Case No: A2/2016/0218

Neutral Citation Number: [2016] EWCA Civ 100
IN THE COURT OF APPEAL
ON APPEAL FROM
HIGH COURT OF JUSTICE, QUEENS BENCH DIVISION
(Mr Justice Cranston)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 22 January 2016

Before

LORD JUSTICE JACKSON
LADY JUSTICE KING

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

Between:

PJS

Applicant

- and -

NEWS GROUP NEWSPAPERS LIMITED

Respondents

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

(DAR Transcript of
WordWave International Ltd
trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

- -

Mr Hugh Tomlinson QC & Ms Lorna Skinner (instructed by Carter-Ruck Solicitors)
represented the Applicant

Mr Gavin Millar QC & Mr Ben Silverstone (instructed by News Group Newspapers)
represented the Respondents

- -

Judgment

LORD JUSTICE JACKSON:

1. This judgment is in six parts, namely:

   Part 1. Introduction,

   Part 2. The Facts,

   Part 3. The Present Proceedings,

   Part 4. The Appeal to the Court of Appeal,

   Part 5. The Law,

   Part 6. Decision.

Part 1. Introduction

2. This is an appeal by a well-known person who seeks to prevent a Sunday newspaper from publishing an account of his extramarital sexual activities. The principal issue in this appeal is whether the first instance judge, who refused to grant an injunction, properly balanced the competing rights which are in play.

3. For obvious reasons, this is an urgent matter. The appellant issued his notice of appeal on Monday of this week, 18 January. King LJ and I, sitting as a two-judge court, heard the appeal yesterday, Thursday, 21 January. We are giving judgment today, Friday, 22 January, so that the newspaper editor knows what he can or cannot publish on Sunday.

4. The claimant in these proceedings and appellant before this court is a well known person in his own right.

5. The defendant in the action and the respondent in this court is News Group Newspapers Limited. The defendant publishes the Sun on Sunday.

6. In this judgment, I shall refer to the Human Rights Act 1998 as "the HRA". Section 6 of the HRA provides:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> [...]
>
> (3) In this section 'public authority' includes—
>
> (a) a court or tribunal [...]"

7. Section 12 of the HRA provides:

> …
>
> (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;
>
> (b) any relevant privacy code."

8. I shall refer to the European Convention on Human Rights as the "ECHR". Article 8 of the ECHR provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

9. Article 10 of ECHR provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

10. Having set out the relevant statutory materials, I must now turn to the facts.

Part 2. The Facts

11. The claimant is in the entertainment business and is married to YMA, who is a well known individual in the same business.

12. In 2007 or 2008 the claimant met AB. There is a conflict of evidence as to whether they met through a mutual friend or on Facebook. The claimant and AB had occasional sexual encounters starting in 2009.

13. AB already 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.

14. Let me now return to the relationship between the claimant and YMA. They have young children.

15. 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. On 14 January 2016, the newspaper's lawyers contacted the claimant's representatives and informed them of the position.

16. The claimant took the view that any publication of AB's and CD's story would be an invasion of privacy. Accordingly, he commenced the present proceedings.

Part 3. The present proceedings

17. On the evening of Friday, 18 January 2016 the claimant applied to Cranston J, the duty Queen's Bench judge, for an interim injunction to restrain the defendant from publishing the proposed story in the Sun on Sunday. At this stage, the claimant had not issued proceedings. He had, however, notified the defendant of his application. Accordingly, both parties appeared by counsel before the judge.

18. In support of his application, the claimant served two witness statements, one made by himself and one by YMA. In opposition to the application, the defendant served five witness statements. These comprised two statements by AB, two statements by CD and one statement by Steve Kennedy, who is editor of the Sun on Sunday. Mr Kennedy annexed to his statement a bundle of newspaper articles, magazine articles and similar material relating to the claimant, YMA. and their children.

19. The defendant advanced two main lines of defence. First, it contended that there was relevant ongoing public debate. Publication of the story, it was said, would contribute to that debate. Secondly, the defendant contended that the claimant and YMA. had put many details of their relationship into the public domain. Therefore, it was in the public interest that the defendant's newspaper should publish an account of the claimant's sexual exploits with others.

