Neutral Citation Number: [2011] EWCA Civ 42

Cases No: A2/2010/2745 and 2746

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
The Hon Mr Justice Tugendhat
Claim No HQ10X3121

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/01/2011

Before:

MASTER OF THE ROLLS
LORD JUSTICE MAURICE KAY
and
LADY JUSTICE SMITH

- -

Between:

Appellant

JIH
- and -
NEWS GROUP NEWSPAPERS LIMITED **Respondent**

- -
- -

Mr Hugh Tomlinson QC and **Mr David Sherborne** (instructed by Berwin Leighton Paisner LLP) for **JIH**
Mr Richard Spearman QC (instructed by **Farrer & Co**) for **News Group Newspaers Ltd**
Ms Gillian Phillips made written representations on behalf of **Guardian News & Media Ltd**
Mr Marcus Partington made written representations on behalf of **The Media Lawyers Association**

Hearing date: 14th January 2011

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Approved Judgment

The Master of the Rolls:

Introductory

1. The courts are not infrequently asked to make orders preventing the publication of private information, concerning, for instance, the details of a person's finances, health, sexual activities, or family life. In such cases, the claimant is normally (but by no means always) a public figure, and at least one of the defendants is normally (but by no means always) a member of the national media.

2. When considering what order to make on such applications, it is normally necessary to balance two competing legal rights, each of which constitutes a fundamental feature of a civilised modern democratic society. Those competing rights are an individual's right to "respect for his private and family life", as stipulated in Article 8 of the European Human Rights Convention and relied on by the claimant, and the more general right to "freedom of expression", relied on by the defendant and laid down by Article 10 of the Convention, which also refers to the "right … to receive and impart information and ideas".

3. In many cases, this balancing exercise is difficult. This is partly because the two rights are rather different in their constituent factors, partly because there are often powerful arguments pointing in opposite directions, partly because each case depends very much on its own particular facts, and partly because the exercise can involve a significant degree of subjectivity.

4. When the balance comes down in favour of preventing publication, a further problem sometimes arises, namely the extent to which, and the way in which, the parties' evidence and arguments, and the court's reasoning and order, in the particular case can be reported. It would be wrong to permit unrestrained reporting in the normal way, as that would involve publishing the name of the claimant and the details of the information whose publication he seeks to prevent, thereby rendering the court's order pointless. On the other hand, public coverage of court proceedings is a fundamental aspect of freedom of expression, with particular importance: the ability of the press freely to observe and report on proceedings in the courts is an essential ingredient of the rule of law. Indeed the right to a "fair and public hearing" and the obligation to pronounce judgment in public, save where it conflicts with "the protection of the private lives of the parties" or "would prejudice the interests of justice", are set out in Article 6 of the Convention.

5. The appeal in this case is concerned with this issue of reporting restrictions, and, as both Mr Hugh Tomlinson QC (who appears for the claimant with Mr David Sherborne) and Mr Richard Spearman QC (who appears for the defendant) contend, it therefore raises a point of general concern and of some importance. However, the determination of the precise extent of what can be reported about the proceedings themselves is every bit as fact-sensitive as the anterior exercise of deciding whether to make an order restraining publication of the private information in the first place.

6. As Maurice Kay LJ said in a recent case raising a somewhat similar issue, *Ntuli v Donald* [2010] EWCA Civ 1276, para 52, when deciding whether, and if so to what extent, to impose reporting restrictions in relation to legal proceedings, "as part of its consideration of all the circumstances of a case, a court will have regard to the

respective and sometimes competing Convention rights of the parties." He went on to say this, two paragraphs later:

> "This is an essentially case-sensitive subject. Plainly [the claimant] is entitled to expect that the court will adopt procedures which ensure that any ultimate vindication of his Article 8 case is not undermined by the way in which the court has processed the interim applications and the trial itself. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which [the claimant] is entitled."

An outline of the facts

7. The facts of this case (in so far as they can fairly be set out in a publicly available judgment concerning information about the claimant's private life, which it is accepted should not be published, at least for the moment, and as they were described by Mr Tomlinson in open court) are as follows. The claimant, known for present purposes as JIH, is a well known sportsman, who has, for some time, been in an apparently long-term and conventional relationship with another person, to whom I shall refer as "XX". Since his relationship with XX had started, but before August 2010, a story had been published, without JIH having received any prior notice, suggesting that he had had a sexual liaison with another person, whom I shall call "YY".

