



Neutral Citation Number: [2022] EWHC 2426 (Ch)

Case No: BL-2021-BRS-000010

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
BUSINESS LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 30 September 2022

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

PLYMOUTH CITY COUNCIL

Claimant

- and -

ABC

Defendant

Spencer Keen (instructed by **Plymouth City Council Legal Department**) for the **Claimant**
The defendant in person

Issue dealt with on paper

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on Friday 30 September 2022.

HHJ Paul Matthews :

Introduction

1. This is my decision on an issue arising out of my earlier decision dated 6 July 2022 refusing the defendant's second application for anonymity in these proceedings: see [2022] EWHC 1670 (Ch). The claim in which the applications were made was issued on 11 June 2021. It concerns claims that the defendant downloaded personal data and confidential information otherwise than for the purpose of carrying out her duties as an employee of the claimant, and without the claimant's consent.
2. On 14 March 2022 I gave written reasons for deciding to refuse the defendant's first application for anonymity, although I also gave the defendant liberty to apply again if circumstances changed in the future. The defendant did not seek to appeal against that decision, and she is now well out of time for doing so. Instead, on 14 April 2022, the defendant applied again to the court for the same relief. As I have said, I dismissed the second application too. I did so not only on the ground that there had been no sufficient change in circumstances since the first application, but also on the merits.
3. On 26 July 2022, the defendant sought permission to appeal my decision to the Court of Appeal on four separate grounds. On 4 August 2022 I refused permission to appeal on the first three grounds, but directed written submissions in relation to the subject-matter of the fourth. I did so because that fourth ground had not previously been argued before me, and accordingly I had given no decision upon it. I considered therefore that it would assist the Court of Appeal if I stated my views on the point.
4. That fourth ground related to the effect on the present proceedings of the Sexual Offences (Amendment) Act 1992. I duly received written submissions from the claimant dated 19 August 2022, and from the defendant in answer (mistakenly dated 16 August 2022, but received by the court on 16 September 2022, and then resent in amended form on 18 September 2022), and have considered them.

The Sexual Offences (Amendment) Act 1992

5. The 1992 Act (as amended) relevantly provides:

“1(1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, [no matter relating to that person shall during that person's lifetime be included in any publication] if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.

[...]

[(3A) The matters relating to a person in relation to which the restrictions imposed by subsection (1) or (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—

- (a) the person's name,
- (b) the person's address,

- (c) the identity of any school or other educational establishment attended by the person,
- (d) the identity of any place of work, and
- (e) any still or moving picture of the person.]

[...]

2. This Act applies to the following offences [against the law of England and Wales—

(aa) rape;

[...]]

(a) any offence under any of the provisions of the Sexual Offences Act 1956 mentioned in subsection (2);

[...]

(2) The provisions of the Act of 1956 are—

[...]

(k) section 14 (indecent assault on a woman);

[...]

5. [(1) If any matter is included in a publication in contravention of section 1, the following persons shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale—

(a) where the publication is a newspaper or periodical, any proprietor, any editor and any publisher of the newspaper or periodical;

(b) where the publication is a relevant programme—

(i) any body corporate or Scottish partnership engaged in providing the programme service in which the programme is included; and

(ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper;

(c) in the case of any other publication, any person publishing it.]

(2) Where a person is charged with an offence under this section in respect of the [inclusion of any matter in a publication], it shall be a defence, subject to subsection (3), to prove that the publication ... in which the matter appeared was one in respect of which the person against whom the offence mentioned in section 1 is alleged to have been committed had given written consent to the appearance of matter of that description.

(3) Written consent is not a defence if it is proved that any person interfered unreasonably with the peace or comfort of the person giving the consent, with intent to obtain it [, or that person was under the age of 16 at the time when it was given].

[...]”

