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Proximity to fame, privacy and copyright ownership

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Dispute Resolution analysis: Following the decision to restrain publication of semi-nude photos of Kate Winslet's husband (Mr Rocknroll), Chloe Strong, barrister at 5RB Chambers, discusses the case and what it means for privacy disputes.

Original news

Rocknroll v News Group Newspapers Ltd [2013] All ER (D) 98 (Jan)

Mr Rocknroll, who was married to the actress Kate Winslet, sought an interim injunction to restrain the defendant newspaper from publishing photographs of him partially dressed at a party. The photographs had been taken by a guest at the party and had been published on Facebook. Mr Rocknroll had subsequently been assigned the copyright in the photographs. The Chancery Division, in granting the application, decided, on the facts, Mr Rocknroll's right to privacy under art 8 of the European Convention of Human Rights (ECHR) had plainly been engaged by News Group's threat both to publish the photographs and to publish a description of their content. Mr Rocknroll was more likely than not to succeed at trial in vindicating his art 8 rights as against the defendant's right to freedom of speech under art 10 of the Convention.

What issues did this case raise?

As with all privacy claims, at the heart of this action was the arts 8 and 10 ECHR balancing act necessary to determine whether or not the publication of the alleged private information--in this case the photographs (and the information contained within them)--ought to be restrained.

It's important to remember art 10 rights in this context refers both to the right of the defendant newspaper publisher to impart that information as well as the public's right to receive the information.

This action in particular also dealt with:

- o the extent to which the private information could be said to have lost its 'private character' due to exposure of the information to the public domain
- o the question of whether those people that associate themselves with celebrities, but who are not 'public figures' in their own right, compromise their art 8 privacy rights by virtue of that association

To what extent is the judgment helpful in clarifying how the court will approach balancing the rights contained in ECHR, arts 8 and 10?

The judgment does nothing new in terms of setting out how the art 8/10 balance will be conducted. The judge simply applied what he described as 'relatively new but well-settled principles', quoting the words of Ward LJ in the case of *ETK v News Group Newspapers Ltd* [2011] All ER (D) 197 (Apr). To summarise the court must:

- o ascertain whether the information engages art 8 in the first place (so as to be able to argue the claimant has a reasonable expectation of privacy in respect of the information)--in doing so it should take into account the extent to which the information is already in the public domain
- o if art 8 is engaged, carry out an art 8/10 assessment, bearing in mind neither article takes automatic precedence over the other, and the decisive factor is really the extent to which that information would contribute to a debate of 'general public interest'

- o not grant an injunction unless it is persuaded by the applicant it would be more likely than not to obtain an injunction following a trial

The judge was particularly swayed by what he felt to be a real risk that publication would have a grave impact on Ms Winslet's children. That being so close to Mr Rocknroll and Ms Winslet's wedding, he said, gave every indication News Group's intention was simply to satisfy its readers' interest in the 'private peccadilloes of the rich and famous', rather than contribute to a genuine public interest debate.

What should lawyers be mindful of when advising in this area?

Speed

If you act with sufficient haste a privacy injunction can be an effective way of restraining publication of private information. Even if this means going to court, without enough time to prepare full legal argument on the issues, this approach should still be adopted if you think there are sufficient grounds to obtain an injunction.

Consent

The judge thought it most unlikely that, just because someone consented to photographs being taken of them they would, at trial, be found to have consented to their publication in a national newspaper.

Zonal argument

Just because someone has an association or a relationship with a celebrity, it should not follow that, by virtue of that association alone, they suddenly become a public figure in their own right. The zonal argument (namely that if a person has courted publicity in respect of one sphere of their life, they are to be taken as having waived their privacy rights entirely in relation to that sphere) has long been discredited. In this case it was 'wholly unrealistic' to suggest Mr Rocknroll had waived his right to privacy in respect of what happened after his marriage to Kate Winslet.

