

SUPREME COURT CONTINUES INJUNCTION IN “CELEBRITY” CASE

PJS v News Group Newspapers Ltd [2016] UKSC 26

Introduction

On 19 May 2016, the Supreme Court handed down its decision in *PJS v News Group Newspapers Ltd* [2016] UKSC 26 in which it overturned the decision of the Court of Appeal and continued an injunction preventing publication of the entertainment figure at the centre of the widely publicized sex scandal.

Background

PJS, the claimant (in the Supreme Court, the appellant) is in the entertainment business and is married to YMA, a well-known individual in the same business, with whom he has young children. In 2007 or 2008, the claimant met AB and, starting in 2009, they had occasional sexual encounters (including with AB’s partner, CD). After the sexual relationship between PJS and AB came to an end, they remained friends for some time. In January 2016, AB and CD approached the editor of a national English newspaper (owned by the respondent, News Group Newspapers Ltd (“NGN”)), and told him about their earlier sexual encounters with PJS. The editor notified PJS that he proposed to publish the story. PJS brought the present proceedings, taking the position that publication of the story would breach confidence and invade privacy, and applied for an interim injunction to restrain the proposed publication.

Previous decisions

On 15 January 2016, Cranston J, sitting in the High Court, refused to grant the interim injunction. The basis for his judgment (as summarised by the Supreme Court) was that he:

- accepted that the appellant had a reasonable expectation that his sexual activities would remain private,
- added that he was “especially troubled” by the children’s privacy interests under ECHR article 8, though these could not operate as a “trump card”,
- rejected the respondent’s suggestion that the proposed publication went to any relevant matter of “public debate”, and
- identified the appellant and his partner as portraying an image to the world of a committed relationship, accepted that “commitment may not entail monogamy”, but concluded that there was a public interest in correcting the image by disclosing that the appellant had engaged in the sort of casual sexual relationships demonstrated by the evidence.

On 22 January 2016, the Court of Appeal (Jackson and King LJJ) allowed an appeal and restrained publication of the relevant names and of details of their relationship. In reaching this decision, the Court of Appeal identified two “significant shortcomings” in the High Court’s reasoning, namely:

- although the judge had correctly identified the children’s article 8 privacy rights, he had not explained how he had taken them into account;
- once it was accepted that “commitment may not entail monogamy”, there was no false image to require correction by disclosure of the appellant’s occasional sexual encounters with others. In this connection, the Court of Appeal concluded positively that on the evidence before it the image presented by the appellant and his partner had been one of commitment not monogamy.

Subsequent publication and second Court of Appeal decision

Following the decision of the Court of Appeal, AB took steps to have details of the relationship published in the United States in a national magazine. Subsequently, similar articles were published in the Canadian and Scottish press, and details started to appear on numerous websites.

Following the publication by the overseas press and internet coverage, a number of articles appeared in the English press which were highly critical of the restrictions imposed on the English press which prevented them from reporting what was becoming widely known overseas (and increasingly in England and Wales, due to internet coverage). On 12 April 2016 NGN applied to the Court of Appeal to set aside the interim injunction granted on 22 January 2016, on the grounds that the protected information was now in the public domain, and that the injunction therefore served no useful purpose and was an unjustified interference with NGN’s own rights under article 10 of the European Convention on Human Rights.

On 18 April 2015, the Court of Appeal (Jackson, King and Simon LJJ) discharged the injunction. In his decision, Jackson LJ (with whom King and Simon LJJ agreed), considered the impact of Section 12 of the Human Rights Act 1998, noting that: “it is important to note that HRA section 12 does not affect the existence of the claimant’s article 8 claim nor does it provide any defence to the tort of misusing private information. The effect of section 12 is twofold. First, it enhances the weight which article 10 rights carry in the balancing exercise. Secondly, it raises the hurdle which the claimant must overcome in order to obtain an interim injunction.”

Having considered the principles applicable to the use of an injunction, and the reasons why the claimant was likely to establish a breach of Article 8 but was not “likely” to obtain a permanent injunction, the Court of Appeal ordered that the injunction should not continue.

PJS immediately appealed and a hearing was held before the Supreme Court on 21 April 2015.

Decision of the Supreme Court

The Supreme Court handed down its decision on 19 May 2016. By a majority of 4-1 (Lord Toulson dissenting), the Supreme Court allowed PJS’s appeal.

