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Judgment: approved by the Court for handing down
(subject to editorial corrections)*

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

ABC

Plaintiff;

-v-

**BRITISH BROADCASTING CORPORATION
and
JOHN PATRICK CONWAY**

Defendants.

WEATHERUP LJ

[1] This is a ruling on an application by the plaintiff for an interim injunction to prevent the publication of part of a video recording that the plaintiff claims amounts to a misuse of private information. Ms J Simpson QC and Mr Sinton appeared for the plaintiff, Mr G Simpson QC for the first defendant and Mr P Lyttle QC and Mr Shields for the second defendant.

[2] An Anonymity Order has been made in respect of the plaintiff and the defendants have been restrained from publication of the video pending this ruling. The grounding affidavit of the plaintiff states that in 1996 she commenced employment with the Bank of Ireland and that employment continued until June 2011. She worked in the bank's factoring unit. The bank had a factoring agreement with Meteor Controls (International) Limited, a company operated by the Conway family and the second defendant was a director of the company. The company got into difficulties and eventually the firm of Cavanagh Kelly were appointed as liquidators of the company.

[3] In June 2009 the plaintiff and one of her colleagues from the bank attended at the company premises in Cookstown to undertake an investigation of the company books and papers. It appears from the plaintiff's description of events that the company officials were not co-operative with the bank. The bank engaged

Tony McCrory, who had been a sales manager with the company, to assist the bank with the investigations. The plaintiff and her colleague attended at the company premises three days a week from June to December 2009. In November 2009 the plaintiff was informed that video footage had been taken while the plaintiff and her colleague were working in the office to which they had been assigned in the company premises. It is plaintiff's position that she was unaware of any CCTV recordings taking place and that the video contains conversations between the plaintiff and her colleague that were confidential and included private matters.

[4] The second defendant believed that the content of the video also contained evidence of misconduct by the plaintiff and her colleague on behalf of the bank in relation to the affairs of the company and the second defendant. The second defendant forwarded the video footage to the first defendant. The plaintiff received a letter dated 1 June 2015 from Mandy McAuley, a reporter on the BBC's Spotlight television programme, offering her a right to respond to a proposed programme making use of the contents of the video. The letter indicates the type of material that the first defendant proposes to broadcast. First of all that the video shows the plaintiff and her colleague talking about having treated bank customers with ruthless disregard and some examples are given. Secondly, that the plaintiff admits that she lied about proof of delivery documents and about customers having had judgments against them and particulars are given. Thirdly, that the video shows the plaintiff stealing non-Bank of Ireland related documentation from the company premises. Fourthly, that the video appears to show the plaintiff carrying out acts of fraud on behalf of the bank. The letter offered the plaintiff an opportunity to respond whether by on-camera interview or by written response.

[5] The first defendant describes the Spotlight programme as Northern Ireland's flagship current affairs programme with a history of investigative journalism. The proposed broadcast is said to be in the public interest on the basis that, while banks have the right to seek to recover debts, it is important that they act at all times with propriety and within the law. Reference is made to the Tomlinson Report on bank lending and the existence of concerns over banking practices in relation to business insolvencies. The first defendant considers that the use of pictures from the video footage is vital to the programme. It is said that it is pictures which record and reveal and provide unique evidence of the behaviour which ought to be put into the public domain and it is therefore editorially vital to the programme that the pictures showing the behaviour referred to can be broadcast. There is said to be no adequate substitute and that it is the nature of the mechanism of television as a form of communication.

[6] On behalf of the second defendant it is stated that the conduct of the Bank of Ireland is under investigation. Legal proceedings have been commenced by the Bank of Ireland against the company, now in liquidation, and against the second defendant on foot of a guarantee of the company debts. The second defendant has filed a defence and counterclaim against the bank and relies on allegations of fraudulent conduct of the plaintiff and her colleague acting on behalf of the bank.

[7] As to the video recording, the second defendant states that CCTV was present on the premises for 15 years and there was a sign on the premises indicating that it was covered by CCTV. The explanation for making the recordings of the plaintiff and her colleague while they were working in the company office is that, in the light of the conduct of the Bank of Ireland before and at the time of the liquidation, the second defendant arranged for an additional camera to be installed in the room where the debt collection exercise was to be carried out. He was very concerned that the Bank of Ireland staff would do something unlawful which would impact either upon himself or the new business which his sons had established after the company had failed. It appears that his former employee, Tony McCrory, approached him some months after the liquidation had occurred raising serious questions with regard to the conduct of the plaintiff.