8. The story whose publication JIH is seeking to prevent concerns an alleged sexual encounter he had with a different person, to whom I shall refer as "ZZ", last year. In August 2010, JIH discovered that the defendant, News Group Newspapers Ltd ("NGN"), had been told of this alleged encounter by ZZ.

9. On learning that NGN intended to publish a story in *The Sun*, based on the information provided by ZZ, JIH began the present proceedings in August 2010 without revealing his identity in the publicly available court papers. He immediately made an application seeking an order, on an interlocutory basis (i.e. until the trial of his action), preventing the publication of information contained in a "Confidential Schedule". That Schedule referred to "[i]nformation concerning a sexual relationship or alleged sexual relationship between [JIH] and [ZZ] during the period of his relationship with [XX] …., including the fact or any details of such relationship" (and I think it is clear that "such relationship" is that with ZZ).

10. JIH's proceedings were served on seven other media companies, and the application was granted in the form of a short term injunction by Nicol J on 13 August 2010, while NGN and the other media companies had the opportunity to consider their respective positions.

11. Thereafter, having considered JIH's claim and, no doubt, having taken legal advice, NGN entered into negotiations with JIH, with a view to agreeing terms pending the trial of his claim. These negotiations resulted in an agreed form of order in which, to summarise the essence of the agreement for present purposes, until the trial of these proceedings (or further order in the meantime), (a) NGN would submit to an injunction preventing it from publishing "all or any part of the information contained

in the Confidential Schedule", save to the extent that any such information was in an open judgment of the court, and, crucially for present purposes, (b) the identity of JIH would not be disclosed, and (c) the hearing of the application be in private, and not be reported. The basis of the order was that NGN accepted that, at least until trial, publication of the information in the schedule would arguably infringe JIH's Article 8 rights, which would outweigh the Article 10 rights relied on by NGN.

12. When the draft agreed order ("the draft order") was presented for approval to Tugendhat J, he decided that he was not prepared to make the order, at least without having heard argument which persuaded him that it was appropriate to do so. In taking that course, he was following the approach which he had adopted in *Gray v UVW* [2010] EWHC 2367 (QB), where he had held that "an order for anonymity and reporting restrictions cannot be made simply because the parties consent: parties cannot waive the rights of the public" (quoting from the judgment below in this case, [2010] EWHC 2818 (QB)**,** para 3). I agree both with the principle there identified, and with the consequent right, indeed obligation, of a Judge to take the course which Tugendhat J took in this case on being presented with the draft order, namely to call for argument to persuade him to approve any part of an order which restricts or prevents publication of any aspect of the proceedings, and about which he has any doubts or worries.

13. The reason that the Judge called for argument as to the terms of the draft order was not concerned with the principle of whether an interlocutory injunction restraining publication of the information in question should be made: the Judge plainly thought that such an injunction was justified. What worried the Judge was the breadth of the draft order so far as the reporting restrictions it contained: he thought that they went too far.

14. Having heard argument on the terms of the draft order concerning restraints on publication, Tugendhat J gave judgment on 5 November 2010. In that judgment, he concluded that the draft order should be approved, subject to the important exception that he should refuse JIH's application to continue Nicol J's order granting him anonymity – [2010] EWHC 2818 (QB). Although Tugendhat J refused permission to appeal, he sensibly stayed the implementation of the order so as to give JIH the opportunity to appeal to this court.

15. Thereafter, there was some media reporting of the case, which revealed more than was permitted by Tugendhat J's order of 5 November. As a result, JIH brought the matter back before the Judge, asking him to reconsider his refusal to accord JIH anonymity. That application was refused in a judgment given on 18 November – [2010] EWHC 2979 (QB). The Judge refused JIH permission to appeal against that order also.

The present application

16. JIH then applied, initially in writing in the normal way, for permission to appeal against both decisions to this court. I ordered that JIH's applications for permission to appeal against the two judgments should be heard by three members of the Court of Appeal, with any appeal to follow immediately if either application succeeded. This is not normally a procedure I favour, but, on this occasion, where there were two potential appeals, where any refusal of permission would have resulted in a renewed

application which would have involved a hearing, where the matter was urgent for the parties, and where the issues raised might well be of wider significance, it seemed right to make such an order.

17. The hearing of the applications was held in open court. It was obviously right, as a matter of principle, to have the hearing in public if it was possible to do so. As both counsel very sensibly accepted, this was indeed possible, on the basis that, at the hearing, the identity of JIH was not revealed, and some of the facts, and some of the contents of the documents were referred to in rather coded or referential terms.

