

Neutral Citation: [2018] NIQB 41

Ref: BUR10570

Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 28/2/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

BNC

Plaintiff;

-and-

THE IRISH NEWS LIMITED

Defendant.

BURGESS J

[1] The Plaintiff, anonymised in a Summons dated 12 September 2017, seeks relief against the Defendant arising from the publication in its newspaper and online editions commencing on 20 April 2017 of a photograph/digital image ("the Image") taken on the iPhone of the Plaintiff in 2015, and which was posted on her Facebook page in that year, and seemingly not removed on or before 20 April 2017.

[2] The Image appeared in an article under the headline "Boxer's mother accused of bringing drugs into jail". The report was of a bail hearing relating to an allegation that the Plaintiff sought to supply drugs to her son who was in Maghaberry Prison. In due course the Plaintiff pleaded guilty to the offence and was duly sentenced. On leaving court a further photograph was taken by a photographer which featured in later editions.

[3] There is no complaint about the accuracy or the fairness of the report of the bail hearing, nor as regards the photograph taken later. Instead the complaint is directed to the use of the Image as part of that report.

[4] The Summons sought the following reliefs:-

"(1) Pursuant to section 91 of the Judicature (Northern Ireland) Act 1978, section 6 of the Human Rights Act 1998 and the Court's inherent jurisdiction

an Order granting the Plaintiff leave to issue the Writ of Summons in an anonymised form, a reporting restriction in relation to the reporting of these proceedings and/or an anonymity order in respect of the identification of the Plaintiff in the terms of a draft order scheduled to the summons;

(2) An interim injunction preventing the Defendant from publishing the Image as set out at schedule 1 to the Summons;

(3) An order pursuant to section 10 of the Data Protection Act 1998 requiring the Defendant as a Data Controller to cease, or not to begin, processing, or processing for the purpose of publication the Image; and

(4) Further or other order as deemed appropriate by the court.”

[5] In an accompanying draft Writ and Statement of Claim, the Plaintiff sought the following reliefs:

“(1) An order providing for a reporting restriction by way of anonymity order in respect of the Plaintiff;

(2) Further, or in the alternative, an interim and/or final injunction preventing the Defendant from publishing the Image;

(3) Further, or in the alternative, an order pursuant to section 10 of the Data Protection Act 1998 requiring the Defendant as the Data Controller to cease or not to begin processing or processing for the purpose of publication the Image;

(4) Further, or in the alternative, damages and/or an account of the profits for breach of copyright;

(5) Further, or in the alternative, compensation pursuant to section 13 of the Data Protection Act 1998 and consequential relief pursuant to section 14 of the Data Protection Act 1998;

- (6) Further, or in the alternative, damages including aggravated damages at common law for invasion of privacy;
- (7) Interest thereon;
- (8) Costs;
- (9) Further, or other Order as deemed appropriate by the court”.

The factual matrix

[6] In 2015, the Plaintiff asked her friend to take the Image on her (the Plaintiff's) iPhone. The Image was posted by the Plaintiff to her Facebook account. It shows the Plaintiff socialising in a private residence, and clearly in a cheerful mood. Whilst it was a friend who actually took the Image on the Plaintiff's iPhone, for the sake of clarity an assignment of any interest the friend may have in the copyright of the photograph was assigned to the Plaintiff, and therefore the Court is satisfied that the copyright to the Image lies with the Plaintiff. I am also satisfied that a person who creates a photograph or indeed a video retains that copyright when it is uploaded to Facebook and other social sites.

[7] Whilst that is the starting point, the Court has considered whether, by uploading the Image to this site, any specific or implied right was granted to any person having access to the Facebook page to download and share the Image, since if there was, there would not be an infringement of any of the rights of the Plaintiff. Under the terms of the use of Facebook, “the owner of any copyright specifically gives Facebook (my emphasis) permissions, subject to privacy and application settings, to a non-exclusive, transferrable, ... royalty free, world-wide licence to use any IT content that you post on or in connection with Facebook”. Also included in the terms addressing anyone accessing a site, under the heading “Protecting Other Peoples’ Rights”, Facebook specifically state that they respect other peoples’ rights and expect the user to do the same - and in doing so, if they collected information from users, they would obtain their consent, explaining what information had been collected and how it was to be used.

