Neutral Citation No. [2013] NIQB 113

Ref:	**GIL9024**

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

Delivered:	**15/11/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

J19

-and-

J20

Plaintiffs;

-v-

FACEBOOK IRELAND

Defendant.

_____

GILLEN J

[1] This is an application on behalf of the defendant to vary and discharge orders of injunction dated 27 September 2013 made in the case of both plaintiffs.

[2] The orders for injunction have been made on foot of ex parte applications by counsel on behalf of the plaintiffs. Each plaintiff has successfully sought to be anonymised being described by the ciphers "J19" and "J20". All parties were agreed that these ciphers should continue for this hearing.

[3] In essence two injunctions were made. For reasons which will soon become clear, the first emergency interim injunction is of no moment. It was to the effect that the defendant must remove from the "Irish Blessings" webpage of its website, the "Ardoyne Under Siege webpage" and the "Belfast Banter webpage" references to and pictures of the plaintiffs to include all entries and comments on same. These removals have now been perfected.

[4] A second interim junction, which is the subject of the application, restrained "the defendant from placing on its website photographs of the plaintiff, his name, address or any like personal details until further order" in each case. To meet the reproach that the order required greater precision Mr Heraghty, who appeared on behalf of the plaintiffs, canvassed a redrafting of the second injunction to read:

> "An interim injunction restraining the defendant from placing or allowing to be placed on its website the Plaintiff's name or similar material identifying the Plaintiff and which associates him with the activities alluded to in the material which was the subject of the interim injunction at paragraph 1."

Background

[5] In this matter the plaintiffs have issued writs for damages in virtually identical terms by reason of the following:

- The anticipated future breach of right to life pursuant to the Human Rights Act 1998.
- Breach of his rights not to be subjected to inhuman and degrading treatment.
- Breach of his right to privacy.
- Breach of the Data Protection Act 1998.
- Misuse of private information at common law by the defendant.
- In and about the publication of photographs, information and comments on the Facebook webpages entitled "Irish Blessings", "Ardoyne under Siege" and "Irish Banter" on 11 September 2013 and on subsequent dates.

[6] The plaintiffs also seek injunctions against the defendant:

- Compelling it to remove the photographs and references to the plaintiffs.
- Restraining the defendant from placing or allowing to be placed further photographs and information of a like nature to that previously published on its webpages.
- Requiring the defendant to carry out adequate monitoring of the webpages to prevent further publication of a like nature.

- Compelling the defendant to remove any such content placed upon its webpages in future without delay.

- Requiring the expurgation by the defendant of any electronic copies of the photographs and information published, held or controlled by the defendant.

[7] The applications for interim injunctions had been founded on the affidavits of J19 and J20. That of J20 averred, inter alia, the following:

- A number of articles on Facebook included the use of a photograph or photographs of himself which were taken and used without his authority. He described the photographs as appearing on "Republican webpages" hosted by Facebook Ireland Limited. One of the photographs of himself had been superimposed on a huge Union Jack with the title "Meet Sectarian Parade Organiser" (J20). This had been posted on a number of Facebook pages with the tagline "Another Loyalist Bigot Exposed. He (J20) organised more Loyalist parades and protests than you can shake a fleg at, he is as bitter as the day is long. #sectarianscumbag".

- Other photographs depicted him in front of a flag and refer to him as a woman beater and a person who takes drugs.

- A further photograph described him as a tout.

- He had read an article in the Sunday World recently indicating that Dissident Republicans would be targeting "Loyalist protestors". He took this to mean people involved in issues surrounding the decision by Belfast City Council not to fly the flag at the City Hall.

- A number of offensive and threatening comments had been added by "any number of mainly anonymous members of the public with a great deal of antipathy towards people of my background".

- He was particularly distressed by reference to the fact that he had Catholic children. Hence he was concerned for the welfare of his children.

- Accordingly he feared for his personal safety and was in perpetual state of anxiety.

- Since these comments, he had not been staying in his own home off the Shankill Road in Belfast and feared he could be easily identified by the pictures and would be attacked.

- He declared he had a history of mental illness and the publication was causing him a great amount of distress, untold anxiety and a detrimental effect on his health.

[8] J19 had made a similar affidavit referring to him appearing on a number of what he described as "Republican websites hosted by Facebook Ireland Limited". He made the following points:

- The main photograph showed a picture of him standing beside a large Union Jack which has "Lower Shankill" written across it. There was inset a photograph of a man in a balaclava standing beside a coffin. The clear inference was that the man in the balaclava was him.

- The coffin referred to had a picture of Bobby Sands attached to the top of it and attached to the front of the coffin were fast food cartons with the name of other deceased hunger strikers written upon them.

- On the Ardoyne Under Siege webpage and next to this photo-montage, he was described as "this knuckle dragging bigot (J19) from the Lower Shankill. Scum".

