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Ref: **McCL8666**

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

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For External Publication

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S DIVISION

BETWEEN:

XY

Plaintiff

-and-

FACEBOOK IRELAND LIMITED

Defendant

McCLOSKEY J

INTRODUCTION

[1] By Writ of Summons issued on 14th November 2012, the Plaintiff claims the remedies of an injunction and damages against Facebook Ireland Limited ("Facebook"). This judgment determines the Plaintiff's quest for interim relief.

[2] By his amended notice of motion, the relief sought by the Plaintiff at this early stage of the proceedings is:

- (a) An interim injunction requiring Facebook to remove from its site the page entitled "Keeping Our Kids Safe from Predators".
- (b) In the alternative, an injunction requiring Facebook to monitor the contents of the aforementioned page in order to prevent recurrence of publication of any further material relating to the Plaintiff and to remove such content from publication forthwith.

[3] Whereas these interlocutory proceedings were initiated *ex parte*, the matter has proceeded on an *inter-partes* basis. Progress has been seamless and expeditious as a result of the willingness of Facebook's solicitors (Messrs Johns Elliott) to cooperate with the Court, bearing in mind that Facebook is not registered in the jurisdiction of Northern Ireland, coupled with the concise and realistic submissions of Counsel for the respective parties, Ms Ellison and Mr Hopkins. I record further that the events in this litigation to date include an Order for specific discovery in favour of the Plaintiff with which Facebook has complied. There are other issues which do not concern the Court directly at this stage of the proceedings. These relate to further discovery of documents and the possibility of the Plaintiff bringing independent proceedings against certain persons.

ANONYMITY

[4] I granted the Plaintiff anonymity at the outset of the proceedings on a precautionary basis, pending further argument from the parties' representatives. In determining this discrete issue at this stage, I refer to the governing principles as expounded in my earlier judgment in **Re A Police Officer's Application for Leave to Apply for Judicial Review** [2012] NIQB 3. In brief compass, questions concerning the anonymisation of litigants and witnesses engage, primarily, the overarching principle of open justice, the recognised common law exceptions to this principle and, in appropriate cases, Convention rights. In the present case, the main factors to be balanced are the nature and extent of information pertaining to the Plaintiff's identity already in the public domain, the accessibility of such information, the risk that the Plaintiff's access to justice will be thwarted if anonymisation is not granted, the Plaintiff's right to freedom from inhuman or degrading treatment and the Plaintiff's right to respect for his private and family life. I must also take into account that the measure of granting the Plaintiff anonymity would constitute a relatively modest dilution of the principle of open justice.

[5] The evidence (considered in greater detail below) demonstrates that there are those who are ill disposed to the Plaintiff and who are prepared to incite strong feelings of antagonism and hostility towards him, with reckless disregard for the possible consequences. Such consequences, in my view, include exposure of the Plaintiff to treatment proscribed by Article 3 ECHR and infringing his right to respect for private life. I must also, of course, weigh the Convention right to freedom of expression, coupled with the impact of section 12(3) of the Human Rights Act 1998. This discrete exercise is undertaken by the Court in a somewhat unusual context in which Facebook, by common consent, has, evidently in response to this litigation, voluntarily removed from the site in question the Plaintiff's name, his photograph and all comments pertaining to the photograph. A second singular feature of the present litigation context is the absence of any party before the Court asserting the Convention right to freedom of expression, with supporting evidence and arguments. Notwithstanding this latter consideration, I am mindful of the Court's duty as a public authority under section 6(1) of the statute.

[6] The balancing exercise which I have conducted impels to the conclusion that the Plaintiff should be granted anonymity in these proceedings. The factor which, in my judgment, tips the balance in his favour is the clear increased risk to him of treatment proscribed by the Convention if the facility of anonymisation were refused by the Court. Realistically, it may well be true that the protection afforded to the Plaintiff by this measure will be limited. However, I am satisfied that this measure will provide the Plaintiff with some protection. Accordingly, giving determinative weight to the Plaintiff's rights under articles 3 and 8 ECHR, I order that he be described throughout these proceedings and in the reporting thereof by the cipher of "XY".