18. Mr Tomlinson argued that JIH should have been accorded anonymity, either on the basis of the position as it was as at the first hearing before Tugendhat J, or in view of the publicity which occurred thereafter. Mr Spearman presented the case for NGN to the contrary with commendable restraint, bearing in mind, on the one hand, that his client had agreed the order for anonymity, and, on the other hand, that he wished to give the court all the assistance that he could. The case against anonymity was supported by written submissions from Ms Gillian Phillips, Director of Legal Services of Guardian News & Media, and from Mr Marcus Partington on behalf of The Media Lawyers Association.

Open justice and the need for restraint

19. The cardinal importance of open justice is demonstrated by what is stated in Article 6 of the Convention. But it has long been a feature of the common law. It was famously articulated in the speeches in *Scott v Scott* [1913] AC 417 – see particularly at [1913] AC 417, 438, 463 and 477, per Lord Haldane LC, Lord Atkinson, and Lord Shaw of Dunfermline respectively. The point was perhaps most pithily made by Lord Atkinson when he said "in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect." For a more recent affirmation of the principle, see *R(Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65, paras 38-42, per Lord Judge CJ.

20. However, as with almost all fundamental principles, the open justice rule is not absolute: as is clear from Article 6, there will be individual cases, even types of cases, where it has to be qualified. In a case involving the grant of an injunction to restrain the publication of allegedly private information, it is, as I have indicated, rightly common ground that, where the court concludes that it is right to grant an injunction (whether on an interim or final basis) restraining the publication of private information, the court may then have to consider how far it is necessary to impose restrictions on the reporting of the proceedings in order not to deprive the injunction of its effect.

21. In a case such as this, where the protection sought by the claimant is an anonymity order or other restraint on publication of details of a case which are normally in the public domain, certain principles were identified by the Judge, and which, together with principles contained in valuable written observations to which I have referred, I would summarise as follows:

> (1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.

(2) There is no general exception for cases where private matters are in issue.

(3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.

(4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.

(10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.

22. Where, as here, the basis for any claimed restriction on publication ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and circumstances of the case are sufficiently strong to justify encroaching on the open justice rule by restricting the extent to which the proceedings can be reported, and (b) if so, the judge ensures that the restrictions on publication are fashioned so as to satisfy the need for the encroachment in a way which minimises the extent of any restrictions.

23. In the present case, as in many cases where the court grants an injunction restraining publication of information, the claimant's case as to why there is a need for restraints on publication of aspects of the proceedings themselves which can normally be published is simple and cogent. If the media could publish the name of the claimant and the substance of the information which he is seeking to exclude from the public domain (i.e. what would normally be information of absolutely central significance in any story about the case – who is seeking what), then the whole purpose of the injunction would be undermined, and the claimant's private life may be unlawfully exposed.

24. In the course of his judgment, at [2010] EWHC 2818 (QB), paras 8 and 9, Tugendhat J accepted the proposition advanced before him by Mr Tomlinson for JIH that:

> "Where the court has accepted that the publication of private information should be restrained, if the court is to avoid disclosing the information in question it must proceed in one of two alternative ways:
>
> (1) If its public judgment or order directly or indirectly discloses the nature of the information in question then it should be anonymised;
>
> (2) If the claimant is named in the public judgment or order then the information should not be directly or indirectly identified."

25. While that is not an unfair assessment in the present case, in other cases the position will sometimes be a little less stark. However, in any case, it is plainly correct that, where the court permits the identity of the claimant to be revealed, it is hard to envisage circumstances where that would not mean that significantly less other information about the proceedings could be published than if the proceedings were anonymised. Thus, if the identity of JIH could be published in the context of the present proceedings, it would not be appropriate to permit the publication of even the relatively exiguous information contained in paras 7-9 above. As the Judge went on to say, the obvious corollary is that, if the claimant is accorded anonymisation, it will almost always be appropriate to permit more details of the proceedings to be published than if the claimant is identified.

