# Judicial Communications Office

**Friday 8 September 2017**

# COURT REFUSES CALLUM TOWNSEND'S APPLICATION TO SERVE PROCEEDINGS AGAINST GOOGLE INC.

## Summary of Judgment

Lord Justice Stephens today delivered an un-anonymised version of the judgment he delivered on 28 July 2017 in which he refused leave to serve notice of a writ of summons on Google Inc. because of its refusal to take down links to news articles about an offender's previous convictions.

**Callum Townsend** ("the plaintiff") applied for leave to serve notice of a writ of summons out of the jurisdiction on Google Inc. ("the defendant"), a company incorporated in the USA. Google Inc. owns and operates the Google Search Service ("Google Search"). The application was based on the propositions that the defendant had committed the torts of misuse of private information, breach of confidence and breach of the Data Protection Act 1998 ("the 1998 Act"). The plaintiff also sought an injunction ordering Google Inc to stop processing personal data relating to him which could produce search results revealing sexual offences committed by him while a child. The application for leave to serve notice of the writ out of the jurisdiction was opposed by Google Inc on the basis that the plaintiff had not established an arguable case and that there was no serious issue to be tried as the plaintiff should not have had any expectation of privacy and that there was no arguable case in relation to breach of the 1998 Act.

**Factual background**

The Court heard that the plaintiff's offending started in 2006 and he was convicted on 18 December 2007, when he was 15 years old, of sending sexualised text messages to another boy in his class. He was also convicted on the same date of an offence of disorderly conduct. These offences would not have been reported in the media as he was under 18 at the date of his conviction. These convictions are now spent under the terms of the Rehabilitation of Offenders (Northern Ireland) Order 1978.

On 16 November 2010, when the plaintiff was 18 years old, he was convicted of three offences of harassment relating again to the sending of sexualised text messages. As he was over 18 at the date of his conviction, the offences were reported by the media and therefore are revealed when entering the plaintiff's name into Google Search. These convictions will not become spent until 2023 because the plaintiff committed further offences during the rehabilitation period. The Court heard that the plaintiff by the age of 24 had a total of 74 convictions of which only 2 are spent. These include 14 convictions for breaching his Sexual Offences Prevention Order ("SOPO"), 4 convictions for violence, 16 convictions for

dishonesty, and 6 convictions for disorderly behaviour and criminal damage. He has been imprisoned on at least two occasions.

In the last six years, the plaintiff has been the subject of at least 26 articles in newspapers across Northern Ireland in respect of his unspent convictions. Some of the articles included photographs of the plaintiff and his street address when reporting on his appearances in court. The repetitive breaches by the plaintiff of the SOPO also attracted political attention by way of questions at the Northern Ireland Assembly.

On 26 October 2012 the plaintiff changed his first name by deed poll [from Stuart to Callum] in order to try to escape the publicity that had surrounded his previous criminal activity. The plaintiff had been convicted of 52 separate offences by the time he had changed his name. He has a further 22 convictions for offences committed under his new name.

On 26 July 2013 the SOPO was removed by order of Dungannon Magistrates' Court.

The plaintiff believed that the Google Search results and particularly search results in relation to his sexual offending whilst under 18 led to a number of distressing incidents including an attack on his home. On 30 May 2014 he requested Google Inc. to remove 12 URLs from search results produced when searching for his name. On 22 November 2014, the plaintiff made a further request for Google Inc. to delist seven of the 12 previously notified URLs. He stated that the links claim he is subject to a SOPO which has been discharged and as a result his education and employment opportunities have been affected and he has been assaulted and subject to death threats.

Google Inc. declined to de-list any of the URLs notified by the plaintiff on the basis that the inclusion of the news articles in Google Search's results was still relevant and in the public interest. The Court was told that only eight of the 12 notified URLs continue to link to journalistic webpages containing content about the plaintiff's criminal activities and none identify any of the spent convictions.

On 4 February 2016, the plaintiff's solicitors wrote to Google Inc. asking it to cease processing "information relating to our client's conviction in respect of sexual offences when he was a minor." The letter asserted that Google Inc.'s processing of information in respect of this conviction had caused the plaintiff damage and distress in the form of "the harassment of our client by people who obtain the said information and consequent loss of employment by our client." On 14 March 2016 the plaintiff commenced these proceedings.