THE EVIDENTIAL MATRIX

[7] Facebook is a so-called social networking site. The evidence is that it has over 1 billion users worldwide. The emergence of sites of this nature is one of the distinct facets of the global phenomenon of information explosion which has materialised and expanded, apparently inexorably, during recent years. Facebook is the largest such site on the planet.

[8] Facebook is a particular, discrete aspect of the internet. It is an open medium available to anyone who can access it. Users can establish independent, dedicated pages for a broad range of purposes – for example, the creation of a personal profile or the pursuit of a campaign such as that with which the Court is concerned in the present case. Fundamentally, Facebook is a medium for the dissemination and acquisition of information.

[9] The ability of any person to access a Facebook page, or site, varies from one instance to the next. While access to some sites is unlimited, others have restricted entry. The offending site in the instant case is of the former variety. It is described as "open", which means that it can be accessed by anyone. One particular phenomenon which this creates is that of fluctuation; the contents of any Facebook page are vulnerable to rapid and unpredictable change. This typically takes the form of ever increasing expansion, with the posting of further material by users/contributors. Variation can also occur through the removal of material already on the site or outright closure.

[10] The phenomenon of variation is illustrated by the evidential matrix of the present case. As recorded above, following the inception of these proceedings Facebook actively removed some of the contents of the offending page, namely the Plaintiff's name, his photograph and all comments pertaining to the latter. As a result, the page, at the time of writing this judgment, differs from that which stimulated the initiation of these proceedings. Its title, "Keeping Our Kids Safe from Predators", remains unchanged. At the request of the Court, the parties helpfully prepared a schedule culled from the offending page in its current form. This contains the material which, from the Plaintiff's perspective, is the most offensive and objectionable. The contents speak for themselves and are available.

[11] The Plaintiff is classified colloquially as a “sex offender”. In 2005 he admitted 6 charges of indecent assault, 6 of gross indecency with a child and 1 of inciting a child to commit an act of gross indecency, all committed between 1982 and 1989. Having spent one half of a 6 year sentence in prison, he was released. He was then detained for a further 6 months on account of having breached one of the conditions of his licence. He has a total of 15 convictions of this nature, having first offended in 1980, when he was a juvenile. It is reported that when he was sentenced in 2006 the judge expressed particular concern about his lack of insight into his offending.

[12] The evidence establishes that the offending Facebook site was probably created around August 2012. In his affidavit, the Plaintiff deposes that his awareness of the site dates from around then. He avers that the contents were frightening and distressing for him. He highlights in particular the unauthorised publication of his photograph. He describes a threat that he would be “burned out” out of his rented accommodation. He also deposes to his ill health, averring that he has to undergo dialysis three times weekly and that he mobilises with the aid of a Motability scooter. He describes heart problems, rheumatoid arthritis and kidney failure. His affidavit concludes:

“I am in fear for my safety and in a state of constant anxiety as I believe if this material continues to be published it will only be a matter of time before the threats materialise into an attack on me or my home. The Defendants are publishing comments intended to vilify me, some of which are directly threatening. By publishing this material about me, the Defendants are providing a vehicle for others who may have criminal intent to gain information about where I live and to stir up hatred against me.”

These averments are uncontested.

THE LEGAL FRAMEWORK

[13] These proceedings serve as a timely reminder that we live in a society governed by the rule of law. This is the supreme principle. All members of society submit and subscribe to a system wherein the law is dominant. This system protects every member of the population. The efficacy of this system requires, and is guaranteed by, an independent judiciary. Non-discrimination, or equality of treatment, is one of the towering principles of the common law. Furthermore, it is a universally recognised value and is enshrined in the Human Rights Act 1998. It is easy to overlook that this principle is also of biblical pedigree and vintage, expressed in, for example, the letters of Saint James [Chapter 2:1-5], who cautions sternly that those who apply double standards of treatment to others are “corrupt judges” and St Paul’s Letter to the Galatians [Chapter 3:28]. Furthermore, this cornerstone principle was identified by Professor Dicey [in the Law of the Constitution,

