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

**Ref: MAG10418**

**Delivered: 01/12/2017**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION**

**2016 No. 49896**

**MM**

**Plaintiff**

**-v-**

**BC**

**First Defendant**

**RS**

**Second Defendant**

**- and -**

**FACEBOOK IRELAND LIMITED**

**Third Defendant**

**MAGUIRE J**

[1] The court has a Notice of Motion before it on behalf of the plaintiff herein. It is dated 15 March 2017. In it is indicated that the plaintiff seeks an order:

“For an interim injunction ... requiring the third defendant [Facebook] to locate and delete from the Facebook platform ... all images of the plaintiff contained within [the Ryan Report].”

[2] The above application is made within the context of litigation which already has a protracted history.

[3] The plaintiff in this litigation is MM, a young woman.

[4] The first named defendant is BC who is of similar age to the plaintiff and at one time was a boyfriend of hers.

[5] The second named defendant is RF, who appears to be a friend of BC.

[6] The third named defendant is Facebook Ireland Limited.

[7] The proceedings were begun by writ dated 7 June 2016. The writ post-dated the granting of an interim injunction by Horner J on 3 June 2016.

[8] The terms of the writ are as follows:

“The plaintiff’s claim is for:

First and second defendants

- (i) Damages for personal injury, loss and damage sustained by the plaintiff by reason of the negligence, misuse of private information, breach of confidence, Breach of the Protection from Harassment (Northern Ireland) Order 1997, Breach of the Data Protection Act 1998 and further damages pursuant to Section 8 of the Human Rights Act 1998 of the first and second defendants collectively, and each of them separately, in and about the publication of a content relating to the plaintiff on 28 May 2016.
- (ii) An injunction pursuant to the Protection from Harassment (Northern Ireland) Order 1997 preventing the first and the second defendants from harassing, pestering, annoying or molesting the plaintiff whether by distributing, broadcasting or transmitting any images or messages pertaining to the plaintiff on the website facebook.com or any other website or via an electronic device.
- (iii) An injunction pursuant to the inherent jurisdiction of the court requiring the first and second defendants to delete any images or messages pertaining to the plaintiff.

Third Defendant

- (iv) Damages pursuant to Section 8 of the Human Rights Act 1998 by failing to have in place an adequate 'reporting mechanism' by which the plaintiff could report publication of offending content relating to her on 28 May 2016.
- (v) Any further or other order as deemed appropriate by the court.
- (vi) Costs."

### **The essential facts**

[9] The plaintiff has sworn several affidavits in these proceedings.

[10] She has indicated that when she had been in a relationship with the first named defendant he took sexually explicit photographs of her. She also claims to have sent him a picture of herself naked. The first named defendant thereafter is said to have placed the photographs on Facebook via a messenger site. The second named defendant appears to have done much the same, she alleges. He is a friend of the first named defendant. Friends of the plaintiff notified her as to what was happening.

[11] As a result of the above, the plaintiff has averred that she felt anxiety and stress. Understandably the plaintiff wanted to stop the images being disseminated and wanted Facebook to delete the images. In these circumstances she contacted a solicitor who arranged for an injunction to be obtained. This was obtained from Horner J on 3 June 2016.

[12] The order made was as follows:

"Notice to the defendant

...

It is ordered that -

- (i) The plaintiff shall be granted anonymity ...
- (ii) An interim injunction ... preventing the first and second defendants from harassing, pestering, annoying or molesting the plaintiff whether by distributing, broadcasting or transmitting any images or messages pertaining to the plaintiff on the website

facebook.com or any other website or via an electronic device.

