Neutral Citation No. [2013] NIQB 48 | *Ref:* **HOR8813**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **05/03/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

ROBERT GORDON MARTIN and HEATHER ELAINE MARTIN & ORS

Plaintiffs

and

GABRIELE GIAMBRONE P/A GIAMBRONE & LAW, SOLICITORS AND EUROPEAN LAWYERS

Defendants

HORNER J

Introduction

[1] This is a most unusual application. A Mareva Injunction was obtained against Gabriele Giambrone, who practises as Giambrone and Law ("the defendant") who specialises, inter alia, in media law. There had been two sets of proceedings, the first brought by the present plaintiffs and the second set by James and Caroline Craven and others. Both relate to failed investments made through the defendant as their solicitors in Calabria in the South of Italy. Following a hearing before Weatherup J, the defendant posted on his Facebook site the following comments:

> "They thought they knocked me down, now they will see the full scale of my reaction. F*** them, just f*** them. They will be left with nothing."

[2] These comments are considered relevant to the Mareva Injunction granted to the plaintiffs and which restricts the defendant from dissipating his assets. The plaintiffs seek to make use of these comments ("the document") in the course of both sets of proceedings and they were included in these plaintiffs' List of Documents. The defendant wants an order that they cannot be used and must not be disclosed to the Judge presently dealing with the Mareva Injunction, Burgess J or to the trial

Judge, Weatherup J. I gave an extempore judgment holding that the document was both relevant and could be disclosed to both the Judge hearing the Mareva Injunction and to the Judge hearing the main actions. I have been asked to reduce it to writing and I agreed to do so. This written judgment has been produced using the notes that I used to give my earlier ruling.

Facts

[3] The defendant claims that his comments were confidential as his Facebook site is restricted to communications to his friends only. He claims that use of the document would constitute a breach of confidence. He told the court that he had deliberately instructed his colleague, Ian Buchan, who has some expertise in software matters to ensure that only his friends could access his comments. He accepted under oath that Mr Chambers, the plaintiffs' solicitor, and members of the plaintiffs' litigation group were able access the site and to read the comments despite the fact that the defendant had apparently instructed Facebook that there was to be restricted access only. For the avoidance of doubt neither Simon Chambers, the plaintiffs' solicitor, nor any of the plaintiffs are friends of the defendant who describes himself as having an expertise in media law.

[4] This application fails on a number of different grounds. Before I go on and deal with those issues I should say that anyone who uses Facebook does so at his or her peril. There is no guarantee that any comments posted to be viewed by friends will only be seen by those friends. Furthermore it is difficult to see how information can remain confidential if a Facebook user shares it with all his friends and yet no control is placed on the further dissemination of that information by those friends. No evidence was adduced as to how many friends the defendant had and what his relationship was with each of them. It was certainly not suggested that those friends were in anyway restricted as to how they used any information given to them by the defendant. For the avoidance of doubt, I do not consider that any of the friends viewing that information would necessarily have concluded that the information was confidential and could not be disclosed. I have received no evidence as to why those friends were in any way restricted as to how they can use information received from the defendant and why they would have known this information was confidential or private.

Legal Discussion

[5] Any party to an action is obliged to disclose to the other party those documents "which are or have been in his possession, custody or power relating to an matters in question in the cause or matter": see Order 24 Rule 1 of the Rules of the Supreme Court (NI) 1980. The test for discovery is set out in the Supreme Court Practice (1999 Volume 1 at 24/2/11) as being:

> "Not limited to documents which should be admissible in evidence (Compagnie Financiere du Pacifique v Peruvian Guano Co [1882] 11 QBD 55 and O'Rourke v Darbishire [1920] AC 581 at 630) nor to those which would prove or disprove any matter in question: any documents which, it is reasonable to suppose, *contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead through a train of inquiry which may have either of those two consequences* must be disclosed (see Compagnie Financiere du Pacifique v Peruvian Guano Co [1882] 11 QBD 55 at 63)."

[6] I also note that Order 24, Rule 9 which relates to an application for discovery of documents states that:

> "On the hearing of an application for an order under rule 3, 7 and 8 the court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall any case refuse to make an order if in so far as it is the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

There is no doubt that the relevant document, namely the Facebook entry, is relevant and therefore discoverable. Prima facie it constitutes information which the plaintiffs are entitled to use both in the application for a Mareva Injunction and at the trial to prove to the court that the defendant, unless restrained, may seek to put any assets which are available to satisfy the plaintiffs' judgment beyond their reach and that of the court.

