Neutral Citation Number: [2016] EWCA Civ 393

Case No: A2/2016/0218 (A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, QUEENS BENCH DIVISION
MR JUSTICE CRANSTON
HQ16X00160

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/04/2016

Before:

LORD JUSTICE JACKSON LADY JUSTICE KING
and

LORD JUSTICE SIMON

- - - - - - - - - - - - - - -

Between :

PJS	Appellant
- and -	
News Group Newspapers Ltd	Respondent

- - - - - - - - - - - - - - -
- - - - - - - - - - - - - - -

Mr Desmond Browne QC, **Ms Lorna Skinner** and **Mr Adam Speker** (instructed by **Carter-Ruck Solicitors**) for the **Appellant**

Mr Gavin Millar QC and **Mr Ben Silverstone** (instructed by **Simons Muirhead & Burton Solicitors**) for the **Respondent**

Hearing dates: Friday 15th April 2016

- - - - - - - - - - - - - - -

Approved Judgment

Lord Justice Jackson:

1. This judgment is in six parts, namely:

Part	Paragraphs
Part 1. Introduction	Paragraphs 2 to 5
Part 2. The facts	Paragraphs 6 to 10
Part 3. The present proceedings	Paragraphs 11 to 19
Part 4. The application to set aside the injunction	Paragraphs 20 to 27
Part 5. Analysis	Paragraphs 28 to 48
Part 6. Conclusion	Paragraphs 49 to 53

Part 1.
Introduction

2. This is an application to set aside an interim injunction, which bans publication of the claimant's extra-marital ventures. The issue in this application is whether recent coverage of the relevant information, both overseas and on the Internet, should cause the court to discharge its previous order.

3. The applicant today and the defendant in the litigation is News Group Newspapers Ltd ("NGN"). NGN publishes the *Sun on Sunday*. The claimant in the litigation and respondent to this application is PJS.

4. The statutory provision which is of principal relevance to this application is section 12 of the Human Rights Act 1998 ("HRA"). Section 12 provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
> …
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court to be journalistic, literary or artistic material (or to conduct connected with such material), to –
> (a) the extent to which -
> (i) the material has, or is about to, become available to the public; or
>
> (ii)it is, or would be, in the public interest for the material to be published;"

5. After these introductory remarks I must now turn to the facts.

Part 2. The facts

6. The claimant is in the entertainment business and is married to YMA, who is a well known individual in the same business. They have young children.

7. In 2007 or 2008 the claimant met AB. They had occasional sexual encounters, starting in 2009.

8. AB had a partner, CD. In a text message exchange on 15 December 2011 the claimant asked if CD was "up for a three-way". AB said that CD was. Accordingly, the three met for a three- way sexual encounter, which they duly carried out. After that encounter the sexual relationship between the claimant and AB came to an end, but they remained friends for some time.

9. In or before early January 2016, AB and CD approached the editor of the *Sun on Sunday*. They told the editor about their earlier sexual encounters with the claimant. The editor proposed to publish the story and notified PJS that he would do so.

10. The claimant took the view that any publication of that material would be a breach of confidence and an invasion of privacy. Accordingly, he commenced the present proceedings.

Part 3. The present proceedings

11. The claimant issued proceedings against NGN in the Queen's Bench Division of the High Court, alleging that the proposed publication would be a misuse of private information and a breach of confidence. He also applied for an interim injunction to restrain the proposed publication.

12. Mr Justice Cranston refused that application. The claimant appealed. At a hearing on 22nd January 2016 the Court of Appeal allowed the appeal. The court issued an injunction restraining publication of the names of PJS, AB or CD or details of their relationship.

13. The reasons for our decision (including the court's observations on the limited public interest in the proposed story) are set out in the court's judgment dated 22nd January 2016. The court has published a redacted version of that judgment, omitting all details which might identify the participants. The court has provided its full judgment, including those details, to the parties.

14. It should be noted that at the hearing in January NGN did not place reliance on HRA section 12 (4) (a) (i). It was no part of NGN's case that the material was, or was about to become, available to the public in any event and that an interim injunction should therefore be refused on that ground.

15. The injunction was effective for eleven weeks. Then things changed. On 6th April 2016 a widely read magazine in the USA published an account of PJS's sexual activities, naming those involved. Over the next few days, other publications in America, Canada and Scotland published similar articles.