- (iii) An interim injunction requiring the first and second defendants to delete any images or messages pertaining to the plaintiff.
- (iv) An interim injunction pursuant to the inherent jurisdiction of the court requiring the third defendant to suspend the facebook.com account/profiles of the first defendant operating the Facebook page '[BC]' at URL ...
- (v) Further an interim injunction pursuant to her inherent jurisdiction of the court requiring the third defendant to suspend the facebook.com account/profiles of the second defendant operating the Facebook page '[RS]' at URL ...
- (vi) An order pursuant to Order 24 Rules 7 and 8 of the Rules of the Court of Judicature (Northern Ireland) 1980 requiring the third defendant to discover to the plaintiff in advance of the close of pleadings all material held by the defendant relating to the facebook.com account profile of [BC] ...
- (vii) An order pursuant to Order 24 Rules 7 and 8 of the Rules of the Supreme Court of Judicature (Northern Ireland) 1980 requiring the third defendant to discover to the plaintiff in advance of the close of pleadings all materials held by the defendant relating to the facebook.com account/profile of '[RS]' within a period of seven days from grant of the order ...
- (viii) The first and second named defendants to swear with 48 hours an affidavit disclosing names of those to whom any of the offending images have been disseminated ..."

[13] It is unnecessary for the court to describe in this judgment a variety of developments which have occurred since the making of the interim injunction relating to the first and second named defendants.

[14] The state of the litigation as regards the first and second named defendants is unclear to the court. This application is concerned only with the extant proceedings between the plaintiff and Facebook Ireland Limited.

[15] The current state of play in respect of the Facebook litigation is helpfully described in an affidavit sworn by Jack Gilbert on Facebook Ireland as follows:

**“The Proceedings**

2. These proceedings relate to the alleged actions of the first and second defendants in sharing sexually explicit images of the plaintiff by private messages on Facebook’s messenger service (‘Messenger’) in or around April/May 2016.

3. ...

4. It appears the first defendant sent some the images of the plaintiff to the second defendant, and the first and second defendants more widely shared some of the images to other Facebook friends via Messenger.

5. Such a situation is often referred to as the distribution of ‘non-consensual intimate imaginary’ or ‘revenge porn’, and is a complaint which Facebook takes very seriously. Pursuant to Facebook’s community standards, the sharing of such images in revenge or without the permission of the people in the images is a form of sexual exploitation. The sharing of such content violates Facebook’s community standards and is subject to removal upon notification. Users can report abusive content or messages, including images of this sort. Facebook has dedicated teams working around the world to review content users report to help make Facebook remains safe.

**The Messenger service**

6. Facebook has a feature, and messaging mobile application, known as Messenger, that enables users to send private message to their Facebook friends.

7. As I understand it, the images of the plaintiff were shared by the first and second defendants via Messenger, and there is no allegation that the images have been posted on to any Facebook profile or page.

### **The Ryan Report - Images of the plaintiff**

8. I refer to the expert report of Scott Ryan dated 11 January 2006 addressed to the plaintiff's solicitor (the 'Ryan Report')<sup>1</sup>.

9. Mr Ryan accessed the Messenger accounts of the plaintiff and the first and second defendants via Facebook to determine what images of the plaintiff were sent and/or received.

10. As appears from pages 17-24 of the Ryan Report, there are a number of images of the plaintiff, which the plaintiff sent to the first defendant on various dates, ranging from 20 October 2014 to 24 April 2015, and which the first and second defendants thereafter sent to each other and/or various other users. All relevant images and messages are documented in the Ryan Report.

### **Actions by Facebook**

11. The plaintiff served a copy of the Ryan Report on Facebook and subsequently requested that Facebook 'access the accounts of the first and second named defendants, remove the pictures of the plaintiff contained therein, and provide written confirmation that this has been done'. Facebook complied with that request.

12. The plaintiff previously provided the URLs for the accounts of the first and second defendants. Utilising those URLs and the information set forth in the Ryan Report, Facebook located instances of the images exhibited at pages 17-21 and 23-24 of the Ryan

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<sup>1</sup> The court's understanding is that this report is the product of a joint instruction on the part of the Plaintiff and the first two Defendants and is entitled 'Anexsys Investigation Report'. The investigator was Scott Ryan and the report is dated 11 January 2016. The report is not in the papers presently before the court.

Report in the private messenger in boxes of the first and second defendants accounts.

