

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

TKR and TKS

Plaintiffs

-v-

BBC

Defendant

(Costs; Anonymity; Reporting Restrictions)

KEEGAN J

Introduction

[1] I have been asked to provide reasons by the defendant in relation to rulings I gave in this matter on 31 January 2017 after judgment in relation to costs, anonymity and reporting restrictions. The context is an ongoing civil case for damages brought by both plaintiffs against the defendant. Mr Coghlin BL appeared for the defendant and Mr Girvan BL for the plaintiffs

[2] I delivered a substantive judgment on 6 January 2017. In that judgment I declined to make interim injunctions pending trial in each case. I do not repeat my findings for the purpose of this ruling save to say that I found that the Plaintiffs' article 8 rights were engaged and that they both had a reasonable expectation of privacy in relation to a private arrest. I found that the defendant's article 10 right was also engaged. Having conducted the balancing exercise I found that the injunctions should not be granted for the reasons set out in paragraph 88 namely:

- (i) It is a fact that the information about the plaintiff's arrest is out in the public domain, in many media formats including the printed press and internet.
- (ii) It is clear that significant intrusion has already occurred associated with publication of the arrests and the need for an injunction must be viewed through that prism.

(iii) I cannot see that an injunction is an effective remedy given what has happened and the stage reached in this case or that it is proportionate. I consider that damages are an adequate remedy.

[3] I consider that it is important to note the context of my ruling at paragraph 85 in particular:

“It is important to note the stage reached in this case in that the file is now with the PPS. This has a bearing on the likely nature and effect of further intrusion. Any further reporting would have to accord with proper journalistic standards. That may of course involve vindication for the plaintiffs if no charges are brought or a report on charges if they are brought. The course to be taken remains to be seen. The public clearly have an interest in being informed about either eventuality. There was no argument made about other categories of information which may be published now that the arrest is known which would cause a particular issue. For instance there was no argument made that further details of the alleged incident will be reported. Of course the media cannot publish material that would prejudice a fair trial otherwise there is a potential for contempt. The defendant’s affidavits clearly point to an appreciation that nothing should be published which would impede the administration of justice.”

[4] After I delivered my judgment the plaintiffs applied for a stay to consider appeal. I granted a stay. The plaintiffs have since indicated through Mr Girvan that they do not intend to appeal. However, the defendant has now raised an issue about a potential appeal given the ancillary orders I made. I now turn to these.

[5] At paragraph [94] of my judgment I said that I would hear from counsel as to the practicalities, timing and form of publication of this decision and any other matters that occurred to them. Mr Coghlin applied for costs and for removal of all reporting restrictions and anonymity. Mr Girvan opposed those applications. Further legal arguments were filed and additional authorities were put before the court in relation to those issues. Having listened carefully to those arguments and considered the written papers, I decided as follows.

Costs

[6] The principle is that costs should follow the event. However, the rule is not absolute and the way in which the court exercises its discretion will depend upon the facts of each case. Mr Coghlin very fairly pointed to the issue of damages as an alternative remedy in this case. He said as this was such an obvious outcome in the cases that costs should be awarded to the defendant in relation to the interlocutory hearing. I am not convinced by that argument given the legal intricacies of this case the finely balanced considerations, the particular basis on which I decided the case and the fact that there is a live issue for trial.

[7] Valentine, Supreme Court Practice at paragraph 17.04 refers to a number of circumstances where costs may not follow the event such as:

- “- equitable relief is refused on discrete grounds
- the losing party lost on the facts but won on a separate issue of law
- the case was decided on an important issue which the losing party was justified in contesting”

[8] As I said in my judgment, there is limited jurisprudence in relation to arrest and there is a case which was recently heard before the Supreme Court in relation to this area which may have a bearing on outcomes. In taking account all of the above, I consider that the correct order in this case is one where costs are reserved to trial and I so order.

Anonymisation/reporting restrictions

[9] Both of the above were provided for in the order of Treacy J. I appreciate that in KL & NN v Sunday Newspapers Ltd [2015] NIQB 88 Stephens J termed such orders as injunctions. However, it seems to me that there is a difference in imposing an injunction to protect a person’s privacy and a restriction upon reporting/anonymisation which also engages a wider public interest. I accept that in the closing part of my judgment I referred to discharge of the interim order however that was in the context of publication. In any event, counsel accepted that I have inherent jurisdiction to manage the civil proceedings before me as I see fit and so there was no issue that I could look at these matters afresh. As KL states these issues are matters for the court.

[10] I note the point made by Mr Girvan that media organisations were put on notice of the previous restrictions provided for by Treacy J and to date no objection has been made.

