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	ICOS No:
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **14/01/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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FB1

v

FACEBOOK IRELAND LTD

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Mr D Heraghty (instructed by Higgins Hollywood Deazley Solicitors) for the Plaintiff
Mr P Hopkins (instructed by Johns Elliot Solicitors) for the Respondent
Mr P Girvan (instructed by Finucane Toner Solicitors) for the Third Party Intervenor

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HUDDLESTON J

Introduction

[1] This case comes before me as:

(a) An application by Facebook Ireland Ltd ("Facebook") to vary two existing interim injunctions which required, inter alia, the removal of certain posts on the Facebook site which were posted in June 2019 i.e. some 17 months ago;

(b) An application by the original applicant in the case – anonymised as FB1 pursuant to the terms of those orders and referred to as the plaintiff below – for the continuation of those orders and an extension of the injunction in relation to specific other posts; and

(c) Finally, an application by the third party intervenor (and poster of some of the initial material) for the complete discharge of the interim orders.

[2] The writ action which is in the full name of the plaintiff (i.e. without anonymity) seeks a declaration that Facebook has breached the plaintiff's reasonable

expectation of privacy and seeks damages for breach of the tort of misuse of private information; injunctions against Facebook for the removal of the material in question posted on its site (by the intervenor and others) together with permanent anonymity.

[3] A declaration is also sought that the defendant has breached the Data Protection Act 2018/GDPR but that point was not argued before me in the context of these proceedings and so I leave it to the trial judge.

[4] The context to this case, and the basis upon which the posts and subsequent orders of this court for interim relief are based, is on the factual scenario that the plaintiff was subject to criminal proceedings when he was a minor. He was subsequently prosecuted for two counts of rape and two counts of sexual assault. The index incident occurred in September 2016 when he was a minor but, when the trial came on for hearing, he had reached the age of 18 years when he pleaded guilty to sexual assault. The court had sight of his basis of plea document. He was sentenced to a two year probation order and 50 hours of community service. The postings on Facebook which are the subject of this action occurred in the immediate aftermath of those proceedings with what I will call "follow-up commentary."

[5] I will not rehearse all of the various postings themselves but it is sufficient to say that the plaintiff and the defendant have agreed that the interim orders of 23 and 26 July 2019 are to be continued – at least in part. Their accepted position was outlined to me at the commencement of the case. I accept that agreed position as to the specific content that Facebook has therefore agreed should continue to be removed from its website pending the trial of this matter. There remains, however, a dispute between the plaintiff and the defendant as to whether some of the URLs or distinct postings were in fact unlawful and should have been the subject of the interim orders or not. The defendant at this stage seeks a variation to the original orders to the extent of some specifically identified postings. The intervenor who was the victim of the sexual assault and is the person who made one of the more material posts – and who was represented in these proceedings by Mr Girvan BL – argues that the posts in their entirety are lawful and that they were posted in the proper exercise of her Convention rights and further that the "follow up" commentary of others is equally posted pursuant to the exercise of their rights of free speech and juxtaposes those with the plaintiff's asserted rights under Articles 2, 3, 8 and 10 of the Convention. On that basis it is her case that the interim orders therefore should be discharged and the posts reinstated. I shall deal with the intervenor's application below.

[6] Turning then to the material part of the case – namely the defendant's application to vary the interim orders. As I said, the parties have agreed that certain content posted on Facebook and identified by reference to specific URLs will remain blocked. Those parts, I accept, are not in contention – at least as between the defendant and the plaintiff in the present variation application. I directed at the end of the hearing that a draft order would be prepared between the parties to reflect that agreed position. Having reviewed the remaining content ("the Disputed

Content") (i.e. that which is the subject of the variation application) I have concluded that it consists in the main of comments and observations which flow from the original postings. In that context, on the evidence before me, that consists of a series of postings which began with some initial postings made by the plaintiff's mother and sister. Although removed voluntarily in short order after they were posted, they were, nonetheless, of a nature that prompted posts in response from the third party intervenor or victim of the assault after which followed a significant number of related posts and commentary. Counsel for the defendant described those – correctly in my view – as being in the nature of "bar room talk." In the main, the ones specifically in dispute are comments which are in support of the intervenor or the posters' views of the criminal justice system and on the outcome of the case itself. It is those which remain in contention between the parties.