[8] The second defendant states that a number of people have viewed the video footage, namely a number of politicians in Northern Ireland and in the Republic of Ireland, six firms of solicitors, employees of the Bank of Ireland, insurers of the Bank of Ireland, each member of the Board of the Bank of Ireland, creditors of the company, his friends, acquaintances and advisors. All have viewed only the parts of the video that relate to the debt collection service. The video has also been viewed by the BBC Spotlight team. The second defendant has provided to the BBC all of the original video footage so as to authenticate the extracts and to provide context for the parts that relate to the debt collection service.

[9] There is dispute about the plaintiff's awareness of the presence of CCTV on the company premises. Notice was placed on the front door and the plaintiff had access, on all but one occasion, by the side door and was not aware of the CCTV notice. In addition there was a camera in the office being used but the plaintiff states that she believed that the camera was not recording as there was no light showing and nothing to indicate that it was recording. However the recording was not made by the visible camera but by another camera that had been installed by the second defendant for the purpose of recording the plaintiff and her colleague.

[10] This is an action for breach of confidence or more broadly, misuse of private information. Such actions concern on the one hand the right to respect for private life under Article 8 of the European Convention and on the other hand the right to freedom of expression under Article 10 of the European Convention. They also concern section 8 of the Human Rights Act 1998 which speaks to the issue of restraining publication of material before trial.

[11] The first question is whether the plaintiff has a reasonable expectation of privacy in relation to the information. I am satisfied that the plaintiff was not aware of the CCTV notice. She entered the building by a side door where there was no notice and on the one occasion she entered by the front door she did not become aware of the notice. A camera was visible in the room but I am satisfied that she did not consider that camera to be operating. She was not aware of the presence of the camera that was recording. This was a clandestine surveillance brought about by the

fitting of an additional camera for the purposes of the recording what went on in the room once the plaintiff and her colleague arrived. I am satisfied that the plaintiff had no reason to suppose that a secret camera was recording. The private conversations that took place about personal and health issues are indicative of the fact that the plaintiff and her colleague did not consider that they were being recorded.

[12] This recording was made by the second defendant. It was not the action of an authority exercising investigatory powers. It was a private undertaking by a rival in litigation for the purposes of that litigation dispute. The bank was investigating the second defendant and the company in relation to their trading practices. The defendant's explanation for the recording is that he wanted to know what the bank was doing and he was suspicious of their conduct. The plaintiff alleges that the second defendant must also have wanted to know what the bank knew about him and what the bank had uncovered in their investigation. I am satisfied that both factors must have been operating when the second defendant undertook this clandestine recording. This was a measure undertaken by the second defendant in his dispute with the bank in order to address the claims and counterclaims being made by the bank and the company and the second defendant.

[13] The BBC has performed a quite different role. It is engaged in investigative journalism and their subject for present purposes is bank misconduct. In particular, there are said to be abroad, suspicions of misconduct in relation to the engagement of the banks with insolvent companies. This is a matter of public interest. There is a different balance of considerations in looking at the role of the BBC to that which applies in relation to the role of the second defendant.

[14] There are 60 hours of video. Much of it is silent but there are 36 active hours when there are exchanges recorded between the plaintiff and others in the office. The plaintiff has been shown parts of the video extending to some 20 minutes. The BBC has edited the video and proposes to broadcast some 6 minutes. The proposed broadcast material may include material that the plaintiff has not viewed.

[15] The material in the video comprises different aspects. One is private information and all parties agree that that which is private material will remain private and is not relevant to any investigation. Secondly, there is what I would call general business information, that is exchanges related to the company's affairs and the investigations that were being undertaken on behalf of the bank. The general business information is not the subject matter of this dispute. The third aspect is the disputed information and relates to the alleged misconduct and is the material that the BBC proposes to include in the broadcast.

[16] The particular relationships need to be identified. The bank and the plaintiff are acting as bankers and on the other side are the company and the second defendant. These are contractual relationships of bank and client and bank and guarantor and are confidential relationships. The plaintiff submits that consideration should be given to a reversal of roles where the bank or the plaintiff would seek to

disclose evidence of misconduct by the company or the second defendant, which, says the plaintiff, would clearly be restrained by the Court. Equally, says the plaintiff, if that information in relation to misconduct were referred to the BBC by the bank or the plaintiff, there would be restraint imposed on the broadcasting of that information as it would involve a breach of confidence on the part of the bank and the plaintiff.