20. Both the claimant and YMA disputed that publication of the story would serve any public interest. They denied that the article was relevant to any public debate. They maintained that they had not courted publicity about their private life. They said that the various press articles about them were substantially true. They had been in a relationship for many years. The relationship was an open one. YMA accepted that from time to time the claimant had sexual encounters with others. The relationship between the claimant and YMA was one of commitment. They provided a loving home for their children.

21. Having considered the evidence and counsel's submissions, the judge refused the claimant's application for an interim injunction. His judgment was short and clear. Essentially, the judge rejected the defendant's first line of defence but accepted the second line of defence. The material parts of the judgment read as follows:

> 4. The second background factor is that the Claimant and his partner have portrayed an image to the world of a committed relationship. That portrayal has taken a number of forms, Mr Tomlinson QC correctly points out there is always a dilemma for a public figure in that if they do not provide publicity they will be pursued the media [sic]. But undoubtedly the Claimant and his partner have on a number of occasions and in various ways portrayed an image of commitment. Moreover the Claimant has himself actively sought publicity.
>
> 5. The third background factor is that the Claimant and his partner have young children. They have featured in aspects of the publicity that the Claimant and his partner have attracted.
>
> ...
>
> 7. To my mind the Claimant does have a reasonable expectation that his sexual activities will remain private. However, it seems to me that the expectation of privacy is somewhat lower than might otherwise be the case because of the Claimant's own behaviour.
>
> 8. I am especially troubled by the Article 8 rights of the children. At some point, Mr Tomlinson QC suggested, the Claimant and his partner might choose to reveal to the children the nature of their sexual relations outside their marriage but it was up to them to choose the time and place. I can also well appreciate the point Mr Tomlinson QC has made about the difficulties these children not least because they are children of a well-known couple. But is a trite [sic] but important point that the Article 8 rights of the children cannot operate as a trump card.
>
> 9. In terms of the public interest Mr Millar QC put the case in my view too highly. He contended that there was a relevant public debate. Mr Millar QC suggested that somehow the story which the Sun wanted to run would contribute to that debate.
>
> 10. Discounting that aspect of Mr Millar QC's case it seems to me that he established that there is a public interest in publication in this case. The Claimant and his partner have portrayed an image of commitment. I accept all that Mr Tomlinson QC has said that that does not necessarily mean they do not engage in sexual relations with other

> people. Commitment may not entail monogamy. But it seems to me that having promoted that particular public image there is a public interest in correcting it when the claimant has engaged in the sort of casual sexual relationships as demonstrated in the evidence to which I referred."

22. Recognising the importance of the issues, the judge granted permission to appeal. He also issued an interim injunction restraining publication of the story for seven days, in order to allow time for the claimant to appeal. That injunction is due to expire in two hours from now. Both parties gave the usual undertakings. One of the claimant's undertakings was to issue proceedings on the following Monday.

23. On Monday, 18 January, the claimant issued a claim form in the Queen's Bench division of the High Court seeking an injunction to restrain the defendant from publishing the story. The claimant also issued a notice of appeal to the Court of Appeal.

Part 4. The appeal to the Court of Appeal

24. In his notice of appeal dated 18 January 2016, the claimant contended that the judge had incorrectly carried out the balancing exercise of the claimant's article 8 rights against the defendant's article 10 rights. He contended that the judge had drawn incorrect inferences from the publicity material exhibited by Mr Kennedy. He denied that publishing details of his sexual encounters with AB and CD would serve the public interest.

25. The defendant served a respondent's notice raising two additional grounds in support of the judge's decision. These additional grounds were:

> "1. publication of the material contributed to a debate of general interest; and
>
> 2. publication of the material fell within the Respondent's freedom to criticise the Appellant on matters of public interest."

26. Because of the urgency of the matter and the limited duration of the current injunction, I directed that the appeal be heard before a two-judge court on Thursday, 21 January with a view to giving judgment before the temporary injunction expired on Friday, 22 January.