13. Iterations of the images sent from the account of 'MM' ... to the first defendant, as reflected on pages 22 and 23 of the Ryan Report, could not be found or accessed via the accounts of the first and second defendants. As such, Facebook requested that the plaintiff provide the URL or UID for the 'MM' account, as Facebook could not simply search for the 'MM' account due there being a number of potential matches for the same name.

14. The plaintiff provided a URL for the 'MM' account on 22 February 2017. Utilising that URL and the information set forth in the Ryan Report, Facebook located the images - again those reflected on pages 22 and 23 of the Ryan Report - and removed those images.

15. The Ryan Report also evidences instances where the first and second defendants sent images to certain of their Facebook friends as set forth at pages 21, 23 and 25-26 of the Ryan Report.

16. Accordingly, and as was done in respect of the first and second defendants and the 'MM' accounts, Facebook requested the URLs or UIDs for the accounts that received the images from the first and second defendants so that Facebook could attempt to locate and delete those images from those accounts. Indeed, this request was made clear to the plaintiff's solicitor prior to the filing of the plaintiff's application. This would be the most efficient and certain approach to deleting any such instances of the images.

17. However, even without being provided with those relevant URLs or UIDs, at my direction, Facebook began a manual search of the relevant URLs or UIDs of these users based on the names of the users provided to Facebook in the Ryan Report. Searching for the relevant URLs or UIDs in this manner takes much longer and requires more resources, which is why Facebook requested the

information from the plaintiff. Nevertheless, as a result of this manual search, Facebook was able, to the best of its knowledge, to locate the relevant UIDs for the accounts identified in the Ryan Report.

18. Based on this manual search, as of the date hereof, Facebook has to the best of its knowledge managed to locate and delete all of the images set forth in the Ryan Report from the accounts that received the images from the first and second defendants.

19. In short, as at the date hereof, Facebook has to the best of its knowledge deleted all copies of the images of the plaintiff identified in the Ryan Report and located in each of the message threads identified in the Ryan Report.

20. Further, in respect of any future publication of these images, under my direction and supervision, Facebook's Safety Team took additional steps to assist the plaintiff. Facebook implemented a technical measure to automatically block all images detailed in the Ryan Report from being re-uploaded to the Facebook service in the future. In other words, should a user attempt to post or share any of those images in the future, whether on the Facebook website or via Facebook Messenger, the images will be immediately blocked. It is important to note that due to technical limitations, this measure is only able to identify with certainty identical versions of the same image and cannot identify attempts to share modified versions of the same image ...

21. Since implementing this technical measure, Facebook Ireland does not have any record of attempts by any users to post or share any of the images.

22. Facebook has therefore taken all of the necessary steps both to remove the images of the plaintiff identified to it by the Ryan Report, and to automatically block any future attempt to upload or share the same images on the Facebook service. In other words, Facebook has now implemented all of



the technical measures available to it in order to remove and ensure the continued removal of the images of the plaintiff identified in the Ryan Report.”

[16] From the above averments it seems to be clear that:

- The first defendant’s accounts and the second defendant’s accounts have been cleared of images of the plaintiff.
- What the court was told were twenty five other accounts containing images sent by the first defendant or second defendant to others have been similarly cleared.
- There is now in position (placed there by Facebook) a blocking mechanism to prevent reloading of the images in the future (provided they are identical to those already there).
- Since implementing the blocking mechanism, Facebook has been able to monitor the situation but does not have any records of attempts by any users to post or share any of the images.

[17] It is the court’s understanding that Facebook’s position is that it has now done enough. In particular, Mr Gilbert has further averred that:

“...Facebook does not have the technical means to search the contents of its entire platform and Messenger accounts”(para 23).

Moreover Mr Gilbert states that:

“It is not feasible from the technical perspective for Facebook to run an automated search for any instances of the images ... within individual message inboxes or across the entire Messenger and Facebook platforms. This would entail running a search across over 1.86 million users boxes” (para 25).

### **The relief now sought**

[18] The terms of the relief now sought have been set out above. At the hearing before the court, Mr Lavery QC for the plaintiff told the court that what was principally concerning the plaintiff was that there may have been onward dissemination of the images from the 25 accounts already traced. This is why the application had been mounted.