[17] The investigation undertaken by the bank concerned the conduct and the financial affairs of the company and of the second defendant as guarantor. In the confidential contractual arrangements between a bank and clients there would be a reasonable expectation that the bank would not disclose information to third parties concerning the affairs of their clients and would not carry the basis of any investigations to the media. Of course there would be other avenues that would be undertaken by the bank, at least initially. On the other hand the discovery of misconduct on the part of the bank would not emerge in the same setting, would give rise to a matter of public interest as being a form of institutional misconduct with the potential to affect large numbers of members of the public and not involve the same considerations as to a reasonable expectation of privacy.

[18] There is a further confidential relationship concerning the plaintiff as an employee of the bank. The bank has required the plaintiff to honour the confidentiality that the bank owed to the company and the second defendant. This requirement by the bank, says the plaintiff, limits the response which the plaintiff can make to the allegations made against the plaintiff by the defendants arising from the contents of the video.

[19] Weighing up all these matters I regard this recording by the second defendant as a clandestine recording which constituted an intrusion and an interference with the plaintiff's right to respect for private life. The information which is proposed to be published by the BBC broadcast concerns alleged impropriety and suspicion of criminal conduct and I am satisfied that any restraint imposed on the proposed publication by the first defendant would be an interference with the first defendant's right to freedom of expression. Hence the respective rights of the plaintiff and the first defendant are in conflict.

[20] The plaintiff regards the interpretation of the contents of the video as being a matter of dispute in that the plaintiff denies that what emerges in the video is the impropriety that is alleged by the defendants. Further the plaintiff seeks the opportunity to examine the parts of the video that the BBC propose to include in the broadcast and to make a response accordingly. The plaintiff has not seen the BBC edited version which it is proposed to broadcast and has not responded to the right of response letter either by interview or by statement.

[21] I have questioned whether the extant proceedings between the bank and the second defendant will resolve the dispute on the interpretation of the plaintiff's conduct in the video. That may be the case or it may not because the bank may settle

the action or it may not call the plaintiff as a witness for whatever reason. The plaintiff refers to the prejudice that the proposed broadcast will have in relation to the proceedings involving the bank but I am not satisfied that that is a significant prejudice. The action will eventually be heard by a Judge and I would not expect the proposed broadcast to impact on the conduct or findings that may be made if the matter eventually comes to trial.

[22] A further complaint by the plaintiff is in relation to prejudice to the PSNI investigation. I have not been satisfied that there is an active PSNI investigation. I am satisfied that there was a report to the police. I doubt whether, if there were an active investigation, it would be prejudiced. The issue would, in effect, be prejudice to a criminal trial if the police investigation resulted in charges against the plaintiff. In that event there would of course be a jury involved and at that time the question would arise as to whether or not pre-trial publication of the subject matter of the criminal trial would prejudice the plaintiff. The present indications are that there is no on-going police investigation and six years have elapsed since the material emerged. I regard any such prejudice as very limited.

[23] It is necessary to consider section 12 of the Human Rights Act which bears on the circumstances in which interim relief might be granted to a plaintiff seeking to restrain publication of material. Section 12 (3) provides that no relief is to be granted so as to restrain publication before trial "unless the court is satisfied that the applicant is likely to establish the publication should not be allowed".

[24] Section 12(3) was considered by Lord Nicholls in Cream Holdings Ltd v Banerjee [2004] UKHL 44 where it was stated:

".... 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."

[25] The statutory test is whether the plaintiff is likely to establish that the publication should not be allowed. The balance favours publication. It is for the plaintiff to adduce evidence that would alter that balance. It is also important to note that it is necessary to consider whether the court is so satisfied 'at this stage', that is, upon the interim application to restrain publication.

[26] The subject matter of the disputed material is concerned with the exposure of criminal conduct and is a matter of public interest. The conduct of the banks in the winding up of companies is also a matter of public interest. The BBC is a public watchdog in an investigative journalist role and is also described not merely as a watchdog but as a bloodhound.

[27] The court must be satisfied that the applicant is likely to establish that publication should not be allowed. This presupposes that the plaintiff would be in a position to establish that publication should not be allowed. The prospects of an individual bringing a case to trial may be limited, when one considers the balance of power between newspapers and broadcasters, with the resources they can call upon, and an individual who is the subject of a proposed publication. However the assessment of the plaintiff's prospects must be made at the interim stage.

