HOUSE OF LORDS SESSION 2003–04
[2004] UKHL 44

on appeal from: [2003] EWCA Civ 103

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Cream Holdings Limited and others (Respondents)
v.
Banerjee and others (Appellants)

ON
THURSDAY 14 OCTOBER 2004

The Appellate Committee comprised:

Lord Nicholls of Birkenhead
Lord Woolf
Lord Hoffmann
Lord Scott of Foscote
Baroness Hale of Richmond

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. The Human Rights Act 1998 introduced into the law of this country the concept of Convention rights. Section 12 made special provision regarding one of these rights: the right to freedom of expression. When considering whether to grant relief which, if granted, might affect the exercise of the Convention right to freedom of expression the court must have particular regard to the importance of this right: section 12(4). Additionally, section 12(2) set out a prerequisite to the grant of relief against a person who is neither present nor represented. The court must be satisfied the applicant has taken all practicable steps to notify the respondent or that there are compelling reasons why the respondent should not be notified. Further, section 12(3) imposed a threshold test which has to be satisfied before a court may grant interlocutory injunctive relief:

> 'No such relief [which might affect the exercise of the Convention right to freedom of expression] 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.'

2. On this appeal your Lordships' House is concerned with the meaning and application of the word 'likely' in this provision.

The factual context

3. The context in which this question arises on this appeal is as follows. The plaintiffs in this action are the Cream group of companies. These companies began as the Cream nightclub in Liverpool in 1992 and then expanded and diversified their business. They opened other clubs elsewhere and began to stage large events such as dance festivals. Now they also carry on a substantial business franchising their brand name and logo and merchandising clothes and other items. They are an important business in Liverpool featuring both on general news pages and financial pages of newspapers.

4. The first defendant, Chumki Banerjee, is a chartered accountant. She was the financial controller of one of the companies in the Cream group for three years from February 1998 to January 2001. Before then Ms Banerjee worked for a firm of accountants and was responsible for dealing with the Cream group's financial affairs between 1996 and 1998. The second defendant, which I shall refer to simply as the 'Echo', is the publisher of Merseyside's two long-established and leading daily newspapers, the 'Daily Post' and the 'Liverpool Echo'.

5. In January 2001 Cream dismissed Ms Banerjee. When she left she took with her copies of documents she claims show illegal and improper activity by the Cream group. She passed these to the Echo with additional information. She received no payments for this. On 13 and 14 June 2002 the Echo published articles about alleged corruption involving one director of the Cream group and a local council official. On 18 June 2002 the Cream group sought injunctive relief to restrain publication by the newspaper of any further confidential information given it by Ms Banerjee.

The proceedings

6. The defendants admitted the information was confidential. Their defence was that disclosure was in the public interest. Lloyd J held there were seriously arguable issues both ways on whether this defence would succeed. Cream had established the 'necessary likelihood' of a permanent injunction for the purposes of section 12(3): 'I do not say it is more likely than not, but there is certainly a real prospect of success'. The balance of convenience test favoured the grant of an interim injunction. Cream were likely to suffer irreparable loss of an

unquantifiable nature if the story were published. Restraint of publication would delay the Echo's story but not necessarily preclude its publication altogether. Given the undoubted obligation of confidentiality inherent in Ms Banerjee's employment contract, the disputes of fact on some matters, and the possibility that Ms Banerjee's complaints of defaults by the Cream group might be met adequately by disclosure to certain regulatory authorities as distinct from publication at large by the press, the right course was to freeze the position and direct a speedy trial if desired. On 5 July 2002 Lloyd J granted an interlocutory injunction prohibiting the defendants until trial from publishing, disclosing or using information defined as confidential information in a confidential schedule. In order to prevent the immediate loss of confidentiality Lloyd J set out part of his judgment in a private appendix.

7. The defendants appealed. The judge, they said, had applied the wrong test under section 12(3), that of a 'real prospect of success' rather than 'more likely than not'. Further, on the basis of his factual conclusions the judge erred in deciding Cream were likely to succeed at the trial.

8. The Court of Appeal, comprising Simon Brown, Sedley and Arden LJJ, dismissed the appeal: [2003] EWCA Civ 103, [2003] Ch 650. Sedley LJ dissented. Again, in order to maintain privacy for the information separate confidential judgments were delivered by two members of the court.

9. All three lords justices agreed the judge was correct in his interpretation of 'likely' in section 12(3), although they differed in their reasoning. As to the facts, Simon Brown LJ held the judge was entitled to conclude Cream has a real prospect of success at the trial. The judge was also entitled to decide that in all the circumstances he should exercise his discretion in favour of making an order involving prior restraint. Simon Brown LJ, however, expressed reservations about the latter point. Not every judge would necessarily have reached the same conclusion as Lloyd J, and he himself might well not have done so. Arden LJ was also lukewarm in her view of the judge's decision, noting that in all the circumstances it could not be said to be perverse.