[19] Without resiling from the width of the initial order sought by the plaintiff in the Notice of Motion, Mr Lavery argued that it would be of advantage to the plaintiff if the court was to order that Facebook access and search the 25 accounts, within a set time frame, for images which had later been sent from each account subsequent to them being received initially. He suggested a time frame of at least four weeks beginning with the original date of receipt.

[20] The court reminds itself, notwithstanding what Mr Lavery has said, that:

- What is before it is the mandatory injunction proposed in the Notice of Motion.
- It is to this proposal that Facebook's evidential response has been aimed at and has been formulated.
- No application has been made in this case at any time to amend the Notice of Motion.
- If any such application had been made, it might or might not have been granted but, if it had been, the court would have been obliged to enable Facebook to respond evidentially to such a development.

[21] Accordingly, in what follows, the court will determine the application before it.

**The test to be applied to the granting of a mandatory injunction on an interim basis**

[22] Mr Hopkins BL for Facebook reminded the court of the test which needs to be applied by the court in the context of the grant of interim mandatory injunction. As is not in dispute, it is the case that the grant of a mandatory injunction is discretionary and not a matter of course. Mr Hopkins specifically referred to the case of Redland Bricks Limited v Morris [1969] 2 All ER 576. In that case the House of Lords referred to the following general principles:

“a mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave damages will occur to him in the future. As Lord Dunedin said it is not sufficient to say ‘timeo’. It is a jurisdiction to be exercised sparingly and with caution but in the proper case, unhesitatingly;

- (2) Damages will not be a sufficient or adequate remedy if such damage does happen. This is

only the application of a general principle of equity;

- (3) Unlike the case where a negative injunction is granted to prevent the continuance or recurrence of a wrongful act, the question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account;
- (4) If, in the exercise of its discretion, the court decides that it is a proper case to grant the mandatory injunction, it must be careful to say that the defendant knows exactly in fact what he has to do, not as a matter of law but as a matter of fact."

[23] Mr Hopkins also referred in his submissions to relevant passages in the well-known text book "Injunctions" by David Bean 10<sup>th</sup> Edition at paragraph 2.27 and to the case of Co-Operative Insurance Society Limited v Argyll Stores (Holdings) Limited [1997] 3 All ER 297 at 303c-304c.

[24] Mr Lavery did not in terms dispute the citations above. However he did draw the court's attention to a recent authority in relation to mandatory injunctions. This is the case of Trant Engineering Limited v Mott MacDonald Limited [2017] EWHC 2061 (TCC). This is a judgment of Mrs Justice Farrell. At paragraph [16] she said as follows:

"In this case the application is for a mandatory injunction. The relevant guidance can be found in the decision of Chadwick J in Nottingham Building Society v Eurodynamics Systems plc [1993] FSR 468, in which the learned judge stated:

'In my view, the principles to be applied are these: first this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong. Secondly, when considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive

step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does have a high degree of assurance that the claimant will be able to establish this right at a trial. That is because the greater the degree of assurance the claimant will ultimately establish this right at a trial. That is because the greater the degree of assurance the claimant will ultimately establish is right, the less will be the risk of injustice if the injunction is granted. Fourthly, but even where the court is unable to feel a high degree of assurance that the claimant will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist whether risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted'."

[25] At paragraph [17] of the same judgment it is noted that the above test was approved by the Court of Appeal in the case Zockoll Group Limited v Mercury Communications Limited [1998] FSR 354.

### **Application of the principles to the present case**

[26] While the court will bear in mind the plaintiff's understandable desire to have the reassurance of knowing that every image of her which might exist on the Facebook platform has been found and deleted, this alone does not establish her case for the order which is sought in the Notice of Motion.

[27] In order to reach a decision in relation to the application before it the court must proceed on the basis of the principles referred to *supra*.

[28] It seems to the court that it is difficult for it in any significant way to second guess the technical content of what has been averred to by Mr Gilbert in his affidavit.