[7] The defendant seeks to resist disclosure on the basis that the information is confidential. Halsbury's Laws of England Volume 19 paragraph 93 states:

> "In enforcing obligations of confidence by litigation, particularly in relation to trade secrets, the degree of disclosure required may defeat the purposes of the process. In some cases the courts have been prepared to accept restricted disclosure but this appears inconsistent with procedural requirements for disclosure, with the principles for the framing of injunctions and with other

> authorities. The court has discretion in relation to disclosure and may direct either that information be disclosed only to the legal advisors of the parties and experts, or that documents be partially covered to conceal confidential material.
>
> In order to prevent the confidences allegedly infringed from being publicly available in court and thereby destroying the subject matter of the proceedings, the court can direct that the trial be held in private. However, if it all possible, the importance of open justice means such proceedings in private should be avoided."

[8] The plaintiffs were obliged to include the Facebook posting in their List of Documents as it was clearly a relevant document. Whether or not the plaintiffs should be entitled to rely on those documents either in the hearing for Mareva Injunction or the main action is a difficult argument for the defendant to make. Effectively they are arguing that it should not be used in the litigation because:

(i) it is confidential and/or private;

(ii) the plaintiffs must have known that it was confidential and/or private.

However the fact that the documents were confidential does not in some way exclude them from the obligations of disclosure. In Science Research Council v Nasse; BL Cars Ltd (formerly Leyland Cars) v Voias [79] 3 All ER 673 Lord Wilberforce said in giving the main judgment of the House of Lords:

> "On these points my conclusions are as follows;
>
> (1) There is no principle of public interest immunity, as that expression was developed from Conway v Rimmer, protecting such confidential documents as these with which these appeals are concerned. That such an immunity exists or ought to be declared by this House to exist, was the main contention of Leyland. It is not argued for by SRC; indeed that body argued against it.
>
> (2) There is no principle of English law by which documents are protected from discovery by reason of confidentiality alone. But there is no reason why, on the exercise of its discretion to order discovery, the tribunal should not have regard to the fact that documents are

> confidential, and that to order disclosure would involve a breach of confidence. In the employment field, the tribunal may regard the sensitivity of particular types of confidential documents, to the extent to which the interests of third parties (including other employees on which confidential reports have been made, as well as persons reporting) may be affected by disclosure, to the interest which both employees and employers may have in preserving the confidentiality of personal reports, and to any wider interests which may be seen to exist in preserving the confidentiality of systems of personal assessments……
>
> (4) **The ultimate test of discrimination (as in other) proceedings is whether discovery is necessary for disposing fairly of the proceedings**. If it is, then discovery must be ordered notwithstanding confidentiality. But where the court is impressed with the need to preserve confidentiality in the particular case it will consider carefully whether necessary information has been or can be obtained by other means, not involving a breach of confidence. (my emphasis)
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> (5) In order to reach a conclusion whether discovery is necessary notwithstanding confidentiality the tribunal should inspect the documents. It will naturally consider whether justice can done by special measures such as in *covering up,* substituting anonymous references for specific names, or, in rare cases, hearing in camera"

[9] Therefore, as I have concluded that disclosure of the document is necessary for disposing fairly of the proceedings, both the Mareva Injunction and the main action, the plaintiffs' claim must fail. However I should comment that I do not accept the claim made by the defendant that the document posted on Facebook by the defendant is:

(a) confidential; or

(b) the plaintiffs must have known it to be confidential.

[10] When the defendant decided to make the posting on Facebook even if it was only to his friends, he did so in the sure knowledge that those "friends" were able to forward the posting on to whomsoever they wished. In any event the posting was

not made just to the defendant's friends but to the public at large. In those circumstances the document was put into the public domain and if there was any argument that it was confidential or private, that argument was destroyed by the posting on Facebook to which the general public had, I find, unfettered access. As Lord Goff said in Attorney General v Guardian Newspapers (No 2) [1990] AC 109 at 282:

> "Once (information) has entered what is called the public domain .. then as a general rule, the principle of confidentiality can have no application to it."

[11] If I am wrong, and the information was confidential and/or private then it is important to look at whether or not those who received the information would have known that they were bound by a duty of confidence. In Campbell v MGN Ltd [2004] UKHL 22 at paragraph 14 Lord Nicholls said:

> "This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in A-G v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109. Now the law imposes a *duty of confidence* whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase *duty of confidence* and the description of the information as *confidential* is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called *confidential*. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."

[12] In my view neither the plaintiffs nor their solicitor could have understood the posting to be impressed with a "duty of confidence" or to be private information. In fact, someone reading the posting is much more likely to have come to the conclusion that the posting was a deliberate act of defiance by the defendant to his creditors and was intended to make it clear to them that regardless of what they did they could not hope to win the final battle.

[13] Finally, I was not addressed as to the effect of Article 8 or Article 10 of the European Convention on Human Rights on this dispute. In any event for the reason

which I have given I do not consider that the Article 8 rights of the third-named defendant were engaged. I am not sure Article 10 was engaged either. Any arguments about how the ECHR may impact on the issue of disclosure falls to be considered in a case in which the plaintiff or the defendant's Convention rights are engaged and detailed arguments are made to the court.