16. As a result of those publications details started to appear on numerous websites, identifying PJS and YMA by name. The claimant's solicitors have been assiduous in monitoring the Internet and taking steps, wherever possible, to secure that offending information is removed from URLs and web pages. But in truth that was a hopeless task. The same information continued to appear in new places. Also tweets and various forms of social networking ensured that the material circulated freely.

17. At the same time newspapers in England and Wales reported the contents of the redacted judgment, vigorously complaining that they were banned from naming the participants. An article in the *Observer* of 10th April stated:

> "Human inquisitiveness is such that thousands more people have probably searched for this story (which is far quicker to locate, one might add, than anything rumoured to be in the Leveson Report) than would have paid to read it in the *Sun on Sunday*."

18. An article in the *Mail Online* of 14th April stated:

> "A FIFTH of people on the streets of England 'already know' the name of celebrity love cheat who gagged the Press from revealing his identity, Mail Online survey reveals

- Married celebrity with young children had a threesome with another couple

- Court imposed an injunction banning anyone in England from naming him

- But his identity has been widely revealed elsewhere and is available online

- Mail Online survey found that 20 percent of the public already claim to know who he is while others said they know how to find out".

19. Against that background, NGN issued an application to set aside the

injunction. Part 4. The application to set aside the injunction

20. On Tuesday 12th April 2016 NGN applied to the Court of Appeal to set aside the injunction previously granted. The ground of the application was that the protected information had entered the public domain; therefore the injunction served no useful purpose and was an unjustified interference with NGN's rights under ECHR article 10.

21. In support of its application NGN has lodged three witness statements made by Louis Charalambous, a partner in Simons Muirhead & Burton, the defendant's solicitors. Mr Charalambous produces copies of numerous articles about this case, both in print and online. Those published within the jurisdiction are anonymised. Those published outside the jurisdiction name the participants. He also produces copies of material which he and others have found on the Internet.

22. Mr Charalambous attaches to his third witness statement graphs which he has obtained using the online tool, 'Google Trends'. These graphs show that since 6th April 2016 there has been a massive increase in the number of searches relating to PJS and YMA by their true names, as well as the US magazine referred to above.

23. Mr Nigel Tait, a partner in Carter-Ruck, the claimant's solicitors, has lodged two witness statements in opposition to the application. Mr Tait recounts the history of events since the grant of the injunction. In particular, he describes the steps which he and his firm have taken in order to secure removal of online material identifying PJS or others involved.

24. Mr Gavin Millar QC, leading Mr Ben Silverstone, appears for NGN. I would summarise his arguments as follows. There has been a material change of circumstances since the injunction was granted. As a result of the publications overseas and online, the protected information is no longer either confidential or private. The claimant's article 8 rights are no longer engaged: see *Mosley v News Group* [2008] EWHC 687 (QB) at [33] – [36]. Some of the other recent first instance decisions on privacy interim injunctions do not give proper effect to section 12 of HRA. The current litigation has triggered a public debate. The identification of PJS and YMA will contribute to that debate. Because the facts are so widely known, any article which the *Sun on Sunday* may publish now will not be a dramatic revelation. It will therefore be less harmful to PJS, YMA and their family. The claimant can no longer establish that he is likely to obtain a final injunction at trial, which is the test under HRA section 12 (3).

25. Mr Desmond Browne QC, leading Ms Lorna Skinner and Mr Adam Speker appears for PJS. I would summarise his arguments as follows. The media have whipped up the current debate and encouraged their readers to search online for the protected information. They are putting pressure on the court to set aside the injunction, by a series of articles ridiculing the decision. See, for example, the *Daily Mail* article of 10 April 2016 entitled 'WHY THE LAW IS AN ASS!'. The court should not succumb to such pressures, but apply the statutory test. Breach of confidentiality and misuse of private information are separate torts. Not all secrecy attaching to the claimant's sexual activities has been lost. No mainstream publication in this jurisdiction has published the story. Furthermore PJS, YMA and their children have article 8 rights which require protection. Re- publication of private information which is already in the public domain is still tortious and a breach of ECHR article 8: see *McKennitt v Ash* [2005] EWHC3003 (QB); [2006] EMLR 10; *Green Corns v Claverley* [2005] EWHC 958 (QB); [2005] EMLR 31; *JIH v News Group*

[2010] EWHC 2818 (QB); [2011] EMLR 9; *CTB v News Group* [2011] EWHC 1326 and 1334 (QB); *Rocknroll v News Group*[2013] EWHC24 (Ch).