Submissions

6. The claimant submitted that the court had no jurisdiction to consider the fourth ground of appeal at all. This (it said) was not a case where it was suggested that the reasoning was deficient or that there was an obvious error, as in *eg Space Air-Conditioning v Guy* [2012] EWCA Civ 1664, [8], [53]. Nor was the so-called *Barrell* jurisdiction (from *Re Barrell Enterprises Ltd* [1973] 1 WLR 19, CA) available, because judgment had already been entered and perfected. In addition, the claimant sought to distinguish the decision of the Court of Appeal in *Roche v Chief Constable of Greater Manchester Police* [2005] EWCA Civ 1454, where the court took into account a further judgment from the court below in considering an appeal against an order by the same judge following an earlier judgment.
7. However, the claimant also submitted that, in any event, the 1992 Act had no application to this case. It submitted that it could apply only where there was a risk that a person in relation to whom an offence to which the Act applies has been alleged to have been committed would be identified in the proceedings as such a person. However, the present proceedings were not related to the commission of any such offence, and it was no part of the case made in the proceedings that such an offence had been committed. Accordingly, it was not “likely” that any members of the public would be led to identify that person as a victim of such an offence.
8. In this connection, the claimant referred to paragraph 26 of my decision of 14 March 2022, in which I said:

“This litigation is not concerned with the defendant’s former relationship or with her personal life now, including where she lives. None of the details of these things is likely to be relevant or need to be discussed and written about.”

As I have already said, this litigation is instead about the downloading of personal data in the context of an employment relationship between the parties. The decision of 14 March 2022 was, as I have also said, not the subject of any appeal.

9. In her response to these submissions, the defendant submitted that the present proceedings were related to earlier proceedings between her and her former partner, and that she wished to refer to her history as a survivor of domestic abuse because (i) it was relevant to her state of mind at the time of the allegations made by the claimant, and (ii) the claimant’s knowledge of such matters was relevant to its treatment of her as an employee and its conduct in bringing the claim against her. In addition, the defendant submitted that she had made it clear “from the outset” that she was claiming anonymity, and that in so doing she was relying on various legislation, including the 1992 Act.

Discussion

Reliance on the 1992 Act

10. I can deal with the last point straight away. As is clear from my original written decision, I do not think that her reliance on the 1992 Act was clear at all. In my decision of 4 August 2022, refusing permission to appeal on the other grounds, I said that the 1992 Act

“ ... was not referred to in the defendant’s written submissions on either of the anonymity applications that she made. Nor was it referred to in the 20-page ‘Response to the draft judgment’ that she sent to the court on 5 July 2022, after receiving a copy of my judgment in draft. I note however that it was referred to on the last page of an 8-page letter which she wrote to the Employment Tribunal on 18 May 2021 to ask for reasonable adjustments (including anonymity) in the proceedings that she had instituted against the claimant before that tribunal.”

11. The defendant appends a chronology to her written submissions which, she says, “focuses in the main on the many occasions I have asked for my letter of 18 May 2021 ... to be considered in full”. She says that this confirms that she has “consistently made reference to the 1992 Act”. I do not agree. The reference to her letter of 18 May 2021 is a reference to her asking for reasonable adjustments to be made in the proceedings concerned. It is not in my judgment an effective invocation of the provisions of the 1992 Act. Before her application for permission to appeal, I had no idea that she was in any way relying on the 1992 Act.

Can the defendant raise the matter now?

12. Turning then to the points made by the claimant, the first question is whether the defendant may raise the matter at all at this stage. As I have said, the 1992 Act and its effect were not argued before me. The text of the relevant provisions was not before me. Accordingly, I did not decide anything about the scope or effect of the Act. In seeking to appeal my decision, one might have thought that the defendant ought not to be able to appeal a point that I did not decide. However, there a number of situations in which points which have not previously been raised can be taken account of, either by the judge at first instance or on appeal.
13. First of all, there is the *Barrell* jurisdiction, by which judges may at any time before perfection of the order recall their judgments and change them: see *Re L and B (Children)* [2013] 1 WLR 634, [19], SC. But, in this case, my order had been made and perfected (by being sealed) before the defendant raised the point by way of seeking permission to appeal, relying on the 1992 Act as a ground of appeal. So, the *Barrell* jurisdiction has no application.
14. Secondly, in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, the Court of Appeal dealt with the case where it was a ground of appeal that the judge had not given adequate reasons for the decision under appeal. Lord Phillips MR, giving the judgment of the court, said:

“25. ... If an application for permission to appeal on the ground of lack of reasons is made to the trial Judge, the Judge should consider whether his judgment is defective for lack of reasons, adjourning for that purpose should he find this necessary. If he concludes that it is, he should set out to remedy the defect by the

provision of additional reasons refusing permission to appeal on the basis that he has adopted that course. If he concludes that he has given adequate reasons, he will no doubt refuse permission to appeal. If an application for permission to appeal on the ground of lack of reasons is made to the appellate court and it appears to the appellate court that the application is well founded, it should consider adjourning the application and remitting the case to the trial Judge with an invitation to provide additional reasons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the appellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the application be adjourned to an oral hearing, on notice to the respondent.”

15. However, this is not a case where the defendant seeks to appeal on the ground that I have not given adequate reasons for my decision. That is not one of her grounds. She simply seeks to reverse my decision that she should not be accorded anonymity on the basis (*inter alia*) that the 1992 Act requires it, and I was wrong not to order it. So, as I understand the matter, the *Emery Reimbold* guidance does not apply, either.

16. Thirdly, in the *Roche* case [2005] EWCA Civ 1454, the judge at first instance gave judgment in favour of the claimant on 2 April, which was embodied in an order. Subsequently, however, on 10 June, the judge heard the parties again, and gave a second judgment on a particular point which appeared to have been the subject of a judicial misunderstanding at the original trial. On 16 June, but at that time in ignorance of the second judgment, the Court of Appeal granted permission to appeal. When the matter came before the court on the substantive appeal, the appellant submitted that the court should ignore the second judgment, relying in particular on section 70 of the County Courts Act 1984, which provides that every judgment in order of the County Court should be “final and conclusive between the parties”.

17. Buxton LJ (with whom Sedley and Jonathan Parker LJJ agreed) said:

“25. Does that mean therefore that not only the order but also the reasoning of Judge Tetlow can only be corrected by a decision of this court and not by the judge himself? For my part, I do not think, in the circumstances of this case, that Section 70 or the general provisions about finality of judgment precludes our considering the second judgment in the course of this appeal. My reasons are as follows. The second judgment of 10 June does not in any way alter the judge's order. It simply gives further reasons why that order is valid in the sense that it simply rejects the relevance of contentions that were not before the judge before he made that order.

26. Secondly, if we were to allow the appeal on the basis of the omissions in the first judgment, we could not of course decide the case ourselves. The matter would have to be remitted either for reconsideration or for retrial. That would be a wholly artificial exercise, granted that Judge Tetlow has already performed that task in the sense of dealing with the alleged lacuna in his judgment of 10 June.

27. Thirdly, if the case had come before us without the benefit of Judge Tetlow's second judgment, this court would have had jurisdiction under *English v Emery Reimbold* to send the matter back to the judge for him to make findings upon matters on which it was alleged he had not made findings. That would, *prima facie*, be a sensible step as against the cost of the potential unfairness to one side

or another of starting the whole matter over again. If it was the case that the court considering the original grounds of appeal might have so ordered, why should the court not take advantage of already having the fruits of that inquiry without having to order it? We have heard no detailed argument on this point. But in my view it would be wholly artificial and wrong if the court did not take account of what Judge Tetlow found on 10 June. ...”

18. In my judgment, this case does not support the proposition that, after judgment has been given and an order made, a party has the right to have any further point or argument in support of his or her case heard by the judge. Instead, it is authority for the proposition that the Court of Appeal is, at least in limited circumstances, entitled to look at and take into account on any appeal any further judicial opinion given by the judge at first instance in relation to the subject matter of the proceedings.
19. Lastly, there is the question of raising a new point before the Court of Appeal. In *Singh v Dass* [2019] EWCA Civ 360, Haddon-Cave LJ (with whom McCombe and Moylan LJ agreed) said:
 - “15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
 18. Third, even where the point might be considered a ‘pure point of law’, the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] RTR 22 at [29]).”
20. It may be that the appellate court, applying these principles, would be prepared to allow the defendant to raise the point about the 1992 Act. But that is a decision for that court. As I understand the law, these principles do not give me jurisdiction to deal with the point after my order has been made and perfected. Accordingly, I conclude that I have no power to deal with this matter at this stage, and the defendant is not entitled to raise it.