[8] I note that the licence granted to Facebook is non-exclusive, and therefore the consent of Facebook to use the Image would not be required (contra see Briggs J in *RocknRoll v Newsgroup Newspapers Ltd* [2013] EWHC 24 (CH) (42) - (44).)

[9] There is some dispute in this case as to the privacy settings of the Plaintiff. Clearly, on or before 20 April 2017, it was possible to access the Image. There is no evidence before the Court that there was any restriction placed by the Plaintiff through her privacy settings. Such settings would require to be taken into account when deciding to publish any picture obtained from the Facebook pages. For

example, if someone has photographs and a profile that anyone can view, it is likely to be more acceptable to publish those photographs than if privacy settings limited photographs to a closed circle of contacts, rather than a mass audience.

[10] Therefore, while I take as my starting point that the copyright lies with the Plaintiff, I have considered 3 other scenarios as to whether or not her consent has been given or whether there are other exceptions to the general rule, namely:

- (i) By affording access to everyone, if the privacy settings have not been properly set to protect the Image, has an implied consent been given?
- (ii) Would the use of the Image in this case fall outside the General Editorial Guidelines of the Press Complaints Commission or its rulings - that it is acceptable in some circumstances for the press to publish information taken from social media websites, which could arise when the individual concerned has come to public attention as the result of their own actions, or are otherwise relevant to an incident currently in the news, when they may expect to be the subject of some media scrutiny. To that is added further guidance that journalists must take into account whether a photo is “innocuous and used simply to illustrate what someone looks like” saying in such a case “it is less likely that publication will amount to a privacy intrusion”; and
- (iii) Assuming the right of privacy does exist, should the approach of the court be to carry out a balancing exercise between the rights of each party under Articles 8 and 10 respectively of the Convention.

[11] I have carefully considered the factual matrix of the background to this case and have concluded what I believe are the decisions to be made to the two underlying issues in the Plaintiff’s claim, namely:

- (a) The use of the Image, whether addressed under the respective headings of an invasion of privacy, a breach of the Data Protection Act 1998 or a breach of copyright in the Image which shows the Plaintiff enjoying herself in a domestic setting. It is alleged that this is dissonant with (or jars with) the reporting of criminal proceedings, and is entirely unrelated to the criminal charges made against her (‘Issue 1’); and
- (b) Injunctive relief should be given to remove the Image and that damages should be paid, including aggravated damages for the distress “a reasonable person of ordinary sensibility would feel if placed in the same position as the Plaintiff and faced with the same publicity (‘Issue 2’).

Issue 1

[12] The use of the image was in conjunction with the narrative in the report, and no objection has been taken to the reporting of the alleged offence or other personal details of the Plaintiff. The commission of this offence was not a purely private matter, such as taking drugs, nor did it in any way impinge on any aspect of her private life. The offence was one in which the public would have an interest on being informed. The subject of drugs in prison was, and remains, a matter of great public concern, to which concern is added how the drugs are obtained. The photograph identifies the person referred to in the narrative. There is nothing in the photograph depicting her in a derogatory or unseemly light, for example, in police custody or in handcuffs, but rather is one of a person enjoying herself. It isn't argued, and could not be argued that it would have affected the fairness of the trial. While it is stated that a number of unpleasant comments were included in the Defendant's Facebook page in response to the publication of the article, and the Image, there is no evidence placed before the Court that the report or, in particular, the identification of the Plaintiff, gave rise to a risk of personal injury from a third party, either at the time or since, despite indeed the publication of a different photograph later in the proceedings when her guilt had been established.

[13] The demeanour of the Plaintiff in the Image certainly jars with the seriousness of the offence which at that stage had been alleged, and subsequently proven, in circumstances where she would have known that she was facing an inevitable court appearance and sentencing. The question can be put as to whether the publication of this photograph, as opposed to one simply identifying the Plaintiff, contributed significantly to the public interest debate.

[14] These issues, on both sides of the argument, will be considered by the Court in the overall balancing exercise as and when it comes to the issue of considering Article 10 of the Convention.