**Breach of Confidence**

Counsel for the plaintiff recognised that his previous convictions, even if spent, could not amount to confidential information and the Court accordingly held that there is no serious issue to be tried in relation to the plaintiff's claim for breach of confidence and refused the application to serve notice of the writ of summons out of the jurisdiction on Google Inc.

**Misuse of Private Information**

The tort of misuse of private information can only come into play where it is established that any information about which complaint is made is private and the publisher knew or ought to have known that it was private. There has to be a reasonable expectation of privacy in respect of the information. The question of whether there is a reasonable expectation of privacy "is a broad one, which takes account of all the circumstances of the case". The information about which the plaintiff asserted he has a reasonable expectation of privacy was identified as being details of criminal offences committed by him in childhood and details of his change of name. The plaintiff asserted that anyone who puts his name into Google Search will find links to his childhood sexual offences and to his old name.

The Court referred to case law which considered whether there can be an expectation of privacy in relation to a criminal conviction and which held that the point at which a conviction recedes into the past and becomes part of a person's private life will *usually* be the point at which it becomes spent. In *CG v Facebook* [2016] NICA 54 at paragraph [43] Morgan LCJ giving the judgment of the Court of Appeal stated that:

> "We agree that with the passage of time the protection of an offender by prohibiting the disclosure of previous convictions may be such as to outweigh the interests of open justice. In principle, however, the public has a right to know about such convictions. Information about what has happened in open court can be freely communicated by members of the public unless there is some compelling reason to prevent it. The open justice principle is fundamental to securing public confidence in the administration of justice and is particularly important in the criminal context where the public is concerned with the punishment and rehabilitation of the offender and the extent of the risk of harm he may present. This is, therefore, a factor of very significant weight which can only be outweighed by the interest of the individual in freedom from intrusion in the most compelling circumstances."

A balance therefore has to be achieved between on the one hand open justice which includes public debate about the effectiveness of the criminal justice system and on the other hand the protection of an offender by prohibiting the disclosure of previous convictions. "*Usually*" the balance depends on whether the conviction is "spent" but particular facts and circumstances may take the case out of the usual either one way or the other. Lord Justice Stephens said that, in this case, the convictions which have been revealed by Google Search are all convictions which are not "spent" including the sexual offences committed when the plaintiff was under 18 in relation to which he was convicted on 16 November 2010:

> "*Usually* there can be no expectation of privacy in such offences which are not spent. The reason why the sexual offences are not

> "spent" is that the statutory rehabilitation period has not expired and it has been extended as the plaintiff is a notorious recidivist. In relation to the question as to why this case should be taken out of the usual it was submitted that the sexual offences involved particularly intrusive personal material relating to the plaintiff's sexual orientation with a disproportionate effect on the plaintiff. The fact that an offence reveals a particular sexual orientation on the part of an offender, whatever that orientation may be, is not a most compelling circumstance so as to require open justice to be outweighed by the protection of the offender. The public interest in disclosure is also demonstrated by the fact that the plaintiff has sought to associate his name with a children's charity. That charity and others like it should have access at the very least to information about his unspent sexual convictions. Also the public interest in disclosure is demonstrated by the fact that the plaintiff's recidivism has been raised as an issue of public concern in the Assembly. I do not consider that there is any disproportionate effect on the plaintiff. There is no arguable case as to an expectation of privacy in relation to the convictions which are not "spent"."

In relation to the contention that there is a reasonable expectation of privacy in relation to the plaintiff's change of name the Court noted that the plaintiff has committed 52 offences under his old name and 22 offences under his new name:

> "The simple and usual consequence of committing offences is that the offender's name will be public and an offender cannot avoid this by the device of changing his name either formally by deed poll or informally by adopting an alias. There is no arguable case as to an expectation of privacy in relation to the change of the plaintiff's name."

Lord Justice Stephens concluded that there is no serious issue to be tried in relation to the plaintiff's claim for misuse of private information and any application to serve notice of the writ of summons out of the jurisdiction on Google Inc. is refused.

