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

Delivered: 29/6/12

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Between:

DREW ROBERT KING

Plaintiff/Appellant;

-and-

SUNDAY NEWSPAPERS LIMITED

Defendant/Respondent.

Before Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal in respect of a costs order in proceedings brought by the appellant who was the plaintiff in an action against Sunday Newspapers Limited ("the respondent") in which the plaintiff claimed damages and an injunction against the respondent as publisher of the Sunday World newspaper concerning a series of articles published in the course of 2002 in respect of the appellant. These articles made a number of allegations against the appellant accusing him of involvement in serious criminal activity, murder and drug dealing and of following a lifestyle funded by criminal activities. His claims relate not to those allegations as such but rather to the content and form of the articles which he alleged created a real and immediate risk to his life and security, infringed his right to privacy and damaged his family life and relations. Ms Quinlivan QC and Mr Moriarty appeared for the appellant. Mr Dunlop appears with Mr Hanna QC on behalf of the respondent. The

court is indebted to counsel for their full and detailed written skeleton arguments and their helpful and succinct oral submissions.

[2] The appellant's writ claimed damages for personal injury, loss and damage sustained by reason of harassment, breach of statutory duty, misuse of private information and breach of the appellant's rights under Articles 2, 3 and 8 of the Convention in respect of the publication of the address where the appellant was believed to be living, of the appellant's picture along with his girlfriend, of the wedding plans, of family details and of the religion of the appellant's child together with christening details. On 11 December 2009 Hart J granted an interim injunction by which he restrained the respondent from publishing information identifying the location at which the appellant resided or making any reference to the existence of the child and in particular its religious denomination.

[3] The private information that formed the basis of the claim for damages comprised the publication of an address purporting to be the then current address of the appellant (although it was incorrect); details of the appellant's partner; a photograph of the appellant and his partner; details of the partner's family; and information about the child of the appellant and his partner.

The history of the proceedings

[4] It was agreed before the judge that the trial should be conducted as a split hearing with the issue of liability and injunctive relief being determined in advance of the hearing relating to damages, if any, arising out of any established claim for harassment or breach of privacy.

[5] The hearing of the liability issue took some three days before Weatherup J ("the judge"). The judge reached a number of conclusions some but not all of which were challenged on appeal with the appellant appealing on some issues and the respondent cross appealing on others. This court after hearing detailed and complex arguments differed from the judge on the question whether the respondent was wrong to publish details of the identity of the appellant's partner and the photograph of the partner. The court differed from the judge's reasons in deciding to prohibit a publication of the religion of the partner although the court did not differ from him in the result. It upheld the judge's dismissal of the appellant's claim for harassment. On the issue of the costs of the appeal the court awarded the appellant 70% of his costs of the appeal.

[6] Following the conclusion of the appeal the judge proceeded with a hearing on the issue of quantum. That hearing took less than half a day of court time. The damages sought only related to the appellant and not to his partner and child who were not parties to the proceedings. The damages to be awarded for misuse of private information concerned the injury to the feeling and distress suffered by the appellant although it was accepted that might include the impact on the appellant of

the misuse of private information about the plaintiff and his partner and child. Whatever injury to feeling and distress there might have been in respect of the broader thrust of the articles about the plaintiff's criminality was not relevant to the issue of damages for misuse of private information. The appellant argued for an award of £5,000 whereas the respondent contended that he should be given no award having regard to the overall character of the articles containing allegations of criminality and reflecting the fact that the private information did not directly affect the appellant but rather his partner and child. The judge in a judgment delivered on 16 September 2011 awarded £1,000. The appellant has not sought to bring any appeal in respect of that award.

The costs order

[7] After hearing submissions on the question of costs the judge in a costs ruling given on 2 December 2011 concluded that there was no special cause to warrant departure from the statutory provision in Section 59(2) of the Judicature (Northern Ireland) Act 1978 that the costs recovered should be at the County Court scale level. To reflect the level involved the judge awarded costs to the appellant in the County Court equity and title suits scale at band 5. Table 1 sets out the solicitor's fee at band 5 at £2,299. Table 2 sets out counsel's fee for preparation at band 5 at £221 and a hearing fee at band 5 of £588. He decided to make a special order under paragraph 6 in the table allowing counsel two thirds of counsel's hearing fee under band 5 for each added day. This covered only one counsel.