In the absence of material put before the court to challenge what Facebook's deponent has said, the court considers that it has little option but to accept the proposition that there is no facility for an automated search for the images within the message inboxes or across the entire Messenger and Facebook platforms and that to achieve this object would consequentially entail checking a very large number of users inboxes. This would appear to be an enormous task which the court could only proportionately require in face of a hugely compelling case for doing so.

[29] In those circumstances the court must examine how compelling the plaintiff's case is. In doing so, the court accepts that it is possible that there may exist further images of the plaintiff on the Messenger and Facebook platforms. There is evidence that the images have reached some 25 accounts belonging to persons other than the first and second named defendants and each account holder might have decided to send an image or images to someone else and each someone else might have decided to circulate the images further.

[30] However, while all of what the court has just said is true, it does not follow that such is likely or, in particular, that it is a strong probability (to use the terminology of Redland Bricks).

[31] There are a number of factors which the court takes account of in these circumstances. Non-exhaustively expressed, these include:

- (i) The existence of the blocking mechanism described in Mr Gilbert's affidavit. It may serve to block recirculation of the images provided the images are identical to those already deleted.
- (ii) The absence of evidence of further dissemination of the images at this time. There is, the court notes, no evidence that a process of further circulation has been taking place beyond the parameters of the measures already taken to delete material in this case. If there was extensive on-going circulation going on, one might have expected that to have come to the attention of the plaintiff or her friends, especially as it would not be unreasonable to suppose that those to whom the images are most likely to be circulated would be persons who, to a greater or lesser extent, know the plaintiff.
- (iii) The efflux of time since the original circulation of the images, at least to a degree, may lessen the risk which now exists of further circulation.

[32] It seems to the court that the above factors broadly tend to make it less, rather than more, likely that the risk which exists will, in fact, to an appreciable degree, materialise.

[33] The court must also consider the issue of the extent of the damage to the plaintiff if the steps sought in the Notice of Motion are not ordered by the court.

[34] It is not difficult to conclude that already the plaintiff has been materially and adversely affected as a result of this whole episode. The court notes the impact upon her as of June 2017 as disclosed in the report of Dr Kane. Dr Kane, in particular, references deterioration in her mood and anxiety as a result of the release of the images. However, she expresses herself as optimistic that the plaintiff's symptoms will settle.

[35] If the steps sought to be taken result in the mandatory injunction the court accepts that this may aid the plaintiff's state of mind but it is not convinced that the refusal to take such steps would result in 'grave damage' to her (again to use the language of Redland Bricks).

### **Conclusion**

[36] The court has decided in all of the circumstances of this case that it should not grant the mandatory injunction sought in the Notice of Motion. It does so, in short, because:

- (a) Of the absence of evidence that there has been further dissemination beyond the 25 accounts which are known about and in respect of which measures to delete images have already been taken. The risk of further dissemination possibly may materialise but the evidence before the court does not satisfy it that this is a "very strong probability".
- (b) Of the absence of evidence that, if the steps which the plaintiff seeks are not taken, the plaintiff will sustain grave damage.
- (c) It is satisfied that the task the plaintiff wants the court to order Facebook to take, as set in the Notice of Motion is technically problematical and would be likely to be onerous, time consuming and expensive and very likely disproportionate to any gains which might result.

[37] Quite independently of the above analysis, it also appears to the court that there is strength in Mr Hopkins' argument that in view of the terms in which Mr Gilbert's affidavit is cast (particularly paragraphs 18 and 19) what has been sought in the Notice of Motion has already been achieved in that it is likely that the images contained in the Ryan Report have already in fact been deleted. The court, however, will not make this point the centrepiece of this judgment, as it has not seen the Ryan Report.

[38] Mr Hopkins, the court acknowledges, also advanced an argument against the granting of this application based on Article 15 of the E-Commerce Directive. However, the court does not consider, in view of its analysis above, that it is necessary to decide this point in this case. The court would prefer to hear more extensive argument before making any determination in respect of the point raised.