27. The appeal duly came on for hearing yesterday. Mr Hugh Tomlinson QC and Ms Lorna Skinner appeared for the appellant/claimant. Mr Gavin Millar QC and Mr Ben Silverstone appeared for the respondent/defendant. I am grateful to all counsel for their considerable assistance to the court.

28. Before grappling with counsel's submissions, I must first review the law.

Part 5. The law

29. The law in this field underwent a seismic change on 2 October 2000 when the HRA came into force. Section 6 of that Act requires courts to act in accordance with the ECHR. The relevant provisions of the ECHR for present purposes are articles 8 and 10, which I have set out in Part 1 above.

30. The interplay between articles 8 and 10 was considered by the House of Lords in Campbell v MGN [2004] AC 457 and In re S (a child) [2005] 1 AC 593. Lord Steyn summarised the position at paragraph 17 of S in four propositions as follows,

> "First, neither article 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. For convenience I will call this the ultimate balancing test..."

31. In McKennitt v Ash [2006] EWCA Civ 1714, [2008] QB 73, Buxton LJ (with whom Latham and Longmore LJJ agreed) authoritatively set out the proper approach of the court in a case such as this at paragraph 11:

> "11. The effect of this guidance is, therefore, that in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but, as Lord Woolf says, are the very content of the domestic tort that the English court has to enforce. Accordingly, in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If "no", that is the end of the case. If "yes", the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter enquiry is commonly referred to as the balancing exercise, and I will use that convenient expression."

32. There are therefore two stages in the court's consideration. The first stage is to determine whether the claimant had a reasonable expectation of privacy in the disclosed facts. See Lord Browne of Madingley v Associated Newspapers Limited [2007] EWCA Civ 295, [2008] QB 103 at paragraph 24. There is a helpful discussion of this concept in Murray v Express Newspapers [2008] EWCA Civ 446, [2009] Ch 481. I need not linger on Murray because in the

present case, it is common ground that the claimant did have a reasonable expectation of privacy in respect of his sexual encounters with AB and CD.

33. I turn now to the second stage. In assessing the article 10 rights of a newspaper which proposes to publish confidential information, it is necessary to consider whether there is any argument for publication based on the public interest. The mere gratification of readers' prurient curiosity does not serve the public interest. See Donald v Ntuli [2010] EWCA Civ 1276, [2011] 1 WLR 294 at paragraphs 19 to 21.

34. The Grand Chamber of the Strasbourg Court explored this concept at some length in Axel Springer AG v Germany [2012] 55 EHRR 6. That case concerned articles published in a German newspaper about criminal offences committed by a well-known television actor. At paragraphs 88 to 95, the court identified the following six criteria as relevant for the exercise of balancing article 8 rights and article 10 rights:

> (i) Contribution to a debate of general interest.
>
> (ii) How well known is the person concerned and what is the subject of the report?
>
> (iii) Prior conduct of the person concerned.
>
> (iv) Method of obtaining the information and its veracity.
>
> (v) Content, form and consequences of the publication.
>
> (vi) Severity of the sanction imposed.

35. The court stated that the first criterion was of particular importance. At paragraph 90 the court said: "An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest".

36. The Grand Chamber of the Strasbourg Court gave further consideration to the criteria in Couderc and Hachette Filipacchi Associés v France (Application No.40454/07) 10 November 2015. At paragraph 110, the court discussed the first criterion. It said:

> "... the only decisive question is whether a news report is capable of contributing to a debate of public interest, and not whether it achieves this objective in full."

37. In paragraph 100, the court referred to the second criterion. It said:

> "... articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest to society."

