Neutral Citation Number: [2011] EWCA Civ 439

Case No: A2/11/0569

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE COLLINS
HQ11D00848

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th April 2011

Before :

LORD JUSTICE WARD
LORD JUSTICE LAWS
and
LORD JUSTICE MOORE-BICK

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Between:

ETK	**Appellant**
- and -	
News Group Newspapers Ltd	**Respondent**

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- -

Mr Hugh Tomlinson QC (instructed by Schillings Solicitors) for the appellant
Mr Anthony Hudson (instructed by Farrer & Co) for the respondent

Hearing date: 10th March 2011

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Judgment

Lord Justice Ward:

1. On Saturday 5th March 2011 the applicant made an application on short notice to Collins J. to restrain News Group Newspapers Ltd, the publishers of the News of the World, from publishing or communicating or disclosing to any other person:

> "(a) any information concerning the facts of this case and the individuals involved (including, in particular, any information identifying or in any way tending to identify the Applicant as being the person who has applied for this order), save for that contained in this order and in any public judgment of the court given in this action;
>
> (b) any information concerning the fact or details of the sexual relationship between the Applicant (who is a male working in the entertainment industry) and the person named in the Confidential Schedule (who is a female working in the entertainment industry)."

2. Having heard the matter in private, Collins J. dismissed the application, refused permission to appeal but granted temporary relief in the terms set out above on the applicant's undertaking expeditiously to apply for permission to appeal. That was done, Sedley L.J. adjourning the application to be heard by two Lord Justices on notice to the respondent. Given the urgency, I directed that the full court should sit on Thursday 11th March to be able to hear the appeal if permission were granted and the parties were content for the appeal to follow.

3. The case was listed to be heard in private. When it was called, Mr David Price Q.C. intervened on behalf of that well known figure, Mr Benjamin Pell, who is regularly seen in the press benches of these courts reporting especially on matters in this field in which he has become quite an expert, to the extent even of his occasionally prompting learned counsel with references to relevant authority of which counsel was ignorant. Mr Price sought to persuade us to hear the matter in open court but we ruled that since the main argument would be fact-sensitive, it was necessary for the preservation of confidentiality to sit in private.

4. We granted permission to appeal, heard the appeal, and although we indicated the result, we formally adjourned in order to hand down this judgment in open court.

The background

5. In about November 2009 the appellant, who is a married man, began a sexual relationship with another woman whom I shall simply call "X", who is herself married. The source of the News of the World's information suggests that this relationship became obvious to those with whom the appellant and X were working. Towards the end of April 2010 the appellant's wife confronted him with her belief, formed either intuitively, or from information conveyed to her, that he was having an affair. He admitted it. This was deeply distressing for the wife but she and her husband determined, not least for the sake of their two teenage children, to rebuild her trust and their marriage. To that end the appellant accepted that he would end his sexual relationship with X and he so informed her.

6. Continuing their working relationship was obviously awkward and in discussion with his employers, the appellant told them that he would prefer in an ideal world not to have to see her at all and that one or other should leave but both accepted that their working commitments did not then make that possible. They agreed to conduct themselves with due decorum and to continue to perform their duties in a professional way as in fact they did.

7. In December 2010 their employers informed X that her services would no longer be required, explaining publicly that it was a convenient moment to make this change. She was, understandably, upset and angry and may even have threatened to take proceedings against the employer. The appellant only became aware of her departure whilst he was on holiday with his family over Christmas.

8. News of these events leaked to the News of the World whose enquiries alerted the appellant to its wish to publish the fact of the affair and that the affair was the real cause of X leaving her employment. He moved accordingly for this injunction, supported not only by his wife, but also by X.

The judgment under appeal

9. Collins J. gave a short ex tempore judgment. He found there was a reasonable expectation of privacy. He conducted a balancing exercise between the right of the newspaper to freedom of expression under Article 10 of the European Convention of Human Rights and the appellant's right to respect for his private and family life under Article 8 and he recognised that by virtue of section 12 of the Human Rights Act 1998 the appellant had to show that it was more likely than not that at trial the balance would come down in favour of Article 8. He held that there was public interest in the effect of the adultery and so refused the injunction because the respondent intended to go no further than reporting the fact of the affair with the resultant dismissal of X . His "last concern" related to the children. As I shall show he held that the adverse effect on them could not tip the balance.

Discussion

10. The principles which govern an application like this for an interim injunction to restrain publicity of private information are by now well established.

(1) The first stage is to ascertain whether the applicant has a reasonable expectation of privacy so as to engage Article 8; if not, the claim fails.

(2) The question of whether or not there is a reasonable expectation of privacy in relation to the information:

> "… is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the

> information came into the hands of the publisher": see *Murray v Express Newspapers* [2009] Ch 481 at [36].

The test established in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 is to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive.

(3) The protection may be lost if the information is in the public domain. In this regard there is, per *Browne v Associated Newspapers Ltd* [2008] QB 103 at [61],

> "…potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper."

Whether what may start as information which is private has become information known to the public at large is a matter of fact and degree for determination in each case depending on its specific circumstances.