published in 1885] as one of the three core components of the rule of law. At its heart, it ensures that all citizens are equal before the law. As Lord Bingham has observed, this general principle is nowadays beyond question [The Rule of Law, p. 56]. In addition, by virtue of section 6 of the Human Rights Act 1998, the Court must avoid acting in a manner incompatible with any person's Convention rights, where engaged. Thirdly, the sanctions imposed by the criminal law on offenders are, presumptively, adequate and exhaustive. Allied to this is the rule that criminals are punished by due process of law, and not otherwise, in a society which treats anarchy as repugnant. I consider that these are four of the main points of reference for the Court in a case such as the present.

[14] In the present case, the Plaintiff, as a member of a society governed by the rule of law and a person equal with all others before the law, is entitled to seek the following protections of the law:

- (a) The legislative protection afforded by the Protection From Harassment (NI) Order 1997, which prevents any person from pursuing a course of conduct amounting to the harassment of another and which the perpetrator knows or ought to know amounts to such harassment (per Article 3).
- (b) The statutory protection provided by the Human Rights Act 1998, section 6 whereof requires the Court, as a public authority, to avoid acting incompatibly with the Plaintiff's rights under Articles 3 and 8 ECHR. These provisions, respectively, guarantee to every member of society freedom from inhuman or degrading treatment and protect every person's right to respect for private and family life.

These two forms of legal protection form the centrepiece of the Plaintiff's case.

[15] As highlighted above, the relief sought at this stage of the proceedings is interim in nature. This engages the well known **American Cyanimid** principles. Thus, as a pre-requisite to granting an interlocutory injunction, the Court must be satisfied that the Plaintiff enjoys a good arguable case for securing the final relief sought and, further, that the balance of convenience favours injunctive intervention by the Court at this juncture. Furthermore, in cases where the Convention right to freedom of expression is engaged, the Court must give effect to section 12(3) of the Human Rights Act, 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". In **Cream Holdings -v- Banerjee** [2005] 1 AC 253, this provision was considered by the House of Lords, which held that, properly construed, by virtue of section 12(3) the Court should not make an interim restraint order unless satisfied that the moving party's prospects of success at the substantive trial are sufficiently favourable to justify such order, taking into account all of the circumstances. Thus the moving party must, as a general rule, traverse the threshold of satisfying the Court that he would probably succeed at the trial: see per Lord

Nicholls, para [22]. The essence of the exercise which the Court must perform in any given case is to have particular regard to the importance of the right to freedom of expression while, simultaneously, giving effect to countervailing Convention rights: per Lord Nicholls para [23]. His observations in paragraph [19] are of note, as they have a particular resonance in the matrix of the present case:

“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 apply 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.”

In summary, “likely” is not to be rigidly construed as “more probable than not” in every case. Thus probability of success at the eventual trial is not an inflexible standard in cases of the present *genre*.

CONCLUSIONS

[16] Bearing in mind that the onus of proof rests on the Plaintiff and that the standard of proof is the balance of probabilities, I am satisfied of the following matters at this stage of the proceedings:

- (a) The contents of the offending Facebook page constitute, *prima facie*, unlawful harassment of the Plaintiff.
- (b) The perpetuation of this webpage creates a real risk of infringing the Plaintiff’s rights to freedom from inhuman and degrading treatment under Article 3 ECHR, together with his right to respect for private and family life under Article 8 ECHR. I so conclude without prejudice to a possible later finding by the court that such infringement has already occurred.

- (c) The Section 12 (3) threshold is comfortably surpassed. On the present evidence, the Plaintiff's case is meritorious, with compelling prospects of final success at trial.

In thus concluding, I have taken into account both the present content of the offending webpage [less extreme] and its earlier incarnation [unbridled, a veritable runaway train]. Some of the "comments" which have been published through this medium are properly and correctly described as threatening, intimidatory, inflammatory, provocative, reckless and irresponsible.