26. Both counsel made reference to the well known '*Spycatcher*' cases, the decision of the European Court of Human Rights in *Editions Plon v France* (2006) 42 EHRR 36 and *Douglas v Hello! Ltd* [2006] QB 125; [2008] 1 AC 1.

27. The court heard the application on Friday 15th April and had the weekend to consider counsel's submissions before delivering judgment today, Monday 18th April.

Part 5. Analysis

28. I have set out the relevant legal principles in my judgment of 22nd January 2016 (with which King LJ agreed) at paragraphs 6-9 and 29-39. I adopt, but do not repeat, those paragraphs.

29. NGN did not seek permission to appeal the Court of Appeal's decision of 22nd January. No-one now challenges that this court (having set aside Cranston J's decision) correctly carried out the exercise of balancing PJS's article 8 rights against NGN's article 10 rights, in accordance with established principles and on the evidence as it then stood. Mr Millar makes the fair point that the court's reasoning is more fully set out in the unredacted judgment. It follows that the starting point for today's analysis must be that the original injunction was correctly granted.

30. The question therefore becomes, as both counsel accepted, whether there has been a change of circumstances such as to warrant setting aside the previous order, notwithstanding the limited public interest in the proposed story. This requires a fresh consideration of HRA section 12 (3) and (4) against the backdrop of the now widely available material, none of which was in the public domain when the interim injunction was granted.

31. One change of circumstance relied upon by NGN can be discarded swiftly. Mr Millar submits that the present case has stimulated a public debate about privacy injunctions. "It is important that NGN can participate fully in this debate by identifying PJS and publishing the information" (skeleton argument, paragraph 5). It cannot be permissible for the media to stir up a debate about an injunction to which they are subject and then rely upon that debate as a ground for setting aside the injunction. I therefore reject this argument.

32. HRA section 12(3) requires that an interim injunction be refused unless the Court is satisfied that the applicant is likely to establish at trial that the publication should not be allowed. The court must have particular regard to the importance of the Convention right to freedom of expression. Among the matters to which the court must have regard is the extent to which the material has, or is about to, become available to the public: see section 12(4)(a)(i).

33. This involves a fact sensitive assessment as to (a) what has occurred, (b) what will occur prior the trial and (c) what the result will be at trial.

34. It is necessary to consider separately the claimant's claims based upon confidentiality and misuse of private information. The Court of Appeal has helpfully and recently articulated the distinction between those two heads of claim in *Google Inc v Vidal-Hall* [2015] EWCA Civ 311; [2015] 3 WLR 409 at [25] as follows:

> "Actions for breach of confidence and actions for misuse of private information rest on different legal foundations. As Lord Nicholls said, they protect different interests: secret or confidential information on the one hand and privacy on the other. The focus of the actions therefore is also different. In *Campbell* at para 51, Lord Hoffmann described the 'shift in the centre of gravity' when the action for breach of confidence was used as a remedy for the unjustified publication of personal information. In those circumstances, he said, the focus was not on the duty of good faith applicable to confidential personal information and trade secrets alike, but the protection of human autonomy and dignity - the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

35. Claims for confidentiality generally fail once information has passed into the public domain. As to that, the broad approach of Lord Goff in *Attorney-General v. Guardian Newspapers (No.2)* [1990] 1 AC 109 at p.282 C-D has stood the test of time. The question is "whether the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential".

36. It is clear that the law extends greater protection to privacy rights than rights in relation to confidential material. However, the extent of that enhanced protection is less clear. In *OBG v Allan* [2008] 1 AC 1 at [255] Lord Nicholls said that privacy can be invaded by further publication of information already disclosed to the public. *K v. News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827 was a claim for an interim injunction by an entertainer in relation to his private life. Ward LJ formulated the governing principles at [11]. Principle (3) was that article 8 protection might be lost 'if the information is in the public domain.'