(4) If Article 8 is engaged then the second stage of the inquiry is to conduct "the ultimate balancing test" which has the four features identified by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at [17]:

> "First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each." (It should be noted that the emphasis was added by Lord Steyn.)

(5) As *Von Hannover v Germany* (2004) 40 EHRR 1 makes clear at [76]:

> "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."

(6) Pursuant to section 12(3) of the Human Rights Act 1998 an interim injunction should not be granted unless a court is satisfied that the applicant is likely – in the sense of more likely than not – to obtain an injunction following a trial.

A reasonable expectation of privacy?

11. Collins J. found in the appellant's favour. Mr Anthony Hudson, who appears for the respondent, undertakes to file a respondent's notice to challenge that finding. He submits that the manner in which the appellant and X conducted their relationship was such that it became known to those with whom they worked with the result that knowledge spread in the workplace, reaching to the higher echelons of management. Thus, he submits, the fact of the relationship was "naturally accessible to outsiders".

He relies on observations of Eady J. in *X v Persons Unknown* [2007] E.M.L.R. 10 at [38] distinguishing between "matters which are naturally accessible to outsiders and those which are known only to the protagonists". That was a very different kind of case where the judge was drawing a distinction between a couple whose marriage was encountering difficulties (the "protagonists") and their acquaintances (the "outsiders") who knew of the marital tensions not from private revelation (which would be protected) but from some public manifestation of the discord e.g. an actual separation (which probably would not entitle the protagonists to a reasonable expectation of privacy). Here the sexual relationship was essentially a private matter. One way or another it became known to work colleagues but their knowledge does not put the information into the public domain – see *Browne v Associated Newspapers Ltd* cited at [10(3)] above. In my judgment the appellant was reasonably entitled to expect that his colleagues would treat as confidential the information they had acquired whether from their own observation of the behaviour of the appellant and X or from tittle-tattle and gossip which larded the office conversation or from a confidential confession to a colleague. A reasonable person of ordinary sensibilities would certainly find the disclosure offensive.

12. In my judgment the judge was correct to hold that the appellant's Article 8 rights were engaged. I would therefore dismiss the respondent's cross-appeal.

The ultimate balance to be struck between Article 10 and Article 8

13. As for Article 10, everyone has the right to freedom of expression but the ones with the greatest need for this constitutionally vital freedom are the organs of the media. In the interests of our democratic society we – and that includes the judges – must ensure that the press are freely able to enquire, investigate and report on matters of public interest. The press is the public watchdog. That freedom is, however, not unrestricted as Article 10(2) itself makes so clear that it is worth repeating:

> "2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to … restrictions … as are prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others or for preventing the disclosure of information received in confidence …"

This restriction can only be justified if it is a proportionate and is no more than is necessary to promote the legitimate object of the restriction. To restrict publication simply to save the blushes of the famous, fame invariably being ephemeral, could have the wholly undesirable chilling effect on the necessary ability of publishers to sell their newspapers. We have to enable sales if we want to keep our newspapers. Unduly to fetter their freedom to report as editors judge to be responsible is to undermine the pre-eminence of the deserved place of the press as a powerful pillar of democracy. These considerations require the court to tread warily before granting this kind of injunction.

14. As for Article 8, weight must be given not only to the right to respect for the private and family life of the appellant himself, but also to the rights of X and, in addition, the rights of the appellant's wife and his children. It is not at all clear to what extent if at

all, Collins J. had regard to the Article 8 rights of anyone bar the appellant. He did say of X:

> "8. The first question is whether there is a reasonable expectation of privacy. There was certainly a reasonable hope of privacy shared by the claimant and [X]. The fact that the relationship was adulterous does not mean that privacy was lost. Prima facie the relationship should be protected by Article 8. …"

This suggests her rights were taken into account but other passages can be read as limiting his focus to the rights of the appellant alone for he said:

> "9. Thus, I have to consider the balancing exercise between the right of the newspaper under Article 10 and the right of the *individual* under Article 8. …
>
> 11. The News of the World argues that their rights outweigh those *of the Claimant*." [I have added the emphasis.]

15. As for the wife and children, the judge said this:

> "13. My last concern relates to the claimant's children. As Mr Tomlinson rightly points out, there is likely to be an adverse effect on them if the News of the World discloses the fact of the adultery. One recognises the concerns that this issue raises but unfortunately if one parent behaves in a way that attracts adverse publicity it will affect the children. This is not something which can tip the balance if there is otherwise no good reason to grant an injunction."

16. Every allowance must be made for the fact that this was an *ex tempore* judgment delivered on a Saturday morning in an urgent application when no-one can expect verbal exactitude or detailed reasoning on every point of the argument. The exigencies of life as the out-of-hours applications' judge shackle perfection. That said, I cannot but conclude that in this instance the judge erred. First, X's rights were at the very forefront of the story the News of the World wished to publish, namely that it was the fact of their adultery, not any lack of professional competence, that led to the termination of her services. She did not welcome the intrusion of the press, has made it plain to this Court that she has no intention of bringing proceedings either against her employer or the appellant who is associated with the employer and supports the application. The evidence before the court is that X has made clear that she did not wish her privacy to be invaded at all.