Issue 2

[15] The second issue is whether or not this particular image caused the Plaintiff distress. Its publication came after she had been charged with a serious offence. I believe what would have caused her greater distress were:

- (a) That she had been charged with such an offence;
- (b) Knowing her guilt, that she would be facing court and the inevitable sentencing by the court for that offence; and
- (c) The publication of the facts of the charge with personal details which, without a photograph, would have identified her to members of the public who knew her, not least by way of a relationship to her son whose name is juxtaposed with that of hers in the article.

[16] I have considered the report of Ms Sharon Lynch, Community Psychiatric Nurse, dated 10 March 2016, some 18 months earlier than the publication of the Image. This charts the Plaintiff's pre-existing mental health problems over a very long period of time. Inevitably, given its date, there is nothing in the report which allows the Court to attribute any of the symptomology presently exhibited by the Plaintiff to this incident, let alone the use of the Image, let alone the nature of the Image.

[17] Given the above factors, I have concluded that the nature of the Image would have added little, if anything, to the Plaintiff's distress and consequently to her wellbeing. I repeat myself by stating that this distress would have been brought on her wholly or to a very substantial part by her involvement in this offence, the inevitable consequences of that involvement and the publication of details of her name and connection to her son.

The Legal framework

[18] Right to Privacy

Setting to one side for the moment whether by reason of the privacy settings the Plaintiff had given an implied consent to the use of any photographs on her Facebook page, in the circumstances of the case had the Plaintiff a reasonable expectation of privacy? In *Weller v Associated Newspapers Ltd* [2016] 1WLR page 1541 at 1546 Lord Dyson MR stated:

"15. The correct general approach to the question whether a publication is in breach of a person's privacy rights has been considered on many occasions both in our domestic courts and in Strasbourg. The House of Lords decision in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 is a good starting point. It established that a two stage test should be applied in these cases. The first stage is to ask 'whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'. If the person did not have such an expectation, the claim for misuse of private information, which is effectively a breach of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, fails. If he or she did have such an expectation, then the court has to conduct the balancing exercise of weighing the person's privacy rights under Article 8 of the Convention against the publisher's right to freedom of expression under Article 10 of the Convention. The balancing exercise was described by Lord Steyn in *Re S (a*

child)(*Identification: Restrictions on Publications*) [2005] 1 AC 593 at paragraph 17 as 'an intense focus on the comparative importance of the specific rights being claimed'.

16. In Murray v Express Newspapers Plc [2009] Ch. 481 the court stated:

'36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher'."

This approach was recently endorsed by the Supreme Court in *In re JR 38* [2015] UKSC 42, [2015] 3 WLR 155 at para 88 per Lord Toulson JSC".

[19] Freedom of Expression

The general principal of freedom of expression has been the subject of many cases, but can be encapsulated in the following principles.

- (a) It constitutes one of the essential foundations of a democratic society and is applicable not only to information that is favourably received but also to that which offends.
- (b) The essential role played by the press in a democratic society has been repeatedly emphasised. Although the press must not overstep certain bounds, regarding, in particular, protection of the reputation and rights of others, its duty is to impart information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas, the public also has a right to receive them.

- (c) The duty of reporting and commenting on court proceedings is inherent in the freedom of expression which contributes to the public status of the press, as envisaged in Article 6(1) of the Convention.
- (d) It is not for the court to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case.
- (e) However, freedom of expression carries with it duties and responsibilities which apply to the media even with respect to matters of serious and public concern. Those duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of an individual and infringing the rights of others. Therefore it is necessary for the media to verify factual statements that may be defamatory of the individual. But, in order for Article 8 of the Convention to come into play:
 - an attack on the person's reputation has to attain a certain level of seriousness and occur in a manner causing prejudice to personal enjoyment of the right to respect for private life;
 - the Article cannot however be relied on in order to complain of a loss of reputation which was the foreseeable consequence of a person's own actions, such as, for example, the commission by him or her of a criminal offence.

See *Axel Springer v Germany* [2012] EMLR 151

[20] Injunctive Relief under section 12 of the Human Rights Act 1998.