- Another states "Wud love five minutes with that fuckn rat ID kick him da death and his family".

- Another states "when they a beating the worst they cried at they did not mean it sad ppl need shooting like that".

- J19 claimed that he was recently threatened in the vicinity of the Ardoyne shops with someone shouting "we know you (J19) you are getting whacked" in a threatening and menacing manner. He felt this was a threat against his life. Since the name used was his own he believed he had been recognised by the person making the threat from the Facebook webpage since he was described by that particular name on that page.

- He is in fear of an attack on his life at all times and that it will only be a matter of time before someone identified him in the Belfast area since he lives just off the Shankill Road in Belfast in close proximity to the Springfield Road peace line.

[9] Before me, Mr Heraghty, who appeared on behalf of the plaintiffs, added that in addition to the threats set out above, J20 had had a previous relationship with the half-sister of a Dissident Republican and was therefore well known and accordingly a further target. He referred to recent shootings in north Belfast which gave him clear concerns for attacks upon both J19 and J20.

Principles governing interim injunctions

[10] These principles are now so well trammelled that I can set them out in brief compass.

[11] American Cyanamid Co v Ethicon Limited (1975) AC 396 is the seminal case setting out the obligations on the applicant to establish a serious question to be tried, that damages are inadequate, that the status quo should not be preserved and the overall balance of convenience has to be considered. In cases where the right to freedom of expression under article 10 of the European Convention on Human Rights and Fundamental Freedoms 1950 (the convention) is engaged, the court must give effect to Section 12(3) of the Human Rights Act 1998 which precludes the grant of interim injunctive relief "unless the court is satisfied that the applicant is likely to establish (at the trial) that publication should not be allowed."

[12] I bear in mind the observations of Lord Nicholls in Cream Holdings v Banerjee [2005] 1 AC 253 at [19] where he said:

> "The matter goes further than these procedural difficulties. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to comply with a 'probability of success' test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial."

[13] Much judicial and academic ink has been spilt on the principles to be applied in the case of interim mandatory injunctions. Zockoll Group Limited v Mercury Communications Limited [1998] A.S.R. 354 approved of the observations of Cadwick J in Nottingham Building Society v Eurodynamic Systems Plc [1993] A.S.R. 468 where he set out four well known principles:

- which course is likely to involve the least risk of injustice if it turns out to be wrong,

- the need to bear in mind that such an order requires a party to take a positive step carrying a greater risk of injustice if it turns out to have been wrongly made,

- the need for the court to feel a high degree of assurance that the plaintiff will be able to establish his right at trial,

- and finally even where the court is unable to feel this high degree of assurance there may be still be circumstances in which it is appropriate to grant such an injunction at an interlocutory stage.

[14] For my own part, I consider that the approach adopted by Lord Hoffmann in National Commercial Bank of Jamaica Limited v Olint Corpn Ltd [2009] 1 WLR is the most convenient summary to guide a judge in such matters when he said:

> "There is … no reason to suppose that, in stating (the American Cyanamid) principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. …. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, the court will feel …. a high degree of assurance that at the trial it will appear that the injunction was rightly granted."

[15] Before turning to the facts of this case, it is important in the context of the instant case to dilate upon the need for clarity and precision in mandatory injunctions. The seminal principle was set out in Morris v Redland Bricks Ltd (1969) 2 All ER 576 at 580 where Lord Upjohn stated:

> "… The court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter

> of fact, so that in carrying out an order he can give his contractors the proper instructions."

[16] Precision is a question of degree and the courts have shown themselves willing to cope with a certain degree of imprecision in cases of orders requiring the achievements of a result in which the plaintiff's merits appeared strong. It is, taken alone, a discretionary matter to be taken into account albeit a very important one.

[17] However the terms of a court's order, reflecting the terms of an obligation, need to be precisely drawn to ensure that the possibility of wasteful litigation over compliance is decreased. The oppression caused by the defendant having to do things under the threat of proceedings for contempt is that "the less precise the order, the fewer the signposts to the forensic minefield which he was to traverse" (Co-op Insurance v Argyll [1997] 3 AER 297 per Lord Hoffmann at 303(h).)

The Regulatory Context

[18] In the interests of completeness I draw attention to the following Regulations and Directive---

[19] Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 provides as follows where relevant:

> "Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where:
>
> (a) The service provider –
>
> (i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or
>
> (ii) upon obtaining such knowledge or awareness acts expeditiously to remove or disable access to the information, and

(b) The recipient of the service was not acting under the authority or control of the service provider".

[20] Directive 2000/31/EC at Article 15(see also Recital 17) provides that:

> "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
>
> 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements".