The reasoning of Tugendhat J in this case

26. The Judge gave a full and careful judgment on 5 November 2010, in which he concluded that anonymity should not be accorded to JIH. While that decision did not involve the exercise of a discretion, it involved a balancing exercise, with which, at least as a matter of general principle, an appellate court should be slow to interfere. When considering an appeal against such a decision, an appellate court is normally

exercising a reviewing function, and should not allow the appeal unless satisfied that the judge was wrong. As I said in *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804, para 49, "[w]here the determination is a matter of balance and proportionality, it is, generally speaking, difficult for an appellant to establish that the judge has gone wrong". All the more so, where, as here, the Judge is very respected and highly experienced in the particular area of practice, and has given the issue very careful consideration.

27. However, in this particular case, I am satisfied that, owing to a misunderstanding or an oversight, the Judge's decision cannot stand. As he pointed out, the draft order was too restrictive in the extent to which it prevented the reporting of these proceedings. And, it should be added, it was only because of Tugendhat J's vigilance that this point was identified: had he not read and considered the draft order when it was sent to him for approval, and had he simply approved it, this point would have gone by default.

28. As the Judge held, the draft order was too restrictive in that it both gave JIH anonymity and prevented the reporting of any aspect of the evidence. As explained above, it is clear that, if anonymity was refused, so that JIH was identified in the media, the information contained in paras 7-9 above could not also be published. However, if anonymity was granted, it seems equally clear that that information could be published, without undermining the purpose of the injunction. So the Judge was right in concluding that the choice to be made was between revealing the identity of JIH or revealing the general nature of the information which he was seeking to keep private.

29. The Judge's decision to opt for revealing JIH's identity, rather than revealing the general nature of the information sought to be protected, was based on the propositions that (a) it was common ground between the parties, as demonstrated by the draft order, that the general nature of the information should not be revealed, and (b) it had not been submitted on behalf of JIH that this should be reconsidered. Accordingly, as even the general nature of the information was not to be published, it followed that JIH's identity should not be withheld from the public, given that restrictions on reporting should always be kept to a minimum. That this was the reasoning of the Judge is clear from what he said at [2010] EWHC 2818 (QB), para 63, and [2010] EWHC 2979 (QB), para 16.

30. In my view, this approach was, on analysis, erroneous, although I understand how the error arose. Once the Judge had, rightly, called for argument as to the terms of the draft order so far as reporting restrictions were concerned, all aspects of the draft order in that connection were up for consideration. Furthermore, although Mr Spearman's analysis of JIH's skeleton argument below has established how it might have been understood otherwise, and the point appears to have been made only relatively briefly in oral submission, I am satisfied that Mr Tomlinson did argue below that, if the restrictions in the draft order on reporting this case were to be reduced, it was the general details of the story which should be reportable in the media, and JIH's anonymity should be retained.

31. Accordingly, the Judge reached his conclusion in his judgment on a mistaken basis. In my view, we should therefore give JIH permission to appeal, and, as indicated when the application was listed for hearing, we should go ahead and decide the appeal. Furthermore, I consider that, rather than sending the case back, which would incur

further delay and cost, we should decide the issue ourselves; indeed, the parties did not suggest otherwise.

Discussion

32. As I have explained, the choice we face is either permitting JIH to be identified or permitting all the information contained in this judgment, and in particular in paras 7-9 above, to be published. I have reached the conclusion that, on the facts of this case, it would be right to accede to JIH's claim for anonymisation, and that, as a result, the information contained in this judgment (but no other information about the facts about or giving rise to the case, at least if they could assist in JIH being identified) can be published.

33. If the identity of JIH is revealed, then the only details of the case which it would be realistically possible to permit to be published, would be the fact that he is seeking a permanent injunction, and has obtained an interlocutory injunction, to restrain The Sun from publishing information about him which he contends is of a private nature. At least on the face of it, there is obvious force in the contention that the public interest would be better served by publication of the fact that the court has granted an injunction to an anonymous well known sportsman, in the circumstances described in paras 7-9 above, than by being told that it has granted an injunction to an identified person to restrain publication of unspecified information of an allegedly private nature.

34. In *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 WLR 325, para 22, Lord Rodger referred to the "recent efflorescence of anonymity orders", although it is right to emphasise that this was in a rather different context from the present type of case. There is a belief in some quarters that there may be no way of assessing the extent to which, and the circumstances in which, the courts are granting orders preventing the publication of allegedly private or otherwise confidential information, because of the inclusion of reporting restrictions in such orders. There may be nothing in that belief, but in recent years there has been an increase in the number of such orders, which itself gives rise to concern, as does the fact that the belief is understandable.