17. The position of the appellant's wife is equally clear: she opposes publicity. Then there are the children. The purpose of the injunction is both to preserve the stability of the family while the appellant and his wife pursue a reconciliation and to save the children the ordeal of playground ridicule when that would inevitably follow publicity. They are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment. In another context,

in *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, [2009] A.C. 115, Lady Hale commented at [4] on the risk of:

> "… missing the central point about family life, which is that the whole is greater than the sum of its individual parts. The right to respect for family life of one necessarily encompasses the right to respect for the family life of others, normally a spouse or minor children, with whom that family life is enjoyed."

18. Collins J. may not have recognised the rights of the appellant's wife but he certainly did accept that the adverse effect on the children was relevant. Regrettably I cannot agree that the harmful effect on the children cannot tip the balance where the adverse publicity arises because of the way the children's father has behaved. The rights of children are not confined to their Article 8 rights. In *Neulinger v Switzerland* (2010) 28 EHRC 706 the Strasbourg court observed that:

> "131. The Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken … 'of any relevant rules of international law applicable in the relations between the parties' and in particular the rules concerning the international protection of human rights. …
>
> 135. … there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount."

Support for that proposition can be gathered from several international human rights instruments, not least from the second principle of the United Nations Declaration of the Rights of the Child 1959, from article 3(1) of the Convention of the Rights of the Child 1989 (UNCRC) and from article 24 of the European Union's Charter of Fundamental Rights. For example, article 3(1) of the UNCRC provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

19. Thus it seems to me just as "the court's earlier approach to immigration cases is tempered by a much clearer acknowledgement of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making" so too must the approach of the court to these injunctions have regard to the interests of children. The quotation is taken from paragraph 20 of the speech of the Baroness Hale of Richmond with whom Lord Brown and Lord Mance agreed in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC4 which was a case concerned with the weight to be given to the best interests of children who are affected by the decision of the Home Secretary to remove or deport one or both of their parents from this country, more specifically with the question: in what circumstances is it permissible to remove or deport a non-citizen parent (here the mother whose immigration history was described as "appalling") where the effect will be that a child who is a citizen of the United Kingdom will also have to leave? I

appreciate that the issue is far removed from that with which this Court is concerned but since the interests of the appellant's children are undoubtedly engaged, the universal principles cannot be ignored. The proper approach is, therefore, neatly summarised by Lord Kerr of Tonaghmore at paragraph 46 of that decision, namely:

> "It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

However this learning must, with respect, be read and understood in the context in which it is sought to be applied. It is clear that the interests of children do not automatically take precedence over the Convention rights of others. It is clear also that, when in a case such as this the court is deciding where the balance lies between the article 10 rights of the media and the Article 8 rights of those whose privacy would be invaded by publication, it should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests. Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.

20. How then does this approach square with the way Lord Steyn advised in *In Re S* that the ultimate balance should be struck, see [10(4)] above. He was confining himself to articles 8 and 10 and not ranging more widely to take note of the other Convention rights of children. He expressed his opinion long before *Neulinger* called for a re-appraisal of the position. In any event, the emphasis he added makes it clear that he was concerned strictly with the balance between article 10 and article 8 "*as such*", i.e. where the only rights in balance were those conferred by articles 8 and 10. If, as he requires, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary, then the additional rights of children are to be placed in the scale. The question then is whether the force of the article 10 considerations outweigh them given what I have said in paragraph 19.

21. Here there is no political edge to the publication. The organisation of the economic, social and political life of the country, so crucial to democracy, is not enhanced by publication. The intellectual, artistic or personal development of members of society

is not stunted by ignorance of the sexual frolics of figures known to the public. As Lord Hope said of Miss Campbell (paragraph 120 of *Campbell v MGN Ltd*),

> "… it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy."

22. In my judgment the benefits to be achieved by publication in the interests of free speech are wholly outweighed by the harm that would be done through the interference with the rights to privacy of all those affected, especially where the rights of the children are in play.

The decisive factor

23. The decisive factor is the contribution the published information will make to a debate of general interest. Is a debate about the reasons why X's employment terminated a matter of such public interest? Both the appellant and X will be known to a sector of the public though it is impossible to measure how large – or how small – that sector is. Certainly some members of the public will have noticed the end of her employment: a proportion of them will even have speculated why she left. But the reasons for her leaving give rise to no debate of general interest. The reasons for her leaving may interest some members of the public but the matters are not of public interest. Publication may satisfy public prurience but that is not a sufficient justification for interfering with the private rights of those involved.

Conclusion

24. I have come to the firm conclusion that the judge erred and that this is a case where it is more likely than not that an injunction would be granted following a trial. In my judgment the appeal should be allowed and interlocutory injunctions granted in the terms sought.

Lord Justice Laws:

25. I agree.

Lord Justice Moore-Bick:

26. I also agree.