38. One important aspect of the public interest, which arises for consideration in the present case, is the need to correct false information which an individual has put into the public domain. If someone makes false public statements about himself or presents a false image to the public, then there is a public interest in setting the record straight. See Rio Ferdinand v MGN Limited [2011] EWHC 2454 (QB) at paragraphs 65 and 68. This principle comes into play where an individual has set out to present a false picture. It is not enough that he gave bland answers in interview. Furthermore, it may not be enough that he was caught out by tricky and unwelcome questions: see *Toulson and Phipps on Confidentiality*, 3rd Ed at paragraphs 7-054 to 7-055; and X v Persons Unknown [2006] EWHC 2783, [2007] EMLR 10 at paragraphs 35 to 36.

39. Finally, when the court is carrying out the balancing exercise, it should in appropriate cases have regard to the interests of other family members who may suffer as a result of the proposed publication. This is certainly not a trump card, but it can on occasions be significant: see K v News Group Newspapers Ltd [2011] EWCA Civ 439, [2011] 1 WLR. 1827.

40. Having set out the relevant legal principles, I must now come to a decision on the present case.

Part 6. Decision

41. The issue at this stage of the litigation is whether the claimant is entitled to an interim injunction. Because ECHR article 10 is in play, the American Cyanamid test does not apply. Instead, the court must apply section 12 (3) and 12 (4) of the HRA. As Lord Nicholls explained in Cream Holdings Ltd v Banerjee [2004] UKHL 44; [2005] 1 AC 253 at paragraph 22, the court must not grant an interim injunction:

> "... 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."

42. The next procedural point which I must bear well in mind is that we are not sitting as a court at first instance. We are hearing an appeal from a judge who has already carried out the balancing exercise which we are being asked to perform. In AAA v Associated Newspapers Ltd [2013] EWCA Civ 554, Lord Dyson, with

whom Tomlinson and Ryder LJJ agreed, described the role of the Court of Appeal in cases such as this at paragraph 8 as follows:

> "It is now clearly established that a balancing exercise between articles 8 and 10 of the European Convention on Human Rights ('the ECHR') conducted by a first instance judge is treated as analogous to the exercise of a discretion. Accordingly, an appellate court should not intervene unless the judge has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a judge could reasonably reach..."

43. Understandably Mr Millar places great weight on that passage. He submits that the claimant has failed to surmount the high threshold set in AAA. Therefore, this appeal must fail.

44. I must confess that initially I saw considerable force in that argument. I have however come to the conclusion that there are two significant shortcomings in the judgment below, which enable this court to re-open this matter.

45. The first shortcoming is that in paragraph 8, the judge identifies the article 8 rights of the children as a relevant consideration. That is plainly correct. The judge does not, however, go on to explain how he has taken those rights of the children into account.

46. The second shortcoming is in paragraph 10. The judge found that in various publicity material the claimant and YMA have portrayed an image of commitment. He accepts that commitment may not entail monogamy. He then says that there is a public interest in correcting the image which the claimant and YMA portrayed.

47. The difficulty with paragraph 10 is that on the present evidence, the claimant and YMA are a committed couple–and they have been for–a long time. On the evidence of both of them, the claimant's occasional sexual encounters with others do not detract from that commitment. The judge accepted that proposition in his statement "commitment may not entail monogamy". Against that background, a bundle of press articles showing the claimant and YMA's commitment to each other does not present a false image requiring correction.

48. I therefore conclude that this court should look again at the evidence and carry out its own balancing exercise. In saying this, I do not criticise the judge. He was dealing with matters at a short hearing on a Friday evening. This court has had the benefit of a one-day hearing with full argument from leading counsel.

49. The next issue which we must consider is whether the press articles and similar material went further than portraying commitment. Were the claimant and YMA presenting an image of monogamy to the world? I interject to say that the word "monogamy" has been used in the documents and in counsel's submissions to mean "faithfulness in sexual matters to one's partner or spouse"; it has not been used in the original sense of the word, meaning having only one husband or wife.

50. The bundle of material which the defendant has assembled only contains two references to monogamy. Both those references occurred before the claimant began his sexual relationship with AB. Mr Millar submitted that press articles remain on the internet forever. Therefore, the claimant was under a duty to

correct them when they became false. In my view, that submission is unrealistic and I reject it. A person cannot normally be expected to sift through historic material about himself on the internet and to amend statements which have become incorrect.