**Breach of the Data Protection Act 1998**

In the alternative the plaintiff sought to frame his case relying on the 1998 Act. Google Inc. accepted that the information processed in this case is sensitive personal data as it consists of information as to the commission by the plaintiff of an offence. It was also conceded that Google Inc. is a data controller and that it is established in the UK for the purposes of the 1998 Act in relation to its provision of Google Search. Google Inc. is therefore required not to process the data unless at least one of the conditions in Schedule 2 is met, and at least one of the conditions in Schedule 3 is also met. The company contended that it has met condition 6 in Schedule 2 and condition 5 and/or condition 10 in Schedule 3.

**Whether a triable issue as to Google Inc.'s compliance with Condition 6 in Schedule 2**

Lord Justice Stephens said there was no suggestion that processing the data was not for the legitimate interest pursued by the data controller. The only issue was whether the processing was unwarranted in the particular case of the plaintiff by reason of prejudice to his rights and freedoms or legitimate interests. He held that the plaintiff's privacy right under Article 8 is not engaged in relation to his unspent criminal convictions and said there is a clear public interest in open justice and a clear right to freedom of expression: "In such circumstances the processing was not unwarranted and there is no triable issue in relation to any allegation that Google Inc. has not satisfied this condition."

**Whether a triable issue as to Google Inc.'s compliance with Condition 5 in Schedule 3**

Condition 5 provides that "the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject." Ordinarily an offender wishes to hide his criminal activity rather than deliberately taking steps to make it public. Lord Justice Stephens said that as a consequence of the open justice principle by committing an offence the offender is deliberately taking steps to make the information public. He considered that there is no triable issue in relation to any allegation that Google Inc. has not satisfied this condition.

**Whether a triable issue that Google Inc. has contravened the third and sixth data protection principles**

The third data protection principle requires an assessment as to whether the personal data as to the plaintiff's unspent criminal convictions was adequate, relevant and not excessive. Lord Justice Stephens considered that given the public interests in play and the lack of any expectation of privacy in relation to those convictions there is no triable issue in relation to any allegation that the personal data did not comply with the third data protection principle.

In relation to the sixth data protection principle it was recognised on behalf of the plaintiff that the outcome in relation to the other issues in this case would be determinative. Lord Justice Stephens considered that there is no triable issue in relation to any allegation that the personal data was not processed in accordance with the rights of the data subject under the 1998 Act.

**Whether a triable issue as to the plaintiff's entitlement to rely on the section 10 data subject notice**

The plaintiff contended that he has sustained substantial distress due to the processing of personal data by Google Inc. in relation to his criminal convictions for sexual offences whilst under 18. The issue as to whether this distress was caused by Google Inc.'s processing of personal data or was caused by reason of the plaintiff's general notoriety would be an issue for trial. Lord Justice Stephens said the plaintiff had to establish that the distress is unwarranted which balances the competing interests. He said it was clear that the

processing was not unwarranted and accordingly there is no triable issue in relation to any allegation that the plaintiff is entitled to rely on a section 10 data subject notice.

**Conclusion in relation to the data protection gateway**

Lord Justice Stephens concluded that there is no triable issue in relation to Google Inc.'s compliance with the data protection principles or in relation to the section 10 data subject notice. Accordingly, there is no triable issue in relation to any breach by Google Inc. of the 1998 Act. The application to serve notice of the Writ of Summons out of the jurisdiction on Google Inc. on the basis of breach of the 1998 Act was therefore refused.

**The injunction gateway**

Lord Justice Stephens held that there is no triable issue as to the invasion of any of the plaintiff's legal or equitable rights there was no good cause of action and therefore no reasonable probability that the plaintiff would obtain an injunction. The application was therefore refused.

**Conclusion**

Lord Justice Stephens refused the plaintiff's application for leave to serve notice of the writ out of the jurisdiction on Google Inc.

**NOTES TO EDITORS**

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).

2. Judgment in this case was delivered on 28 July 2017 in an anonymised form and with a reporting restriction. The Court gave the plaintiff time to consider whether he wished to appeal and to consider whether there was any reason for the continuation of either the anonymity order or any part of the reporting restriction order. The plaintiff does not wish to appeal and accepted that there is no continuing basis for the anonymity order. Accordingly the Court delivered this judgment in an unanonymised form.

**ENDS**

If you have any further enquiries about this or other court related matters please contact:

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