The submissions of the defendant in the instant case

[21] In the course of a skilfully produced skeleton argument augmented by oral submissions, Mr Hopkins on behalf of the defendant made the following points:

- There was no evidence before the court of a real and immediate risk to the life of the plaintiffs under article 2 of the convention, being risks that were objectively verified and which were present or continuing (King v Sunday Newspapers Limited [2010] NIQB 107).

- There was no evidence amounting to the breach of Article 3 under the Convention.

- Weighing the competing rights under Article 8 of the convention, namely the right to private and family life of the plaintiffs against article 10 namely the defendant's right to freedom of expression, the plaintiffs had failed to establish any evidence of the circumstances in which the photographs were taken required to threaten article 8 autonomy.

- The plaintiffs have not shown a very strong probability on the facts of grave damage accruing in the future if the mandatory injunctions were not granted.

There was insufficient precision in either the injunction granted or in the suggested amendment by the plaintiff (see paragraph 4 supra).

- Facebook could not comply with the order as it stands because it is impossible for it to prevent its users from accessing the website and posting this content. Facebook has over 1 billion monthly active users worldwide in over 200 jurisdictions. It is not reasonably possible for Facebook to monitor all the content placed upon the website to ascertain if any one piece of information relates to the plaintiffs as opposed to someone else with the same name. Even if this were feasible it is submitted that this would place an overly onerous and disproportionate burden upon Facebook.

- As an information society service under the Directive 2000/31/EC at paragraph 15 no general obligation is imposed to monitor the information which they transmit or store nor is there a general obligation actively to seek facts or circumstances indicating illegal activity.

- Facebook has reporting mechanisms which the plaintiff can use to challenge any new material. This procedure accords with the "notice and take down" system envisaged by Regulation 19 of the Electronic Commerce (EC Directive) Regulation 2002.

The plaintiff's case in the instant proceedings

[22] Mr Heraghty, in the course of succinct and focused written submissions augmented by oral argument, made the following points:

- The defendant has a general responsibility to properly monitor the nature of material appearing on its website.

- The defendant operates an electronic complaints system and can bring sanctions to bear upon webpage hosts.

- The defendant has failed to provide any evidence on the feasibility, proportionality and onerous nature of the injunction now sought.

- There is ample evidence of serious risk of breach of the Article 2 rights of both of these plaintiffs in light of the affidavit evidence mentioned above.

- The proposed amendment to the injunction now sought provides adequate precision.

- It is possible for the defendant to set up an automatic electronic monitoring device which would respond to the appearance of the plaintiffs' names. One billion users would not need to be monitored.

Conclusion

[23] Whilst I was not persuaded that this was an instance falling under article 2 of the convention for reasons mentioned in paragraphs 27 and 28 below, solely for the purposes of these applications I was prepared to approach the issues on the basis that the presence of the webpages concerned did create a real risk of infringing the plaintiffs' rights to freedom from inhuman and degrading treatment under Article 3 of the Convention and their right to respect for private and family life under Article 8. Needless to say I do so without prejudice to a possible later finding by the court that such an infringement has not occurred. For the purposes of this application I was also prepared to accept that the hurdle of Section 12(3) of the Human Rights Act to the effect that the courts should not make an interim restraint order unless satisfied that the moving parties' prospects of success at the substantive trial were sufficiently favourable to justify such order had been surmounted.

[24] The first injunction is clearly no longer required since all of the offending material hosted on the webpages referred to in the orders for the injunction have been removed. I therefore discharge that interim injunction. So far as the second injunction is concerned I have come to the conclusion that it also must be discharged for the following reasons which can be stated with reasonable brevity.

[25] First, the law requires reassuring clarity and intellectual coherence. The flow of authority – well illustrated on a practical level in XY v Facebook Ireland Limited [2012] NIQB 96 at [20] in the judgment of McCloskey J – is that such orders require precision. Defendants must not be left in a state of tormented ignorance of precisely what is required to be done. Would the defendant in the instant case be required to take down lawful comments of a general nature similar to that set out in the order? Would the defendant have to make a value judgment on whether the comments were lawful or not? In short such orders are all too imprecise and would require perhaps the court to give an indefinite series of rulings to ensure the execution of the court order. Injunctions cannot be based on glimpses and suggestions. Whilst a search for lambent precision may be too exacting a task in some instances the fact of the matter is that if the court order cannot be precisely drawn there is a possibility of wasteful litigation over compliance. The defendant would suffer oppression caused by it having to make such judgment calls under threat of proceedings for contempt. To borrow the jewelled phrase of Lord Hoffmann in the Co-op Insurance v Argyll case "The less precise the order, the fewer the signposts to the forensic minefield which has to be traversed." I am satisfied that the order sought in this case is too imprecise and the suggested amendment by counsel does not repair the deficit.