[7] The plaintiff argues that when taken collectively they could support a view that he is a rapist which could subsequently impact upon him in terms of both his physical and emotional well-being. The only direct evidence on that point is the immediate loss of part-time employment in a night club and a temporary move to his sister's address at the relevant time i.e. in the aftermath of his conviction. Both relate to a period after the court case in 2019 and both appear to have been time limited. The plaintiff says, however, that overall this grounds his claim in tort for the misuse of his private information. When pressed, his counsel particularised this as the plaintiff's expectation not to be described as a rapist and so, the plaintiff by way of a supplemental application, seeks not only to maintain the existing orders but also to extend them to a number of additional specific posts which are in similar vein.

[8] The parties are largely agreed on the law in relation to this case, namely that which is set out in *Callaghan v Independent News and Media Ltd* [2009] NIQB 1, i.e. the law will afford protection to information where there is a reasonable expectation of privacy. In that context however, a plaintiff must firstly satisfy the court that in the particular circumstances of the case that he, as an applicant for equitable relief, has a reasonable expectation of privacy in relation to the information which is in dispute – which in the context of this case is the information that remains the subject of the Disputed Content or is the information to which the plaintiff seeks an extension of the existing orders.

[9] Based on all of the evidence before me and having reviewed the specific postings which constitute the Disputed Content and the additional posts I do not consider that he has reached that particular threshold. In short, in the context of the facts of this case, I do not consider the plaintiff ought reasonably to have had an expectation of privacy in relation to these posts sufficient to justify a denial of the variation which has been sought or an extension of the orders. I say this for the following reasons:

(i) The allegations of rape to which the plaintiff objects were in fact part of the charges which he faced in the Crown Court and so were and indeed remain a

matter of public record. There was some dispute at hearing but in the end it was accepted that the allegations of rape remained "on the books" in the usual course. As such the charges were and remain a matter of public record and therefore fully in the public domain;

(ii) In addition those allegations were already, as the applicant himself concedes in his affidavit evidence, widely known in the community from which he comes before the case came on for trial – relating as they did to events which occurred in September 2016 which were themselves the subject of knowledge and comment within that community;

(iii) Looking then specifically at the posts, those in contention I find came as a direct reaction to the posts of both his mother and sister – posts which on his own evidence he cautioned against – no doubt because the plaintiff foresaw that they would provoke the reaction which they in fact did;

(iv) The posts from the intervenor and the material which followed it and to which I was taken relates, in my view, as I have said, to what is largely a commentary on the result of his plea, the level of sentence imposed and/or how people viewed the correctness (or otherwise) of the final result and indeed the justice system which produced it. Significantly they are I conclude, something which must be viewed through the prism of a reaction to his family's own initial posts.

[10] When one looks at it in the round the conviction and sentence which were imposed are matters which should properly be in the public domain as a matter of public interest and yet it is those that form the main basis of the plaintiff's claim to privacy. The plaintiff has sought the extension of the orders to cover certain additional posts. In relation to those additional posts and, indeed, the Disputed Content I have concluded that he cannot have a reasonable expectation of privacy in relation to matters which were quite rightly a matter of public record. Taken in the context of the posts from his own family I conclude that what followed was in the nature of public comment and so, it follows that I have determined that the injunctions should not be extended to cover those additional comments and that the variation sought by the defendant be granted.

[11] I am also bolstered in this view by the fact that the evidence suggests that the content about which the plaintiff objects is quite clearly in the public domain by virtue of other posts on the internet for example through the UK Database. In respect of this the applicant has taken no action, nor is any action at this stage likely. On his own evidence that appears to be because the UK Database is hosted in the US and therefore proceedings are more difficult. That is his position. In point of time it was conceded by his counsel that the UK Database postings predate the ones on Facebook and indeed provided the core of the information which was subsequently utilised in the various Facebook posts. The decision not to pursue any remedy in that regard is a matter purely for the plaintiff but the continuing existence of the

information inevitably must also impact upon what reasonable expectations the plaintiff can have had as regards the privacy of such information both generally, but also more particularly, as regards this defendant.