10. On this point Sedley LJ dissented. Lloyd J erred in his conclusion that there is likely to be no public interest justification for the disclosure of the story which Miss Banerjee gave the Echo and the Echo

wishes to publish. The principal matter the Echo wishes to publish is 'incontestably' a matter of serious public interest. The essential story was one which, whatever its source, no court could properly suppress.

11. Ms Banerjee and the Echo appealed to your Lordships' House, raising arguments along the same lines as those they presented to the Court of Appeal.

Section 12(3) and 'likely'

12. As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'. In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as 'very likely' or 'quite likely'. In section 12(3) the context is that of a statutory threshold for the grant of interim relief by a court.

13. The legal background against which this statutory provision has to be interpreted is familiar. 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.

16. Against this background I turn to consider whether, as the Echo submits, 'likely' in section 12(3) bears the meaning of 'more likely than not' or 'probably'. This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think 'likely' can bear this meaning in section 12(3). Section 12(3) applies the 'likely' criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of 'more likely than not' in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure.

17. Take a case such as the present: an application is made to the court for an interlocutory injunction to restrain publication of allegedly confidential or private information until trial. The judge needs an opportunity to read and consider the evidence and submissions of both parties. Until then the judge will often not be in a position to decide whether on balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. In the nature of things this will take

time, however speedily the proceedings are arranged and conducted. The courts are remarkably adept at hearing urgent applications very speedily, but inevitably there will often be a lapse of some time in resolving such an application, whether measured in hours or longer in a complex case.

18. What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, section 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the Echo agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would be absurd if, had the Echo not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

19. 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.

20. These considerations indicate that 'likely' in section 12(3) cannot have been intended to mean 'more likely than not' in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that 'likely' should have an extended

meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary.

21. Similar problems have arisen with other statutory provisions imposing a statutory threshold on the grant of relief by a court. Two instances may be mentioned. A prerequisite to making a care order under section 31 of the Children Act 1989 is that the child in question is suffering or 'is likely to suffer' significant harm. Your Lordships' House has held that in this context 'likely' is used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case: see *In re H (Minors)(Sexual Abuse: Standard of Proof)* [1996] AC 563, 585. So the degree of likelihood differed according to the circumstances of the case. Again, a prerequisite to making an administration order under section 8(1) of the Insolvency Act 1986 is that the court considers making such an order 'would be likely to achieve' one of the statutory purposes. Following the lead given by Hoffmann J in *In re Harris Simons Construction Ltd* [1989] 1 WLR 368, in *In re Primlaks (UK) Ltd* [1989] BCLC 734, 742, Vinelott J held this required the court to be satisfied there is a 'prospect sufficiently likely in the light of all the other circumstances of the case to justify making the order'.

22. In my view section 12(3) calls for a similar approach. 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 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.

The instant appeal

24. In the instant case it is not necessary or helpful to analyse the judge's careful judgment line by line to see whether in substance his interpretation of section 12(3) differed from that set out above. This is so because I am satisfied that in one particular respect the judge fell into error in any event. The error was identified by Sedley LJ and sufficiently explained by him at paragraph 88 of his judgment [2003] 3 WLR 999, 1024, and paragraph 1 of his 'private' judgment. I agree with him that the principal happenings the Echo wishes to publish are clearly matters of serious public interest. The graduated protection afforded to 'whistle blowers' by sections 43A to 43L of the Employment Rights Act 1996, inserted by the Public Interest Disclosure Act 1998, section 1, does not militate against this appraisal. Authorities such as the Inland Revenue owe duties of confidentiality regarding the affairs of those with whom they are dealing. The 'whistle blower' provisions were intended to give additional protection to employees, not to cut down the circumstances where the public interest may justify private information being published at large.

25. Since Lloyd J misdirected himself in a material respect when exercising his discretion and the Court of Appeal did not exercise this discretion afresh, it falls to your Lordships' House to do so. I would allow this appeal. Given the public interest mentioned above I am firmly of the view that the Cream group's prospects of success at trial are not sufficiently likely to justify making an interim restraint order in this case. On the evidence the Cream group are more likely to fail than succeed at the trial, and the Cream group have shown no sufficient reason for departing from the general approach applicable in that circumstance. I would discharge the judge's injunction so far as it relates to information already supplied by Ms Banerjee to the Echo. The defendants were content that the injunction should otherwise remain in force.

26. I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt Echo's publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group may ultimately be found to have against the Echo or Ms Banerjee in respect of matters the Echo may decide to publish.

LORD WOOLF

My Lords,

27. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

28. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD SCOTT OF FOSCOTE

My Lords,

29. The issue raised by this appeal, namely, the proper judicial approach to section 12(3) of the Human Rights Act 1998, is one of great importance. This is particularly so for cases like this in which the disclosure which is sought to be prevented is, if the information in question is true, disclosure of iniquity by any standards. I have, however, had the advantage of reading in advance the opinion of my noble and learned friend Lord Nicholls of Birkenhead and am in complete agreement with the guidance he has given in paragraph 22 of his opinion and with the reasons he has given for concluding that this appeal should be allowed. I, too, would make the order he has suggested.

BARONESS HALE OF RICHMOND

My Lords,

30. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.