[26] Secondly, on the evidence open to me at the moment, it does seem that monitoring all the possible websites could impose a disproportionate burden on the defendant. Of course the plaintiffs will be able to seek further relief from this court if there is any recurrence of the offending publications. It will then be open to

Facebook, acting responsibility and in accordance with their principles, to proactively take the steps for necessary removal and closure.

[27] Thirdly, I consider that there was insufficient evidence before me at this stage – a position which may of course be corrected by the time of trial – to lead me to come to the conclusion that it is likely that the plaintiffs would establish a breach of Article 2 of the Convention. In Carlin's (Daniel Martin) Application [2013] NICA 40, in the context of an application for judicial review of a District Judge's decision to refuse to make an order for anonymity in respect of an applicant charged with offences relating to the making of indecent images of children, Morgan LCJ said at [5]:

> "[5] When this application was made there was no material from police before the District Judge at the time that he made his decision. We consider that where it is proposed to make an application for anonymity for a defendant there should be at the earliest possible time notification to the court, the police and the prosecution setting out the circumstances of the application. This should include any statements upon which the applicant may wish to rely. The police should be asked to comment on whether there is any reason to consider that there is a risk or threat to the individual concerned and if possible to give some indication as to what, if any, steps have been or might be taken in relation to it."

[28] It seems to me that in cases involving allegations of breach of Article 2 rights, such as in the present instance police evidence or something similar may well be required in order to satisfy the court save in the most obvious instances. I am satisfied that the ipse dixit of a plaintiff will only in rare instances be sufficient.

[29] In the context of this hearing I invited counsel to comment on the recent decision in the European Court of Human Rights Delfi v Estonia (Application No. 64569/09). Delfi was an internet news portal that publishes up to 330 news articles a day and as one of the largest news portals on the internet in Estonia. At the end of the body of the news articles there were words "add your comment" and fields for comments, the commenter's name and his or her e-mail address (optional). Below those fields there were buttons "publish the comment" and "read". The comments were loaded automatically and were, as such, not edited or moderated by the applicant company. The articles received about 10,000 readers' comments daily, the majority posted under pseudonyms. There was also however, a system of notify and take down in pace. Any reader could mark a comment as insulting or mocking and the comment was removed expeditiously. Further there was a system of automatic deletion of comments that included certain stems of obscene words and a

victim of a defamatory comment could directly notify the applicant company in which case the comment was removed immediately.

[30] The European court robustly determined that an internet news portal can be liable for offensive comments which were posted below a news article about the decision of an Estonia ferry company to change the route of a ferry line. In essence the court said that Delfi could have foreseen that their story would spark fierce debate including offensive user posts and that they could have been more proactive in ensuring the appropriate monitoring tools would be available if necessary. In short the prior automatic filtering and notice and take down system used by the applicant company did not ensure the sufficient protection for the rights of third persons. The court believed that the difficulty in establishing the identity of persons who wrote the anonymous comments was so material that holding Delfi responsible for those posts was the only viable way to attribute liability. The court was of the opinion that efforts to identify the person responsible did not outweigh the societal burden of transferring the liability or the comment to the on-line platform.

[31] This case may well be fact sensitive and indeed subject to an appeal to the Grand Chamber. Time will tell whether the line of reasoning of the ECHR in this case is the start of a new movement towards a broader monitoring obligation of intermediaries or if it is only applicable to the specific events in this case.

[32] Re reading this case I experienced a sense of shrinking relevance to the instant case. It is distinguishable from the facts now under consideration if for no other reason than that the parties responsible were identifiable. It is perhaps also important to appreciate that in the Delfi case the E-Commerce Regulations 2002 did not play a part. Each EU Member State has implemented the EU Directive on E-Commerce (2000/31) Article 14 which includes an exception for "hosting" when a company providing an information storage service (ie. hosting comments under its articles), does not have knowledge of the unlawful activity or information and upon being made aware of it acts expeditiously to remove or prevent access to the information. The Estonian Supreme Court had rejected Delfi's attempted use of that provision but the ECHR only considered whether the particular Estonian law under which Delfi was liable was an unlawful interference with Delfi's rights or free expression. The UK has transposed the EU Directive into its national law with the E-Commerce Regulations 2002. (See reference to Regulation 19 above at paragraph [19] above). Courts in the United Kingdom e.g. Tamiz v Google [2012]EWHC449 have concluded that the practice of websites monitoring comments (anonymous or otherwise) and swiftly removing defamatory ones when they are brought to their attention has so far been sufficient to help most companies avoid liability. The ECHR ruling does not in my view therefore suggest that such an interpretation of the EU Directive is incorrect. It is still up to the national laws of a country to decide if a company is liable in the first place and the European Court of Justice remains an alternative avenue for appeal.

[33] Accordingly, I am unpersuaded despite having taken its findings into account that the case of Delfi is sufficient to aid the plaintiffs in this case.

[34] I therefore discharge the second interim injunction.