The parties' contentions

[8] Miss Quinlivan contended that the decision of the High Court did not appropriately reflect the complexity of the case. The case was particularly complex as demonstrated by the fact the appellant successfully appealed the decision of the High Court on certain issues and the defendant also successfully cross appealed on one issue. The claim involved a claim that Article 2 rights and Article 8 rights were engaged and broken. Counsel contended that the decision of the Court of Appeal in McGaughey v. Sunday Newspapers Limited [2011] NICA 51 by which the Court of Appeal concluded that a breach of privacy claim should be remitted to the County Court were the likely level of damages fell within the jurisdiction of the County Court represented a departure from previous practice in this jurisdiction that such claims were traditionally brought in the High Court. It was also a departure from English authorities which showed that routinely such claims were pursued at High Court level. Counsel pointed out that the defendant never sought to remit the action and in fact at the trial instructed two counsel, thereby indicating the gravity of the case. It was submitted that a number of issues were unique in the instant case and required determination at a high level. These were the question as to whether the appellant was entitled to rely on the privacy rights of members of his family in circumstances where those family members did not themselves initiate proceedings; the emphasis that should be given to the rights of the child and how that impacted

on publicity about the appellant's partner; and the question whether publicity about the religion of the appellant's partner and child could be protected as an aspect of private information and whether the public interest under Article 10 outweighed the Article 8 rights at issue. Counsel referred to a blog published by Hugh Tomlinson QC which indicated that the Court of Appeal decision established two points of general interest. The Court of Appeal decision confirmed that a claim can be brought in relation to interference with the privacy rights of members of a person's family who are not before the court, an issue of practical importance particularly where there is a threat of the publication of private information which impacts adversely on several family members. Secondly, the case identified the importance to be given to the interests of the child.

[9] Mr Dunlop submitted that this court should not interfere with a decision reached by the judge in the exercise of his costs discretion. The judge had properly interpreted and applied Section 59(2) of the Judicature (Northern Ireland) Act 1978 and Order 62 rule 17(4). He had found no special cause to justify disapplying the statutory imperative to award only County Court costs. The award of the injunction clearly fell within the County Court jurisdiction. Even on the appellant's case the award was never going to exceed the County Court jurisdiction. The fact that the case was appealed did not make it a special case. Counsel pointed out that McGaughey v. Sunday Newspapers Limited [2011] NCA 51 showed that cases of this type of action should properly be brought in the County Court. The County Court was clearly capable of handling the issues raised by the case. The engagement of Article 2 added nothing to the argument. Counsel did not accept that there was a demonstrable English practice requiring that all such cases be heard at the High Court level. The award of £1,000 was a very modest one and it would be wholly disproportionate to fix the respondent with the costs on the High Court scale.

Conclusions

[10] Section 59(2) of the 1978 Act provides:-

"Save as where otherwise provided by any statutory provision passed after this Act or by rules of court, if damages or other relief awarded could have been obtained and proceedings commenced in the county court, the plaintiff shall not, except for special cause shown and mentioned in the judgment making the award, recover more costs that would have been recoverable had the same relief been awarded by the county court."

Order 62 rule 17(4) is to the same effect. Thus as the judge correctly stated, the costs will be at the County Court scale level unless there is a special cause shown and mentioned in the judgment.

[11] As Hutton LCJ stated in Birch v. Harland and Wolff Limited [1991] NI 90 the Court of Appeal has all the powers of the High Court. In that case the trial judge in a case in which damages awarded fell within the County Court jurisdiction decided to award costs at four-fifths of the High Court scale. His order did not, however, record a special cause before departing from the principle of awarding County Court costs. However the Court of Appeal considered that the award was in fact appropriate and stated as a special cause that the section raised questions of some complexity. That decision is authority that the complexity of a case may in certain circumstances be a special reason for awarding costs higher than the County Court scale costs. It is also authority for the proposition that this court on appeal may state in the order a special cause justifying an order for costs at the higher scale.