51. I have read and re-read the bundle of publicity material many times. This represents the best evidence that the defendant has been able to assemble in respect of a substantial period of many years. There are, as I say, just two references by the claimant to monogamy. One of those references is in answer to a direct question of the kind discussed by *Toulson and Phipps* at paragraph 7-054. In my view the picture which emerges from the publicity material is not one of total marital fidelity, but rather a picture of a couple who are in a long term, loving and committed relationship. On the present evidence, that image is an accurate one.

52. If the defendant publishes the proposed story, this will not set the record straight in any material respect. It will simply reveal that one feature of the claimant's and YMA's long term relationship is that the claimant is allowed to have occasional sexual encounters with others. That would provide supplementary information, but it would not correct a false image.

53. I accept that the claimant is a public figure. This therefore exposes him to comment and criticism in the media. Criteria number 2 as set out in Axel is therefore relevant. On the other hand, as the Strasbourg Court observed in Couderc, "kiss and tell" stories about a public figure which do no more than

satisfy readers' curiosity concerning his private life do not serve the public interest. I therefore come to the conclusion that the judge's decision cannot be supported for the reasons which the judge gave.

54. I must now turn to the respondent's notice. This sets out two additional grounds for supporting the judge's decision as recited in Part 4 above.

55. In addressing these grounds, I bear in mind the important policy considerations which ECHR article 10 enshrines. The right to freedom of expression includes the right to say or publish matter which others may find offensive, heretical or unwelcome. Freedom of expression is an important right for its own sake. See the judgment of Sedley LJ in Redmond-Bate v DPP [1999] EWHC Admin 733.

56. Mr Millar submits that there is a relevant public debate in progress. Mr Millar submits that the proposed story in the Sun on Sunday will contribute to that debate.

57. I am not persuaded by that submission. In my view, the information which it is proposed to publish will not advance the public debate or provide support for any of the competing opinions which are in circulation. I entirely agree with the judge's analysis of this issue as set out in paragraph 9 and the first half line of paragraph 10 of his judgment.

58. Mr Millar has developed a separate argument that the defendant is entitled to publish articles criticising public figures. The defendant is entitled to make such criticism, even if the conduct in question is not criminal: see Hutcheson v

News Group Newspapers Ltd [2011] EWCA Civ 808, [2012] EMLR 2 at paragraph 29. Therefore, the defendant is entitled to publish an article criticising the claimant's adulterous relationship.

59. I accept that the defendant is entitled to publish articles criticising people in the public eye. Therefore, the defendant does have article 10 rights to publish an account of the claimant's adultery. On the other hand, the claimant has an article 8 right for his sexual liaisons to remain a private matter.

60. Mr Tomlinson submitted that the judge erred in playing down the claimant's article 8 rights on the ground of his behaviour. It seems to me that assessing the weight attached to the article 8 rights was a matter for the judge. Nevertheless, even on the judge's assessment, the claimant had an expectation that his sexual encounters will remain private. The proposed story, if it is published, will be devastating for the claimant. In my view on any proper balancing exercise, the claimant's article 8 right to privacy must prevail over the defendant's article 10 right to publish an account of the adultery.

61. There is also the position of the children to consider. The proposed article would generate a media storm and much public interest in the claimant's family. There would be increased press interest in the claimant's and YMA's family life. The children would become the subject of increased press attention, with all that that entails. Furthermore, even if the children do not suffer harassment in the short-term, they are bound to learn about these matters from school friends and the

internet in due course. That is a factor to place in the balance: see K v News Group Newspapers.

62. Let me now draw the threads together. For the reasons set out above, I am satisfied on the basis of the evidence before this court that when this action comes to trial, the claimant is likely to establish that publication should not be allowed. Therefore, the claimant has satisfied the test in section 12 (3) of the HRA.

63. Accordingly, if King LJ agrees, the claimant's appeal will be allowed. There will be an interim injunction restraining the defendant from publishing the proposed article until trial or further order.

LADY JUSTICE KING

64. I agree.

Order: Appeal allowed