37. Judges in a number of first instance cases have grappled with this problem. In *McKennit v. Ash* [2005] EWHC 3003 (QB) at [81] Eady J appears to have accepted that the protection might be available until it was clear that there was 'no longer anything left to be protected.' In *Rocknroll v. Newsgroup Newspapers Ltd* [2013] EWHC 24 (Ch) at [21] and [25] Briggs J concluded that the protection would be retained unless the extent of the publication was such that an injunction to prevent publication or republication would serve no useful purpose.

38. Eady J observed in *Mosley v. News Group Newspapers Ltd* [2008] EWHC 687 (QB) at [33]:

> "Nevertheless, a point *may* be reached where the information sought to be restricted, by order of the Court is so widely and generally accessible 'in the public domain' that such an injunction would make no practical difference."

39. In my view, the correct analysis is that a claim for misuse of private information can and often will survive when information is in the public domain. It depends upon how widely known the relevant facts are. In many situations the claim for misuse of private information survives, but is diminished because that which the defendant publishes is already known to many readers. The publication is an invasion of privacy and hurtful for the claimant, but is not as egregious as it would otherwise be. That does not deprive the claimant of his claim for damages, but it weakens his claim for an injunction. This is for two reasons. First, the article 8 claim carries less weight, when the court carries out the balancing exercise of article 8 rights as against article 10 rights. Secondly, injunctions are a discretionary remedy. The fact that material is generally known is relevant to the exercise of the court's discretion.

40. In this regard, it is important to note that HRA section 12 does not affect the existence of the claimant's article 8 claim nor does it provide any defence to the tort of misusing private information. The effect of section 12 is twofold. First, it enhances the weight which article 10 rights carry in the balancing exercise. Secondly, it raises the hurdle which the claimant must overcome in order to obtain an interim injunction.

41. Although it will be a matter for the trial judge at the end of the day, I adhere to the view which I expressed in January, namely that the story which NGN proposes to publish is likely to be a breach of the claimant's article 8 rights. What has changed is the weight which the claimant's article 8 rights carry, when balanced against NGN's article 10 rights. Also the fact that material is widely known must be relevant to the court's discretion.

42. The next question to consider is the effect of a media 'campaign' against a particular injunction. *CTB v. News Group* [2011] EWHC 1326 (QB), which was relied on by Mr Browne, was not a case in which a section 12 assessment was carried out. Some of the observations of Eady J must be seen in that light. Nevertheless, as he stated at [16], the court should not set aside an injunction merely because it has met widespread disobedience or defiance. Such an approach would be contrary to the rule of law. Lord Templeman made the same point in *Attorney-General v. Guardian Newspapers Ltd and others* [1981] 1WLR 1248 at 1299F-G.

43. There is an important difference between succumbing to disobedience or defiance on the one hand, and accepting that there has been and is likely to be extensive dissemination of private material on the other. In the latter type of case, it will be necessary to consider, on the particular facts of the case, whether the order should be maintained notwithstanding the dissemination of the material. Each of the first instance cases cited by counsel turn upon their own facts.

44. In the present case Mr Browne does not allege that the media have acted in breach of the injunction. So this is not a case of 'disobedience'. He does, however, submit that a large number of people have acted 'defiantly'. The difficulty with this argument is that the Internet and social networking have a life of their own. Furthermore, this court has little control over what foreign newspapers and magazines may publish.

45. There are many people who, perfectly understandably, have no interest in the sex lives of celebrities. But those who are interested in such matters will by now have read press reports of this case. They will have had no difficulty in finding out who PJS and YMA are. There is no quantitative evidence available, as Mr Millar conceded when pressed by Simon LJ. On the other hand, it does appear that those who want to find out the individuals' identities have already done so. Mr Browne was constrained to accept this in argument. He submitted, however, that if the injunction is lifted, others with less interest in such topics will become aware of the claimant's conduct. He cited the example of someone going into a newsagent's shop to buy the *Financial Times*, and catching sight of front page headlines in other newspapers about the claimant's conduct.

46. Ultimately this court has to make an assessment under HRA section 12 (3) of whether the claimant is "likely" to obtain a permanent injunction restraining publication at trial. The court must do so paying particular regard to the factors set out in HRA section 12 (4) (a) (i) and (ii).

