

Judicial Communications Office

Thursday 5 October 2017

COURT DISMISSES APPLICATION TO FORCE SUNDAY WORLD TO DISCLOSE SOURCE

Summary of Judgment

Lord Justice Stephens today removed a restriction on reporting a judgment he delivered on 19 July 2017 in which he dismissed an application by Colin Duffy, Alex McCrory and Henry Fitzsimons for:-

- (a) an interlocutory injunction prohibiting an unidentified journalistic source of two articles published in the Sunday World from making any further disclosures in relation to for instance the contents of covert audio recordings and
- (b) an order compelling the newspaper defendants to reveal the name or the status of the journalistic source who provided information contained in the two articles.

Colin Duffy, Alex McCrory and Henry Fitzsimons (“the plaintiffs”) are currently facing criminal proceedings connected to a gun attack on police officers on the Crumlin Road on 5 December 2013. The prosecution evidence relies on covert audio recordings of conversations in Lurgan on 6 December 2013 which are alleged to be between the plaintiffs. On 12 December 2014 the prosecution served committal papers on the plaintiffs which included a transcript of the covertly recorded conversations. On 26 January 2015 CD recordings of the conversations were served on the plaintiffs’ legal representatives. Copies of the CD were also in the possession of employees of the Public Prosecution Service, Northern Ireland Courts and Tribunals Service, the PSNI, and anyone to whom the plaintiffs may have made the materials available.

The Sunday World (“the newspaper defendants”) published articles on 8 February 2015 and 8 November 2015 which purported to quote from the covert audio recordings. The second article said the newspaper had obtained a 15 page disclosure document produced during interviews by the police. The plaintiffs assert that the source of the disclosure to the newspaper defendants is a police officer. The plaintiffs are suing the newspaper and the Chief Constable for compensatory, aggravated and exemplary damages. As part of the interlocutory proceedings, the plaintiffs sought an injunction prohibiting the unidentified journalistic source from any further disclosure of the contents of the covert recordings and an order compelling the newspaper defendants to reveal the name or status of their source.

Interlocutory Injunction

Lord Justice Stephens set out the legal principles applicable to granting an interlocutory injunction. He said the likelihood of success at the trial is an essential element in the court’s consideration of whether to make an interlocutory injunction or interim order. The injunction looks to the future between the date of the application and the date of trial and its

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purpose is to restrain threatened breaches of the plaintiff's rights pending trial. If the plaintiff establishes that his rights have been infringed, the court will ordinarily assume that the infringement is not a one-off activity and will grant an interlocutory injunction to stop repetition. If, however, no future threat exists an interlocutory injunction will be refused.

Application for an Interlocutory Injunction against the unidentified journalistic source

Lord Justice Stephens firstly considered whether the plaintiff will more likely than not succeed at trial against the source. He said that if the source is a police officer or public official the plaintiffs will probably (more likely than not) succeed in establishing that he/she acted unlawfully on a number of alternative or cumulative grounds including breach of confidence, misuse of private information and breach of the Data Protection Act 1998. Lord Justice Stephens said the pool of potential sources is wide given the number of people who would have had access to the document and it is not possible to analyse at this stage all the potential ways in which the information may have been provided to the newspaper. He said he was prepared to hold purely for the purposes of this interlocutory application that the plaintiffs had established that they will probably (more likely than not) succeed at trial in establishing that the source acted unlawfully.

Lord Justice Stephens then considered whether a future threat of infringement exists. He said he is prepared to hold for the purpose of this interlocutory application that the source acted unlawfully on two separate occasions which were separated by nine months (the dates between the two articles being published by the Sunday World). Against this, the lack of any further reports since November 2015 supported the proposition that no future threat existed. On 24 and 27 November 2015 the newspaper defendants gave undertakings not to re-publish and there has been nothing further since then by the newspaper or anyone else. Lord Justice Stephens said that another factor which supported the proposition that no further threat existed is that the source or sources are known to the newspaper and they have stated that they will immediately inform the source or sources that they should anticipate that any further disclosure of the covert recordings will result in their prosecution and conviction either for an offence under the Data Protection Act or for the offence of misconduct in public office.

Lord Justice Stephens next considered the gravity of the consequences if the risk does materialise. He said the first potential consequence will be to the criminal proceedings but as they are to be heard by a judge sitting alone the risk of a jury being affected by any further publication is not present. Another risk will be to the plaintiff's presumption of innocence. The judge said that if there is a future breach of their presumption of innocence by or at the instigation of a public authority then the plaintiffs can be compensated by an award of damages irrespective of the outcome of the criminal proceedings which he considered should be an adequate remedy.

Lord Justice Stephens concluded that the plaintiffs have no arguable case that there is now, or will be at trial be found to be, a real risk that the unidentified journalistic source will

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repeat the alleged unlawful acts and on this basis he refused to grant an interlocutory injunction against the fifth defendant.

Application for Disclosure of the Name or Status of the Source

The plaintiffs sought to obtain the name or status of the source by way of two separate legal routes. Both routes to compel disclosure of the name or status of the source are subject to section 10 of the Contempt of Court Act 1981 which provides that: "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

Lord Justice Stephens said that the plaintiffs in this case have to establish that disclosure is *necessary* in relation to one or more of the following gateways, namely:-

- (a) in the interests of justice or
- (b) in the interests of national security or
- (c) for the prevention of disorder or crime.