The applicable test to set out in the *Cream Holdings v Banjaree* [2004] UKHL 44 [1], [13-23]: -

"13 ... In the 1960s the approach adopted by the courts to the grant of interlocutory injunctions was that the applicant had to establish a prima facie case. He had to establish this before questions of the so-called 'balance of convenience' fell to be considered. A prima facie case was understood, at least in the Chancery Division, as meaning the applicant must establish that as the evidence currently stood on the balance of probability he would succeed at the trial.

14. The courts were freed from this fetter by the decision of your Lordships' House in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Lord

Diplock said, at pages 407-408, that the court must be satisfied the claim 'is not frivolous or vexatious; in other words, that there is a serious question to be tried'. But it is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavit nor to decide difficult questions of law calling for detailed argument and mature consideration. Unless the applicant fails to show he has 'any real prospect of succeeding in his claim for a permanent injunction at the trial', the court should proceed to consider where the balance of convenience lies. As to that, where other factors appear to be evenly balanced 'it is a counsel of prudence' for the court to take 'such measures as are calculated to preserve the status quo'.

15. When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under Article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a 'serious question to be tried' or a 'real prospect' of success at the trial.

...

22. ... Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the

circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court that he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on Article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

23. This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to

countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant.”

[21] One final parameter which I have considered is that even if there was a claim for contending that publication of an unauthorised photograph would impinge a right of privacy, would any award in damages which might eventually be made be a satisfactory or adequate remedy when measured against the refusal of an interlocutory injunction?

Discussion

[22] The Plaintiff uploaded onto her Facebook page a photograph of herself in a domestic setting, a photograph showing someone clearly enjoying themselves in a social context. There is a dispute as to the privacy settings. If the Court were to conclude that such settings enabled third parties, unconnected with the Plaintiff, both to access and to download, and in due course use any such photograph, then no right to privacy would arise and in such circumstances no relief by way of injunction, interim or otherwise, could be imposed.

[23] However, assuming for the moment that no such release was granted by the Plaintiff and that the copyright existed in her, a use of the Image would be an infringement of her Article 8 rights. However refusal to allow the Defendant to use that Image would in turn be an infringement of their Article 10 rights.

[24] I have set out above all of the relevant issues that might inform such a balancing exercise. I repeat that there is no objection taken to the report of the offence giving rise to the publication of the bail hearing. That set out the nature of the offence, and that it was the Plaintiff who was being charged by way of giving her name and her relationship to the prisoner for whom the drugs were being introduced into the prison. It is not the use of a photograph per se to which objection is taken, and which grounds the application for the interim relief, but rather the social setting of the Plaintiff reflected in the Image. Having balanced all of the circumstances, I am satisfied that the balance of convenience falls firmly in favour of the Defendant in this particular matter.

[25] I therefore determine that the Plaintiff has failed to satisfy me of the likelihood of her succeeding to obtain a final injunction. I also conclude that any damages that might be awarded for any distress the Image has caused, over and above the distress of the whole of the event giving rise to the criminal proceedings, will be more than adequate to meet her claim.

[26] In those circumstances the Court refuses the application for interim injunctive relief.

Anonymity

[27] That leaves the Court with the application that these proceedings and indeed any proceedings that follow should be anonymised. The first point to be made is that imposing any such anonymity would seriously undermine the order just made in terms of the refusal of interim relief. In effect, having failed to have the Image removed, reflecting the freedom of expression of the Defendant in publishing and continuing to publish the Image, that determination would effectively be undermined by removing the name of the Plaintiff from the proceedings. Secondly, any reporting of the proceedings would inevitably refer to the narrative and background of the proceedings, which would identify the Plaintiff, the circumstances underlying her criminal conviction and the grounds upon which the action was being taken, namely to have a particular photograph removed from the Defendant's website. In short, in such circumstances anonymity actually affords the Plaintiff no remedy whatsoever.

[28] The issue of anonymity is approached by the Courts with great care in the context of open justice. I can find no prejudice arising by reason of a refusal to grant anonymity, nor that any right of privacy arises outwith that which has been sought in relation to the use of the Image.