[28] The interpretation of the material that is proposed to be broadcast is disputed by the plaintiff. I have not been satisfied at this stage that the plaintiff is likely to establish that publication should not be allowed.

[29] In defamation cases the rule in Bonnard v Perryman [1891] 2 Ch 269 is that in general no interim injunction will be granted where the defendant swears that he will be able to justify the defamation and the Court is not satisfied that he may not be able to do so. This is not a defamation action but an action for misuse of private information. Although not an identical test to that under section 12 the rule favours publication and it is for the plaintiff to alter that balance in order to prevent publication. While this is a privacy claim, the plaintiff's reputation is a part of the concern. Insofar as the rule in Bonnard v Perryman may apply to the present case I have not been satisfied that the plaintiff has established a basis for refusing the interim injunction.

[30] The plaintiff questions whether the broadcast needs to identify the plaintiff. Lord Hope had occasion to consider this contention in In re British Broadcasting Corporation [2010] 1 AC 145 -

“.... article 10 protects not only the substance of the ideas and the information expressed but also the form in which they are conveyed. In essence article 10 leaves it for journalists to decide what details it is necessary to reproduce to ensure credibility.... So the BBC are entitled to say that the question whether D's identity needs to be disclosed to give weight to the message that the programme is intended to convey is for them to judge. Judges are not newspaper editors. They are not broadcasting editors either. The issue as to where the balance is to be struck between the competing rights must be approached on this basis.”

[31] The plaintiff has not engaged with the content of the proposed broadcast. The plaintiff has seen an extract but not the BBC edited version that it is proposed should be broadcast. The plaintiff has a transcript of the BBC version. It contains commentary and subtitles to explain the pictures. The message cannot only be determined by the written form presented to the plaintiff. The video relating to the

text is important. The BBC has emphasised the impact of the video to justify their use of the video and they are right to do so because visual impact is important. However that also affects the balance of rights between the plaintiff and the defendants. *I am satisfied that the proper balance requires that the plaintiff should see the video in the form in which it is proposed to be broadcast before the plaintiff exercises the right to respond, if she wishes to do so [see addendum].*

[32] Further, there is private information in the video which will not form part of the broadcast. The plaintiff applies for the return of the private information and its destruction. I do not propose to order that that be done. The totality of the video may be relevant to a later review of all the material. The private information may overlap with other aspects such as the general business material and the disputed information. It is not appropriate to separate out any part of the total video at this stage. Of course the private information must not be broadcast but it should be retained as it may give context to some later dispute about this material.

[33] There was criticism from the plaintiff of the BBC viewing all of the content including the private material. The BBC were entirely correct to call for all of the video as part of the exercise in assessing the context of the material and to enable the programme makers to undertake the editing judgment as to the appropriate parts to include for the purposes of the proposed broadcast.

[34] In relation to the second defendant I propose to restrain any publication of any part of the video without further order. His position is entirely different to that of the BBC. He is engaged in a dispute that has resulted in litigation between the bank and the company and the second defendant. There are different considerations that apply. Those considerations may be altered by the outcome of the litigation between the second defendant and the bank. There should be included in the order a restraint on the second defendant from publishing any of the material, whether the private information or the general information or the disputed information. The disputed information will of course have entered the public arena once the BBC have completed the proposed broadcast. To those who wish to access the information which has been broadcast by the BBC there are outlets by which one can access the BBC programme.

[35] It follows from all of this that the plaintiff's anonymity ceases. I will order that that cessation should not occur in advance of the broadcast.

[36] The existing interim injunction will be discharged and replaced with an order in the terms of this judgment. The order will include a restraint on any publication of the video prior to the BBC broadcast. *The plaintiff will be afforded access to the video in the form that is proposed to be broadcast. The plaintiff will have the opportunity to respond as she wishes [see addendum].* The second defendant will be restrained from further publication of any of the video pending further order.

ADDENDUM

[1] Two passages in the above judgment have been revisited in the circumstances set out below.

The first passage is at the end of paragraph [31] above where it was stated -

"I am satisfied that the proper balance requires that the plaintiff should see the video in the form in which it is proposed to be broadcast before the plaintiff exercises the right to respond, if she wishes to do so."

The second passage is at paragraph [36] above where it was stated -

"The plaintiff will be afforded access to the video in the form that it is proposed to be broadcast. The plaintiff will have the opportunity to respond as she wishes."