[12] McCaughey v. Sunday Newspapers Limited made clear that an action for an invasion of rights of privacy is one which can suitably be tried in the County Court if the level of damages likely to be awarded falls within the County Court jurisdiction. There is no a priori reason why such a claim should be heard in the High Court. Whether a case should be remitted for trial in the County Court if High Court proceedings for such a cause of action are instituted must be a matter to be determined in the High Court in the light of all the circumstances of the individual case. In McCaughey the Court of Appeal was satisfied that remittal in that case was appropriate. That does not preclude the possibility of the High Court in particular cases concluding that remittal is not appropriate. The complexity or novelty of the legal and/or factual issues raised by an individual case may be such that the view may be reached that trial at the High Court level would be appropriate. A decision not to remit in such circumstances would not of itself inevitably mean that special cause would be shown for allowing High Court costs but it would be a strong indicator that such an order would be appropriate.

[13] The instant case raised a number of complex and novel issues in relation to privacy law. That is an area of law which has been developing on an incremental basis in response to the obligation lying on the state under the Human Rights Act 1998 to develop and fashion a law of privacy that provides adequate protection for the Article 8 rights of the individuals and an adequate basis for vindicating those rights if wrongfully abused. As the relevant principles become more clearly and fully established, the more straightforward litigation in the field will become. The instant case represents the first Northern Ireland authority on the question of how the Article 8 rights of a plaintiff are to be properly balanced with the Article 10 rights of a defendant newspaper in the context of a case in which divulging private information materially impacts on members of the plaintiff's family and thereby has an impact both on them and on the plaintiff himself. The respondent's defence that the affected members of the family were the only persons entitled to pursue a claim in damages necessitated a consideration of the question whether the appellant in his own right was entitled to damages in so far as interference with the other family members rights had an impact on his right to respect for his family life.

[14] Had the respondent made an application for remittal of the proceedings at an early stage we entertain little doubt that the High Court would have concluded that the novelty and complexity of the issues raised in the proceedings justified a hearing at the High Court level. The likely measure of damages taken on their own would have justified remittal but the complexity and novelty of issues would have justified a refusal of remittal. In this developing area of law it is not without significance that if the proceedings were remitted to the County Court the Court of Appeal would be the last appellate court to rule on legal issues raised, whereas in High Court proceedings the ultimate decision would be that of the Supreme Court.

[15] This case necessitated a hearing before Hart J, a protracted hearing before Weatherup J and a hearing in the Court of Appeal which has given a lengthy and reasoned decision providing clarification for future cases. The course of the litigation supports the appellant's submission that the nature and complexity and novelty of the case justify the proceedings being conducted at the High Court level.

[16] Ms Quinlivan strongly relied on English case law to show that litigation of this kind is routinely conducted at the High Court level notwithstanding the modest awards of damages. The authority cited by her in support of the proposition do point to a number of high profile cases at that level in which ultimately modest damages were awarded. However we bear in mind the very different framework in England and Wales for the determination of the appropriate track for the disposal of cases. We have insufficient citation of authority to justify the conclusion that actions for misuse of private information are rarely if ever taken at the County Court level or before District Judges. It seems to us unlikely that in absolutely straightforward cases of misuse of private information where the damages are likely to be very modest that such cases would have to be commenced at the High Court level. Accordingly we do not consider that the English case law is in any way determinative of the issue. Furthermore we cannot accept Miss Quinlivan's argument that the fact that the respondent did not pursue an application for remittal and in fact instructed two counsel constitute special grounds for awarding costs at the High Court level.

[17] In the result pursuant to Section 59(2) of the 1978 Act because of the complexity and novelty of the issues raised in the litigation we conclude that there was a special cause to award costs on the High Court scale. Accordingly we allow the appeal.