35. The concern would, I think, be substantially met if courts comply with the principle that judgments and orders are made available as mentioned in para 21(9) above, and those judgments and orders disclose as much as possible about the case. More particularly, there is much in the point that the media will be generally better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, a sexual liaison between an unidentified well known sportsman, in an apparently monogamous relationship, and a third party) rather than (b) the name of the individual who is seeking to protect an unspecified aspect of his or her alleged private life by means of an injunction. As Mr Tomlinson puts it, the former information would normally enable the public to have a much better idea of why the court acted as it did than the latter information.

36. Having said that, I acknowledge the importance of being able to name JIH as the claimant. As Lord Rodger famously said, in the *Guardian case* [2010] 2 WLR 325, para 63, "What's in a name? 'A lot' the press would answer". Two paragraphs on, he explained that "if newspapers can identify the people concerned, they may be able to

give a more vivid and compelling account which will stimulate discussion". And he went on to say that "[c]oncealing … identities simply casts a shadow over entire communities." However, as Mr Tomlinson says, that was said in a context where there was no question but that the nature of the allegations and contents of the court order could be freely published. Unlike the present case, Lord Rodger was not concerned with a trade-off between revealing the identity of a party and publishing the substance of the allegations and order. Nonetheless, the judgment vividly illustrates the importance of being able to identify, and put a name to, parties to litigation which is potentially of interest to the public.

37. It is not, of course, for the media to dictate to the courts whether an anonymity order, or some other sort of order, is appropriate. However, as Mr Spearman points out, if a story is of less interest to the media and the public, it is less likely to be reported or read, and media reporting "contributes to a debate of general interest" – per the European Court of Human Rights in *Von Hannover v Germany* [2005] EHRR 1, para 63.

38. There are other arguments. An anonymity order runs the risk of unintentionally encouraging suspicion and gossip in relation to innocent third parties. In the present case, as even a casual inspection of blog and twitter sites would reveal, vouchsafing the fact that the injunction was granted at the request of a well known sportsman may well lead to suspicions or allegations against well known people other than JIH. On the other hand, it is true that, at least in many cases, identification of the claimant will be more likely to result in public speculation, or even deduction by journalists or members of the public, as to the nature of the information which he is trying to keep out of the public domain. Indeed, there is something in the point that such speculation could be even more damaging to JIH than if no injunction had been granted at all.

39. As I have already emphasised, when deciding on questions of this sort, each case will turn on its own facts. Accordingly, it is not appropriate to suggest that there is some sort of general rule that anonymisation is more, or indeed less, likely to result in greater interference with free speech and maintaining public scrutiny of the courts than precluding the publication of more extensive information about the proceedings.

40. In this case, I consider that the crucial factor is the previous story about JIH's alleged liaison with YY, which had already been published, without JIH's prior knowledge or permission. That earlier story involved a very similar allegation about JIH to that which NGN was proposing to publish as a result of ZZ's allegations. If we permitted JIH's identity to be revealed without permitting the nature of the information of which he is seeking to restrain to be published, then it would nonetheless be relatively easy for the media and members of the public to deduce the nature of that information: it would be a classic, if not very difficult, jigsaw exercise. It is true that the very fact that this decision means that we are revealing that JIH is a person about whose alleged sexual activity a previous story has been published, and that this will immediately narrow the field for those seeking to identify him, but, in my view, that point is of limited force: there have been quite a few stories of this nature relating to different well known people published in the printed and electronic media in the past two or three years.

41. Given that I consider that, in the absence of the point just discussed, the argument would, from the point of view of NGN, be at best very finely balanced, it follows that

I conclude that JIH is entitled to retain anonymity in connection with these proceedings – until trial or further order in the meantime.

Conclusion

42. For these reasons, I would allow JIH's appeal against the order of 5 November 2010 to the extent that I would direct that he is to be granted anonymity in connection with these proceedings until trial or further order. I would also direct that the extent to which the facts of, and individuals involved in, this case can be reported is limited to the facts and matters in this judgment and the two judgments of Tugendhat J. It is therefore unnecessary to consider JIH's appeal against the judgment of 18 November 2010, but it is right to record that, had I decided to uphold the decision of 5 November, I would have upheld the decision of 18 November. If the Judge had been right to conclude on 5 November that anonymity should be refused, he was well within the margin of discretion available to him to decide that the events subsequent to that date did not justify going back on that conclusion.

Lord Justice Maurice Kay:

43. I agree.

Lady Justice Smith:

44. I also agree.