[12] In addition, I also find that the applicant in his original application failed in his duty of candour to the court. As I have said, the principal point of the intervenor was that her posts were as a response to Facebook posts uploaded by the applicant's mother and his sister. That fact was not made clear in the original grounding affidavit although it is quite clear from the applicant's subsequent affidavits that he was very well aware of that sequence of events. In the context of this case, I find that was a material omission – not only as regards the question of due process and the availability of equitable relief but, for the purposes of this case, also because it trenched directly on the question of any reasonable expectation to privacy which the plaintiff could have had in the circumstances as judged at the point at which he brought his original application. Lord Hope put it in the case of *Campbell v MGN* [2004] UKHL at para 99 that one must look at the question of reasonable expectation through the prism of "*a fair reasonable person of ordinary sensibilities*." It seems to me that such a person, being appraised of both the fact of conviction, with an awareness of the extent of the posting on the UK Database and, taking into consideration the posts which were made by his family must by necessity have had a materially reduced expectation of the privacy of the information that is in dispute. It was highly likely, given the high level of emotions at the time – that the mother and sister's posts were likely to provoke a response as is implicit from the plaintiff's own evidence. Indeed they did and, essentially, it is that response that is now the principal source of the objections.

[13] Whilst I accept that the posts themselves were not made by the plaintiff clearly the background was something of which the plaintiff was aware (again as acknowledged in his third affidavit) but yet it was not drawn to the attention of the court on the initial application for interim relief. In that, the plaintiff fails in his duty of candour but also, as I say, the facts and exchanges when considered in full context lessened any reasonable expectation that he might have had on the question of privacy.

[14] For all of those reasons, therefore, I feel that the plaintiff fails at the first hurdle on his application for an extension of the interim orders. As the plaintiff and the defendant are agreed as to the part continuance of the effect of the original orders pending the trial I will not interfere with those but I will accede to the defendant's application for a variation of those interim orders in the terms sought. At the conclusion of the case I invited counsel to liaise between themselves to propose a draft order which would reflect the exact URLs in relation to which the variation is to apply.

[15] The intervenor sought a lifting of the injunction. On the balance of convenience I am not minded to do that at this stage and will leave that question to the trial judge.

[16] On the question of anonymity I have heard the representations of all parties. The plaintiff was granted provisional anonymity which I accept is a derogation from the principle of open justice but, at this stage of the proceedings, and pending the final resolution of the matter, I have decided that the anonymity order should be continued. To do otherwise is likely to inflame the situation unnecessarily – a situation that has remained static for what has now been a period of almost 17 months. I am also mindful that removing anonymity at this stage would also impact upon the intervenor.

[17] The procedural irregularities which attended the anonymity order and which were pointed out in the hearing i.e. in the terms of the issuance of the Writ and general lack of compliance with the Practice Guidelines which are in point – those are all matters that I leave for formal application by the plaintiff as a precursor to the serving of the Statement of Claim.

[18] In that regard the plaintiff's counsel had indicated that the service of the Statement of Claim had been delayed pending the outcome of this case. Given the result, there is now no longer a reason or impediment which would prevent the case from proceeding in early course and for the Statement of Claim to now be served. I invite that action to be taken as soon as possible.

[19] In giving ex tempore judgment, I asked counsel for the parties to liaise to draft the appropriate order dealing specifically with the URLs and posts which are the subject of the variation application taken in light of the fact that I have accepted that the principal provisions of the interim orders are to be continued pending trial.

[20] The issue of costs was raised. In relation to the costs of the intervenor I grant an order for taxation.

[21] In relation to the costs of the defendant and for any further aspect of the proceedings, I leave those matters to the trial judge.