The plaintiffs did not seek to rely upon disclosure being necessary in the interests of national security but relied on the gateways of interests of justice and for the prevention of crime. The requirement to establish that the disclosure is "necessary" involves "a single exercise in which the court considers not merely whether, on the facts of the particular case, disclosure of the source is necessary to achieve the legitimate aim but, more significantly, whether the achievement of the legitimate aim on the facts of the instant case is so important that it overrides the public interest in protecting journalistic sources in order to ensure free communication of information to and through the press". Furthermore, proportionality must also be considered by the court so that "the question ... therefore becomes whether the claimant has shown that it is both necessary, in the sense of there being an overriding interest amounting to a pressing social need, and proportionate, for the court to order the journalist to disclose the name of his source".

Whether in the interests of justice

Lord Justice Stephens accepted that some degree of disclosure would be in the interests of justice but the weight to be attached to that interest has to be assessed so that it can be taken into account in the balancing exercise. In relation to the newspaper defendants he did not consider that any significant weight should be attached *at this stage*. He envisaged that at trial there will be the potential for adverse inferences being drawn against the newspaper defendants both in relation to data protection and in relation to misuse of private information. He said he was not persuaded based on the present evidence and the potential for adverse inferences that the status of the source was of any significant weight in relation to the newspaper defendants.

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Lord Justice Stephens said it was clear that the status of the source was crucial to the case against the Chief Constable and to the potential proceedings against the Attorney General for Northern Ireland. However, if the plaintiffs achieve all or substantially all of their relief from the newspaper defendants then the weight to be attached to this interest will be substantially reduced. He said that if these are the circumstances then a declaration or a declaration and an award of damages will be an adequate remedy. In assessing the weight to be attached to the interests of justice the judge also took into account what the plaintiffs have achieved by this litigation to date in comparison with what remains to be achieved. He said the plaintiffs have secured undertakings from the newspaper defendants, they have ensured that the source is made aware of the very serious potential consequences if there is any repetition, they have prevented any further publications and in his assessment there is no real risk of the source repeating the alleged unlawful acts. While there remain substantial issues to be determined a concentration on those issues should not overshadow the interests of justice which have been achieved.

Whether for the prevention of crime

Lord Justice Stephens accepted that disclosure of the identity of the source would be for the prevention of crime both on the basis of investigating whether a crime has been committed and on the basis of deterring a background in which crime breeds. He also accepted that identifying the status of the source will indirectly deter the source and will deter a background in which crime breeds. However, the weight to be attached to that gateway has to be assessed so that it can be taken into account in the balancing exercise. On the one hand the area of covert surveillance under RIPA is a particularly sensitive area which attracts considerable weight. However, in relation to the source in this case he/she has now been made aware by the newspaper defendants of the very serious potential criminal and employment consequences. The deterrence of the source has taken place not only by the proceedings but also by the information which has been made available to him by the newspaper defendants.

Lord Justice Stephens concluded that there is now no real risk that the fifth defendant will repeat the alleged unlawful acts. His overall assessment at this interlocutory stage is that the weight to be attached to the gateway of the prevention of crime is to be kept strictly in proportion.

Conclusions as to whether disclosure is necessary

Lord Justice Stephens considered that the disclosure of the name of the source was not so important that it overrides the public interest in protecting journalistic sources in order to ensure free communication of information to and through the press. His conclusion was based on his assessment of the weight to be attached to the relevant gateways, to what has been achieved in this litigation to date and to what remains outstanding, to the chilling effect on journalistic sources particularly in the context of alleged terrorist activities and the chilling effect of any actual or perceived threat to the life of or bodily integrity of a source.

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This is an interlocutory decision and if at the trial the balance shifts then the matter can be reconsidered.

The judge said that the issue as to whether the status of the source should be disclosed is more finely balanced though at this interlocutory stage he said he had arrived at a clear conclusion that disclosure is not necessary. In arriving at that conclusion he took into account that at this interlocutory stage it is not possible to analyse the pool of potential sources in order to determine whether disclosing the status of the source would lead to a reasonable chance of his or her identification. Whether there is a reasonable chance that the identity of the source would be revealed depends not only on the information presently available to the court but also on the information that is or could be available to the Chief Constable. Lord Justice Stephens considered that discovery from the Chief Constable and the trial process will bring greater definition to the size of the pool of potential sources. Furthermore the trial process will throw greater light on whether the status of the source needs to be disclosed. In arriving at the conclusion that disclosure of the status is not necessary at this stage the judge also took into account his assessment of the weight to be attached to the relevant gateways, to what has been achieved in this litigation to date and to what remains outstanding, to the chilling effect on journalistic sources particularly in the context of alleged terrorist activities and the chilling effect of any actual or perceived threat to the life of or bodily integrity of a source. Again the judge noted that this is an interlocutory decision and if at the trial the balance shifts then the matter can be reconsidered.

Conclusions

Lord Justice Stephens dismissed the plaintiffs' application for an interlocutory injunction against the unidentified journalistic source. He also declined to give leave to serve interrogatories on the newspaper defendants to obtain either the name of or the status of the source.

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).

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