Prior public access

Even though the photographs in this case were freely accessible to any Facebook member prior to the application being brought (not just those that were 'friends' of the person on whose site they were posted), this did not necessarily deprive the photographs, or the information contained within them, of their 'private character'. This was, however, a decision reached specifically on the evidence in this case--the judge felt it unlikely there had been 'widespread public inspection' of the wall or home-page containing the photographs, despite their technically being freely accessible to anyone who searched for them.

This should provide some comfort to claimant lawyers who might be concerned that any kind of prior public access to the information they are seeking to protect would necessarily defeat a claim that their clients would otherwise have had.

Anonymity

If you do want to depart from open justice principles, eg to have the claimant's name anonymised, then be prepared to clearly argue why that is justified. The default position is everything will be heard in public, and all parties will be identifiable.

Information contained vs physical object

One point to note is that the analysis as to whether there is a reasonable expectation of privacy in relation to information contained in photographs (as opposed to the actual photographs themselves) differs in one respect. With the former there is no presumption that art 8 rights are particularly likely to be engaged when publication is threatened (in contrast to the position with photographs).

Are there still any grey areas or unresolved issues lawyers will need to watch out for?

The very nature of privacy law, and the fact the court must carry out an individual art 8/10 balancing act based on the facts of each separate case, means there is always room for an unexpected result.

It is crucial to first assess whether the information in question actually engages art 8, and whether the claimant is going to be able to establish a reasonable expectation of privacy in respect of it. If the information turns out not to engage art 8, any injunction application risks drawing attention to something that may have otherwise passed by relatively unnoticed by the majority of the public. A contingency plan in these circumstances would not go amiss.

When it comes to photographs, lawyers may wish to take heed of the claimant lawyers' approach in this case, which was to bring an action both in privacy, and on the basis of copyright infringement (presumably in case the former failed). The discussion by the judge on the copyright element of the action was unfortunately limited, given the claim had already succeeded on privacy grounds. What was made clear, however, was that he would have granted an injunction on this ground to restrain publication of the photographs, albeit such injunction would only restrain the copying of the photographs themselves--it would not prevent publication of a description of the information contained in them.

In spite of this obvious pitfall, if lawyers do want to adopt this approach to bolster any privacy action, they should be careful not to assume the copyright is owned by the person who is the subject of the photograph (indeed it rarely is--it is normally the person who took the photograph). This means first identifying the copyright owner and then seeking an assignment from them of those rights to their client so they can bring the infringement action (as was done in this case).

Are there any patterns/trends emerging in the law in this area?

Perhaps the most useful thing to take away from this decision is the discussion of what causes a person to become a public figure, and have their privacy rights compromised accordingly. This issue has been at the forefront of a number of recent decisions, for example in *Trimingham v Associated Newspapers* [2012] All ER (D) 248 (May), where the claimant, in part by reason of her dating Chris Huhne, was found to have entered the public sphere to such an extent that it played a factor in her privacy claim failing.

The jurisprudence on privacy law has, over the past few years, become much more comprehensive, both at the High Court and at the appellate level. The courts have given every indication that, when it is justified, they will grant an injunction to prevent publication of private information, eg the injunction granted to prevent further dissemination of a sex tape in which celebrity X-Factor judge Tulisa Contostavalos appeared (*Contostavlos v Mendahun* [2012] All ER (D) 152 (Apr)).

In addition, the scenarios in which a departure from the principles of open justice can be justified (for example, a hearing in private, or anonymisation of a party) have been significantly clarified by the decision in *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324.

The proliferation of these reported decisions, coupled with the Practice Guidance produced following Lord Neuberger's Report of the Committee on Super-Injunctions - Super-Injunctions, Anonymised Injunctions and Open Justice, means the route to obtaining a privacy injunction, and the steps a court must go through before it grants one, are much more clearly defined than they were a couple of years ago.

My prediction is that the more settled this area becomes, the more confident lawyers will become in recognising when art 8 issues are at play, and when they have a claimant with good grounds to obtain a privacy injunction, or pursue a privacy action for damages.

Interviewed by Duncan Wood.

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