The Supreme Court observed that the relevant provisions of the European Convention on Human Rights were Article 8 (Right to respect for private and family life) and Article 10 (Freedom of expression) (scheduled to the Human Rights Act 1998); along with section 12 of

the Human Rights Act 1998.

Lord Mance (with whom Lord Neuberger, Lady Hale and Lord Reed agreed) gave the leading judgment, with Lord Neuberger and Lady Hale giving supporting judgments. In his judgment, Lord Mance analysed the Court of Appeal's judgment of 18 April 2016, considering in particular:

- The Court of Appeal's reasoning on section 12 of the Human Rights Act 1998;
- The reference to a "limited public interest";
- The distinction between rights of confidence and privacy rights;
- An effective remedy.

Section 12 of the Human Rights Act 1998

Lord Mance stated that it was the view all members of the Supreme Court that the Court of Appeal's reasoning contained a "clear error of law" in relation to section 12. In contrast to the Court of Appeal's view that section 12 "enhances the weight which article 10 rights carry in the balancing exercise", Lord Mance stated that there was considerable authority (including from the highest level) that, "even at the interlocutory stage, (i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied."

This error alone would have required the Supreme Court to re-exercise its discretion in respect of the injunction, although there were also further aspects of the Court of Appeal's decision which led to the same conclusion.

The reference to a "limited public interest"

Lord Mance also found that the Court of Appeal had erred in there "being in the circumstances even a "limited public interest" in the proposed story and in its introduction of that supposed interest into a balancing exercise."

Any public interest in publishing criticism relating to the sexual encounters of someone like the applicant must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of outweighing such article 8 privacy rights as the appellant enjoys.

The distinction between rights of confidence and privacy rights

The Court of Appeal erred in applying a qualitative test to the level of disclosure.

An effective remedy

In the present case, whether or not substantial or even exemplary damages could be recovered was not decisive of the question whether an interim injunction should be granted. On the particular facts, the appellant's real concern was with the invasion of privacy that would be involved in further disclosure and publication in the English media, and that any award of

damages, however assessed, would be an inadequate remedy.

The central issue was whether a permanent injunction would be granted at trial – on the evidence, given that publication would represent a serious breach of PJS and his family’s privacy rights, it was likely that it would.

Supporting judgments

Lord Neuberger (with whom Lady Hale, Lord Mance and Lord Reed agreed) observed that while a decision whether or not to discharge an interlocutory injunction is a matter for the court which determines that issue, an appellate court could interfere with such a decision if the determining court proceeds on an erroneous basis, and indeed the Court of Appeal had done so in the present case:

- It was incorrect to state that section 12 of the Human Rights Act “enhances the weight” to be given to NGN’s right to freedom of his expression (rather than PJS’s right to respect for his private and family life);
- It was wrong to proceed on the basis that the story had what Jackson LJ described as “limited”, as opposed to no, “public interest”;
- The Court of Appeal overlooked, or at any rate gave insufficient weight to, the intrusive and distressing effect on PJS and his family of newspaper coverage of the story.

Lord Neuberger’s position was that the injunction should be continued, in summary because it seems likely that PJS will establish at trial that (i) publication of the story in the Sun on Sunday would be an unlawful breach of his rights, and (ii) he should be entitled to an injunction to restrain it, because of the consequential intrusion into his and his family’s private lives.

Lady Hale’s supporting judgment (three paragraphs of which were redacted) focused on the impact on PJS’s children.

Dissenting judgment

In a dissenting opinion, Lord Toulson held that the injunction originally granted by the Court of Appeal on 22 January 2016 should not be reinstated.

While agreeing with Lord Mance that it was incorrect for the Court of Appeal to say that section 12 of the Human Rights Act enhances the weight which article 10 rights carry in the balancing exercise with the article 8 rights of PJS, he disagreed with the other criticism of the Court of Appeal’s judgment.

Lord Toulson considered that the court needed to be very cautious about granting an injunction preventing publication of what is widely known, if it is not to lose public respect for the law by giving the appearance of being out of touch with reality. Where the information is widely available, the form of the publication should not make a significant difference: the purpose of section 12 is to discourage the granting of an injunction to prevent publication of information which is already widely known.

Full Decisions

The full decisions of the English courts can be found at the following links:

- Court of Appeal (22 January 2016) **[Here](#)**
- Court of Appeal (18 April 2016) **[Here](#)**
- Supreme Court (19 May 2016) **[Here](#)**

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