[17] Secondly, I resolve the balance of convenience test in favour of the Plaintiff. I am satisfied that the grant of injunctive relief at this stage will entail at most minimal inconvenience for Facebook and no evident financial loss. In contrast, it will provide the Plaintiff with a measure of protection against further *prima facie* unlawful conduct, the consequences whereof could, realistically, be highly detrimental to him. It is appropriate to record, in this context, that society has dealt with the Plaintiff's offending in accordance with the rule of law. He has been punished by incarceration and, having been released, reimprisoned and released again, he is subject to the substantial daily restrictions on his lifestyle and liberty flowing from the Sex Offenders Licence to which he is subordinate. His conduct is restricted and monitored accordingly. While his offences were repulsive, he has been punished appropriately. Against this broader canvas and at this stage of the evolution of the wider story, I conclude that the pendulum of the rule of law swings in the Plaintiff's favour to the extent that he qualifies for the temporary relief sought at this stage of the proceedings.

[18] Accordingly, I grant the Plaintiff an interim injunction requiring the Defendant to remove, by 10am on 3rd December 2012, from its site facebook.com the page entitled "Keeping Our Kids Safe From Predators" having the URL <http://www.facebook.com/pages/keeping-our-kids-safe-from-predators/341148705971600>. I consider this the only potentially efficacious remedy open to the Court in the present circumstances.

[19] The Order of the Court will incorporate provision for liberty to apply. By this mechanism the Plaintiff, if necessary and if so advised, will be able to seek further relief from the Court if there is any recurrence of the offending publication. Of course, in such eventuality, it will be open to Facebook, acting responsibly and in accordance with the principles and themes clearly expressed in this judgment, to proactively take the necessary removal and closure steps.

[20] I refuse the Plaintiff's application for the wider form of interim injunction sought by him. This was to the effect that Facebook be required to monitor the offending webpage in order to prevent republication of the offensive material. In this respect, I prefer the argument of Mr Hopkins that such an order would lack the requisite precision, could impose a disproportionate burden and, further, would

potentially require excessive supervision by the Court. See **Cooperative Insurance v Argyll** [1997] 3AL ER 297, pages 303 – 304, per Lord Hoffman. See also Halsbury’s Laws of England, Volume 24 (Fourth Edition Reissue), paragraph 849. The propriety of granting this discrete remedy will, of course, be revisited at the substantive trial, against the backcloth of a fuller evidential matrix, which should include details of how this social networking site actually operates from day to day.

[21] It is appropriate to observe that this court is fully aware of the information pertaining to the Plaintiff – in particular his name, physical appearance, criminal record and whereabouts – already in the public domain. This information will remain in the public domain, come what may. The Order of this court does not suppress publication of this information in any way. Rather, it simply requires certain modest steps to be taken by the operator of a social networking site to ensure that, pending the substantive trial of this action, the Plaintiff is not exposed to further conduct which I consider, to a high level of arguability, to be unlawful. Furthermore, the sole respect in which the Order of this court impinges on the general principle of open justice is to permit the Plaintiff to litigate anonymously for the reasons explained in paragraphs [4] to [6] above. Facebook is, fundamentally, a publisher of information. Its voluntary actions to date provide some measure of confidence that it will comply assiduously with both the letter and spirit of this judgment.

[22] Finally, I take this opportunity to highlight that cases of this nature will, inevitably, be intensely fact-sensitive. The Court is mindful of the contemporary controversy surrounding other contexts, such as the online bullying of schoolchildren and the potentially appalling consequences of this gravely worrying phenomenon. This judgment does not speak directly to other contexts. Rather, it is confined to the particular litigation context in which it is provided. While the legal sphere in which this judgment is pronounced appears to be relatively unexplored, it is a fact that the Northern Ireland High Court has previously granted similar interim injunctions against Facebook in a small number of cases [probably three]. The law develops incrementally and, as it does so, parallels may foreseeably materialise in factually different contexts.

[23] I reserve the costs of all proceedings to date. I order that the Plaintiff’s costs be taxed as an assisted person. Further case management directions will follow when required. In the meantime, the proceedings will progress in accordance with the Rules of the Court of Judicature and the relevant Practice Directions. The facility of review on request will be available to the parties.