47. In the situation which now prevails, I still think that the claimant is likely to establish a breach of ECHR article 8. But, notwithstanding the limited public interest in the proposed story, I do not think that the claimant is "likely" to obtain a permanent injunction. I reach this conclusion for seven reasons:

i) Knowledge of the relevant matters is now so widespread that confidentiality has probably been lost.

ii) Much of the harm which the injunction was intended to prevent has already occurred. The relatives, friends and business contacts of PJS and YMA all know perfectly well what it is alleged that PJS has been doing. The 'wall-to-wall excoriation' which the claimant fears (*CTB* at [24]) has been taking place for the last two weeks in the English press. There have been numerous headlines such as "celebrity love cheat" and "Gag celeb couple alleged to have had a threesome". Many readers know to whom that refers.

iii) The material which NGN wishes to publish is still private, in the sense that it concerns intimate sexual matters. I reject Mr Millar's submission that PJS's article 8 rights are no longer engaged at all. First, there are still many people, like Mr Browne's hypothetical purchaser of the *Financial Times*, who do not know about PJS's sex life. Secondly, NGN's planned publication in England will be a further unwelcome intrusion into the private lives of PJS and his family. On the other hand, it will not be a shock revelation, as publication in January would have been. The intrusion into the private lives of PJS and his family will be an increase of what they are suffering already.

iv) If the interim injunction stands, newspaper articles will continue to appear re-cycling the contents of the redacted judgment and calling upon PJS to identify himself. Websites discussing the story will continue to pop up. As one is taken down, another will appear. This process will continue up to the trial date.

v) As stated in paragraph 59 of the previous redacted judgment (paragraph 61 of the full judgment), NGN is entitled to publish articles criticising people in the public eye. Therefore it has an article 10 right to publish an account of PJS's conduct. That article 10 right has to be balanced against PJS's article 8 right for his sexual liaisons to remain a private matter. The

need to balance article 8 rights against article 10 rights means that there is a limit to how far the courts can protect individuals against the consequences of their own actions.

vi) As a result of recent events, the weight attaching to the claimant's article 8 right to privacy has reduced. It cannot now be said that when the day of trial comes, PJS's article 8 right is
likely to prevail over NGN's article 10 right to freedom of expression, such as to warrant the imposition of a permanent injunction.

vii) Finally, the court should not make orders which are ineffective. It is in my view inappropriate (some may use a stronger term) for the court to ban people from saying that which is common knowledge. This must be relevant to the exercise of the court's discretion. Injunctions are a discretionary remedy.

48. I turn next to the position of YMA and the children. As explained in paragraph 39 of my previous judgment, the interests of other family members, in particular children, are a significant consideration, but they cannot be a trump card. Paragraph 61 of the redacted judgment (paragraph 63 of the full judgment) referred to the likelihood that, in the absence of an injunction, the children would in the future learn about these matters from school friends or the Internet. That is now a less material consideration. In my view, whether or not the court grants an injunction, it is inevitable that the two children will in due course learn about these matters.

Part 6. Conclusion

49. For the reasons set out above, in my view the injunction restraining publication of the information identified in the confidential schedule to the order dated 22nd January 2016 must be set aside. For the time being, however, the various documents on the court file including the court's unredacted judgment of 22nd January 2016, must remain confidential. This is for the reasons explained by Lord Nicholls in *Cream Holdings v Banerjee* [2004] UKHL 44; [2005] 1 AC 253 at [26].

50. Once the injunction has been lifted, it will be a matter for NGN to decide whether they wish to go ahead with publishing their story. If they do so, that will not be a contempt of court, but they will still face the claimant's claims for breach of confidence and misuse of private information.

51. Any future applications to release documents on the court file or to substitute the full judgment dated 22nd January 2016 for the redacted version can be made, if and when such applications become appropriate. It may be possible to deal with those matters in writing.

52. I request counsel to agree an appropriate form of order to give effect to the court's decision.

53. If Lady Justice King and Lord Justice Simon agree, this application to discharge the injunction will be allowed to the extent indicated

Lady Justice King:

54. I agree.

Lord Justice Simon:

55. I also agree.

-ENDS-