclosure would be likely to incriminate him. He had already been convicted of criminal offences under section 1 of the Criminal Law Act 1977 and the Regulation of Investigatory Powers Act 2000 in relation to other such incidents. The phone messages that Mulcaire was said to have accessed were from clients of Phillips, and contained both their private information and information about their "finances, commercial business transactions, professional relationships and future career plans" (at [6]). The questions facing the Supreme Court were: (a) whether the subject matter of these messages constituted "technical or commercial information" or, if not, whether the information was "other intellectual property"; and (b) whether disclosure of that information would tend to expose Mulcaire to proceedings for "a related offence".

The Supreme Court held that the information constituted "technical or commercial information" and so must be disclosed by Mulcaire. The Court rejected Mulcaire's argument that "technical or commercial information" must be interpreted narrowly as covering only such information as could properly be referred to as "intellectual property". The Supreme Court (at [18]) agreed with Vos J. who at first instance in a related action, *Gray v News Group Newspapers Ltd* [2011] EWHC 349 (Ch), [2011] 2 W.L.R. 1401 at [77], had declared that "there is no universal definition of the term". Lord Walker, giving the only speech, explained that the term "intellectual property" lacked "potency". There were some matters (copyright, patent, trade marks) which everyone agreed fell within its remit, but there was no agreement as to its outer boundaries (at [20]). "Intellectual property" would include some statutory rights not listed, such as database rights or plant breeders' rights, but the notion was not of assistance in interpreting the phrase "technical or commercial information". That said, Lord Walker recognised that there were difficulties with defining "technical or commercial information", though it clearly included as part of its core content "trade secrets", that is not only "products and processes" but also "a wide range of financial information about the management and performance of a business, and plans for its future" (at [22]). He appeared to approve of Lord Neuberger M.R.'s holding in the Court of Appeal that whether information was "commercial" was a matter of character rather than value. As the claimant's pleadings alleged that the messages that had been accessed contained commercial as well as

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personal information, the House of Lords was satisfied that the statutory exemption to the privilege against self-incrimination was applicable.

This meant the Court did not need to address Phillips' argument that personal information that was covered by the obligation of confidence amounted to "other intellectual property". Nevertheless, recognising that the point was an important one and could be determinative of other claims, Lord Walker proceeded to consider it. Significantly, the Supreme Court did not agree with the Court of Appeal ([2012] EWCA Civ 48, [2012] 2 W.L.R. 848, *sub. nom. Coogan v News Group Newspapers*) that such information could be regarded as falling within the designation "intellectual property", in part because the statutory definition had explicitly referred to technical and commercial information, but also because section 72 had been enacted in response to "commercial piracy" and thus was intended to "fortify remedies against unlawful trading practices" (at [28]–[29]; see also [20] (where he refers to "unlawful trade competition")). Consequently, personal information was in general not to be regarded as intellectual property (even if confidential). The Court left open whether, in situations where celebrities treated their own personal information as material for commercial exploitation, that information could properly be called "commercial information" (at [31]).

The Supreme Court then had to decide whether the information for which disclosure was sought would tend to expose Mulcaire to proceedings for a "related offence", and, in particular, whether potential proceedings for conspiracy to commit an offence under the Criminal Law Act would count as an unrelated offence. If so, the exemption from the privilege was inapplicable. The statute indicated that a related offence included "any offence committed by or in the course of infringement", and the apparent difficulty lay in the fact that a conspiracy seemed by definition to precede the act of infringement. However, Lord Walker made short work of the problem, noting that authorities (*DPP v Doot* [1973] A.C. 807) indicated that conspiracy was a continuing offence, continuing from the moment of the unlawful agreement until the point the agreement was terminated by "completion, abandonment or frustration". Consequently, every time Mulcaire intercepted Phillips's messages, an act was carried out pursuant to the conspiracy, so an offence would be committed in the course of infringement.

While section 72 of the Senior Courts Act is a good example of the transformation of the concept of "intellectual property" from a category of laws to a legal concept in its own right, the decision in *Mulcaire* illustrates that the concept retains a protean quality. For the moment, the "impotent" concept of "intellectual property" will find its outer

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limits defined by reference to the context of the legislation in which the term has been used. This will not always be straightforward, given the varied nature of the contexts in which the term appears. Just as the *Mulcaire* case framed "intellectual property" in terms of "unlawful trade competition", similar concerns likely delimit the concept in the context of TRIPs ("'trade-related' aspects of intellectual property rights") and the Access to Documents Regulation (where other exemptions apply to personal data). But many aspects at "the core" of "intellectual property", such as the moral rights of authors and performers, have as much to do with personality and reputation, matters not far removed from the personal confidences in *Mulcaire*. We will have to wait and see whether these personalist or dignitarian interests, along with personal confidences, fall within the meaning of "intellectual property" in the context of the Enforcement Directive and Charter.

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