[2] Further to the judgment delivered 21 September 2015 the Order stated as follows -

"The first defendant, its servants or agents or otherwise howsoever -

Shall not broadcast any of the disputed video footage, as defined in paragraph [15] of the judgment of 21 September 2015, without first providing a copy of such of the disputed video footage as the first defendant intends to broadcast to the plaintiff, so as to permit or to exercise a right to respond.

For the avoidance of doubt, such right to respond shall be exercised by the plaintiff either in writing or by way of interview and the period of time to be provided to the plaintiff to make any such response shall be no less than two clear working days following the receipt of the disputed video footage by the plaintiff's solicitors."

[3] Paragraph [15] of the judgment referred to the disputed video footage as that which 'relates to the alleged misconduct and is the material that the BBC proposes to include in the broadcast'."

[4] Thereafter the plaintiff and the first defendant reached an agreement. Further to that agreement the plaintiff and the first defendant applied to the Court to amend the Order of 21 September 2015 and by that amendment dated 6 November 2015 the part of the Order relating to the first defendant, as set out above, was deleted.

[5] The first defendant broadcast the disputed video footage on 10 November 2015.

[6] In the meantime the first defendant had lodged a Notice of Appeal against the decision of 21 September 2015. By that appeal the first defendant sought to set aside that part of the judgment of 21 September 2015 that ordered that the first defendant provide a copy of the disputed footage to the plaintiff before the plaintiff exercised the right to respond.

[7] The appeal came on for hearing in the Court of Appeal on 15 March 2016. As the broadcast had already taken place the plaintiff's anonymity had ceased and the appeal was listed as Kelly Toner v BBC. The Court of Appeal, without adjudicating on the appeal, remitted the matter to this Court to consider if the judgment of 21 September 2015 should be amended in light of the amendment of the Order on 6 November 2015.

[8] Counsel for the first defendant had not addressed the Court at the original hearing on the requirement contained in the judgment and in the Order that the first defendant disclose to the plaintiff the disputed video footage before the plaintiff exercised any right of reply.

[9] On the remitted hearing Mr Simpson QC appeared for the first defendant and there was no appearance for the plaintiff or the second defendant. Mr Simpson submitted that the requirement for disclosure of the disputed footage to the plaintiff amounted to 'prior restraint' which has always been regarded as undesirable because it involves depriving citizens of the fundamental right of freedom of communication. Injunctions which amount to prior restraint may only be justified where it is (i) necessary, (ii) proportionate and (iii) established by convincing evidence. In the present case there was no such justification. Accordingly the Court will not call upon the publisher to disclose the content of a proposed publication to the Court. Nor will the Court require the publisher to disclose a proposed publication to the subject of that publication. Nor will the Court require disclosure in relation to the exercise of any right of reply afforded to the subject of the publication. Mr Simpson cited Leary v BBC (29 September 1989), Re B (a child) Disclosure [2004] FLR 142, McKennitt v Ash [2006] EMLR 10, A v B [2005] EMLR 36, Campbell v MGM [2003] QB 633 and Greene v Associated Newspapers [2005] QB 972.

[10] Section 12(4)(b) of the Human Rights Act 1998 requires a Court to have particular regard to any relevant privacy code when considering making an order which impacts upon freedom of expression.

[11] The first defendant's Editorial Guidelines at section 6 deal with the "Right of Reply" and state -

"6.4.25 When our output makes allegations of wrongdoing, inequity or incompetence or lays out a strong and damaging critique of an individual or institution the presumption is that those criticised

should be given a 'right of reply', that is, given a fair opportunity to respond to the allegations.

We must ensure we have a record of any request for a response including dates, times, the name of the person approached and the key elements of the exchange. We should normally describe the allegations in sufficient detail to enable an informed response, and set a fair and appropriate deadline by which to respond.

6.4.26 Any parts of the response relevant to the allegations broadcast should be reflected fairly and accurately and should normally be broadcast in the same programme, or published at the same time, as the allegation."

[12] The first defendant's right of reply letter dated 1 June 2015 set out in considerable detail the material contained in the disputed footage that the first defendant proposed to broadcast. The plaintiff did not respond.

[13] Having heard further argument on the matter I have been satisfied that a prior restraint should not have been imposed. Further I have been satisfied that, in the circumstances of the case, prior restraint would not have been justified as being necessary or proportionate.

[14] By this addendum the passages quoted at paragraphs [31] and [36] of the judgment of 21 September 2015 are deleted.