[11] The arguments in relation to this issue have been well ventilated by counsel. I begin by stating that I accept entirely the principle of open justice, reiterated in the various authorities put before me such as JIH v News Group Newspapers [2011] EWCA Civ 42 and A v BBC [2014] UKSC 25. However, it is not absolute. On the facts of this case, the principle must be weighed against other factors not least the administration of justice. The defendant has clearly stated upon affidavit that nothing would be published in this case which offends that latter principle and I bear that in mind as a guide in my consideration.

[12] Mr Coghlin rightly points out that anonymity and reporting restrictions are usually argued and imposed where an injunction has been granted in order not to negate its effects. I accept that this is a different circumstance however I do not consider that I am precluded from considering these issues. In A Police Officer's Application (Leave Stage) [2012] NIQB 3, McCloskey J stated as follows:

“an issue of this kind falls to be determined, there is no true *lis inter partes* and the court should approach the matter in the round, forming an evaluative judgment that is as fully informed as possible in the circumstances.”

[13] I have had the benefit of substantial argument in this case and I am familiar with the papers filed in these proceedings. That includes papers provided by the police on foot of a Khanna subpoena. A point was raised that if these restrictions are not imposed that the papers themselves become open to public scrutiny albeit that I can manage disclosure. However, I cannot see that it would be right that a consequence of this case is the dissemination of a new category of private information created as part of the case in the context of a criminal investigation which is ongoing. That includes police materials. This is a particularly sensitive time for all concerned in the process.

[14] I bear in mind that if I am considering derogating from the principle of open justice it should be by the least intrusive method, for the least possible time and based on the facts of the case. To that end I have considered the competing arguments for redaction of the judgment, time limited restrictions, expedited hearing and the undertaking offered by the defendant. I should say that the undertaking was directed towards non-publication of court papers but did not include matters in the judgment, the public domain or from sources. This was not acceptable to the plaintiffs.

[15] It flows from A v BBC that the common law principle of open justice remains in vigour even when Convention rights are at play. Stephens J also refers to this at paragraph 11 of KL. No one disputed that article 6 is a relevant consideration in this case. Also, as A v BBC case states it is impossible to enumerate all contingencies where the court may impose some restrictions upon open justice. In this case the core issue is an ongoing criminal process. In my view the integrity of that must be protected. The administration of justice must be protected. Mr Girvan pointed to

the social media comment that has already occurred in this case. I do not underestimate this issue particularly as the plaintiffs are public figures. He referred to the fact that the Whats App conversations are now the subject of criminal investigation themselves. Mr Girvan also frankly and properly said that the complexion of this case would become much clearer depending on whether the plaintiffs are charged with a criminal offence or not. The outcome of that will also dictate how and to what extent this case proceeds.

[16] There are clearly different considerations at play when looking at these issues compared to restricting publication of private material. I have to consider wider public interests when considering these orders. I have a duty to act in a Convention compliant way pursuant to the Human Rights Act 1998. That applies in all manner of court proceedings including civil, criminal and family proceedings.

[17] Balancing the competing arguments, I have decided to maintain anonymity in this case at present and to impose a reporting restriction. I do so within my inherent jurisdiction. I have reached this conclusion because of the ongoing criminal process and due to the substantial risk I perceive if the judgment is published at this stage. However, my order is not indefinite or all encompassing. The files in this case have been with the PPS for 3 months now and so a decision in relation to charge is expected in the near future. My order must be proportionate and so it will be defined as follows:

- (i) The parties will be permitted to continue these civil proceedings under the cyphers previously given.
- (ii) Reporting of the details of the judgment will be postponed until a suitable time and the parties may make submissions to the court prior to publication being ordered.
- (iii) The fact of these civil proceedings including the outcome of the injunction application may be reported upon.
- (iv) There will be an expedited trial. I am grateful to counsel for agreeing directions towards a trial in May 2017. This is on the basis that there is no police objection to it proceeding at that time.
- (v) The order will served on media organisations as before and any objections to these orders will be heard.
- (vi) There is liberty to apply granted to the parties and any other interested parties to vary the order at any time upon application to the court.

[18] Of course the removal of the injunction means that the defendant may return the original articles about the arrest to the website and report on the progress of the investigation. The reporting to date has been factual as I have said and there was no

argument that any other category of information required to be published. I take the defendant at its word in not wishing to impede in any way the administration of justice. If the parties are unclear about any matter, an application may be made immediately to the court.

[19] Unfortunately, it appears from the exchanges between counsel that the form of the draft order cannot be agreed. I had asked counsel to finalise the draft order as a matter of urgency, without prejudice to their rights of appeal. I note that an explanatory note has been drafted to explain the publication of details that can take place and that appears appropriate to me. I will therefore adjudicate on the terms and the matter should be returned to court urgently for that purpose.