The merits of the defendant’s point

21. In case I am wrong on my first conclusion, however, I turn to the merits of the point put forward by the defendant, and in particular the effect on legal proceedings of the 1992 Act. In *R (Press Association) v Cambridge Crown Court* [2013] 1 WLR 1979, the Court of Appeal held that the Act did not confer power on the court to order that any party to proceedings should be anonymised. Instead, the Act made it a criminal offence to identify certain persons in any publication thereafter.

22. The court said this:

“16. It is clear from this legislative provision that the responsibility for decisions relating to publication is aligned with risk, and it is for those responsible for publication to ensure that the provisions which protect the public identification of a complainant in a sexual case are obeyed. They do so, however, not because they are enjoined to do so by judicial order, but because that is a statutory requirement.”

23. There is an important question as to whether the Act applies where there are no criminal proceedings in which an allegation of a relevant offence has been made. The Act in section 1(1) specifically refers to “an allegation [having] been made that an offence to which this Act applies has been committed against a person”, and “the person against whom the offence is alleged to have been committed”. The natural meaning of these words is to refer to the case of a person who is charged with having committed such an offence against another person, and criminal proceedings being instituted. But they can also be read as applying to a case where one person has accused another, whether in civil proceedings or indeed out-of-court, of having committed such an offence.

24. There is no clear authority on this point that I am aware of. *National Westminster Bank plc v Lucas* [2014] EWHC 653 (Ch) was a case concerning the administration of the estate of the late Jimmy Savile. The executors of his will sought directions as to making provision for potential claims against the estate for past sexual abuse. A scheme had been devised for this purpose, and the court was being asked to approve it. However, at a very late point in the proceedings, reference was made to the 1992 Act, and its possible effect on the scheme. It had been suggested that the administrators of the scheme would be entitled to seek to obtain information about claims made under the Scheme from any other person who might have relevant information bearing upon such claims, in particular as to the genuineness of those claims.

25. Sales J (as he then was) said this:

“55. After considering the matter overnight, however, those acting for the PI Claimants (in particular) indicated that in fact this might not be possible, out of a concern that it would be unlawful by reason of the Sexual Offences (Amendment) Act 1992 for the Bank or Third Party Defendants to identify to others a person who was making a claim in relation to sexual abuse. I was concerned by this, both because no-one had presented any detailed reasoned argument to me to explain why this would be the effect of the 1992 Act (and I was doubtful, absent such argument, that it would be) and because it appeared to make the operation of the Scheme potentially unfair to the Trust and the individual beneficiaries, in that it might well in practice disable the Bank or Third Party Defendants from seeking from them information which could have a material bearing on the question whether a particular claim has merit or not.

56. In the event, to meet these concerns, the PI Claimants, the Third Party Defendants and the Bank agreed that clause 4 of the Scheme should be modified to provide that any claimant wishing to make a claim under the Scheme will have to give consent for their name to be provided to such sources of information

(including the individual beneficiaries) as the Bank and the Third Party Defendants might consider helpful to allow for evidence to be obtained to respond to the claim. I am satisfied that this adjustment to the Scheme avoids any problem arising from the 1992 Act in the operation of the Scheme and will allow for the possibility of appropriate access in the course of such operation to relevant information held by the individual beneficiaries and others.”

26. So, the judge’s provisional view (albeit without argument) was that he was “doubtful” that the 1992 Act had the effect of granting anonymity outside the context of criminal proceedings. However, in the event, the problem was simply sidestepped, by providing that the claimants under the scheme would have to give consent to their names being passed to others in order to obtain information about claims. Because section 5(2) of the Act provides that no offence is committed under the Act where identification of the victim takes place with the victim’s written consent, that amendment to the scheme meant that it was not necessary finally to resolve the point. In passing, I observe that that solution is of course not available in this case. The defendant has not consented to her identification.
27. I was referred to another authority, *Birmingham City Council v Riaz* [2016] 1 FLR 797, where a local authority applied for an existing reporting restrictions order to be extended to cover the whole life of a victim of sexual exploitation by the defendants. The victim supported the application. Certain media outlets opposed it. It is not clear from the judgment whether the order was sought under the Contempt of Court Act 1981, section 4(2), the Youth Justice and Criminal Evidence Act 1999, section 45A, or some other statute. Presumably it was not sought under the Children and Young Persons Act 1933, section 39, because that section does not allow an order to be made which extends beyond the age of 18 years of the young person concerned: *R (ota JC and RT) v The Central Criminal Court* [2014] EWCA Civ 1777.
28. The argument and discussion about whether to extend the order were mainly concerned with the Human Rights Act 1998 and the European Convention on Human Rights, articles 8 and 10. The 1992 Act was referred to in a submission by the local authority (supported by the victim) that:

“22. ... (m) If this matter had been within the criminal sphere then as a result of the provisions of Section 1 of the 1992 (Amendment) Act 1992 the existence of an allegation of a qualifying sexual offence would bring the protection of lifetime anonymity to the person against whom the offence was alleged to have been committed, including attempts, conspiracy and incitement of another to commit such offences.”

This suggests that two of the parties thought that the Act had no application outside criminal proceedings. The judge, Keenan J, simply said of these submissions:

“24. In broad terms I accept the general principles advanced by the local authority.

29. He then went on to say:

25. Thus lifelong anonymity maybe granted to all victims and witnesses in criminal proceedings who are under the age of 18 when the proceedings

commence; albeit, in accordance with the usual practice in criminal proceedings, they will be named in open court but the same can not be published. Anonymity is afforded to all victims of sexual abuse and victims of female genital mutilation in criminal proceedings. Accordingly the local authority submits why should the same protection not be afforded to a victim of [child sexual exploitation] in civil proceedings?”

30. This is a revealing statement. The judge ultimately concluded (at [46]-[47]) that he *should* make a reporting restrictions order for the whole life of the victim. But it is clear that in so doing he did not rely on the existence of the statutory prohibition in the 1992 Act *as already providing that protection*. That, and the use of the words “civil proceedings” in the rhetorical question at the end of the quotation, suggest that he did not consider that the 1992 Act was engaged. If it had been, there would have been no need to make an order at all. This leads me to the view that “allegation” in section 1(1) of the 1992 Act refers to a formal allegation made in criminal proceedings, that is, where a criminal charge has been made. Accordingly, in my judgment, the Act does not apply in the present case.
31. In case I am wrong about that, however, I go on to consider the scope of the statutory requirement. I have already set out the relevant statutory words above. They prohibit the publication of any matter during a person’s lifetime if such publication

“is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed”.
32. In the present case, the only person making any reference to conduct of others which may amount to such an offence is the defendant herself. However, and as I have said, the present proceedings are not concerned with the conduct of the defendant’s ex-partner. The claim makes no mention of such conduct. It is not considered relevant to the claim, which concerns the employment relationship between the parties. Because of the interlocutory proceedings that have taken up so much time since the claim was originally issued in June 2021, the defendant has not so far filed a defence. So there is no formal reference by her within these proceedings to any such conduct. The defendant however says that that conduct is relevant both to her own state of mind at the time of the acts complained of by the claimant, and to the claimant’s state of mind at the time of bringing these proceedings.
33. I do not accept this argument. First of all, on its face this claim has nothing whatever to do with the conduct of the defendant’s ex-partner during their earlier domestic relationship. There are no allegations at all in the claim relating to this. It has to do instead with the actions of the defendant herself during the closing stages of her employment relationship with the claimant, and concerns alleged breaches of duties owed under her contract of employment to her employer. (I emphasise that the defendant has not yet filed a defence, and therefore I cannot know what it will say.) At this stage, I see no reason why conduct of the defendant’s ex-partner should affect the question whether the defendant committed the acts alleged by the claimant, nor any reason why the claimant’s state of mind in bringing these proceedings should be affected by any such conduct.
34. Consequently, I do not see any reason at this stage to conclude that the identification of the defendant as the defendant in these proceedings would be likely to lead

members of the public to identify her as the person against whom any offence specified by the 1992 Act was alleged to have been committed. I emphasise that I confine myself to the position “at this stage”, and keep an open mind for the future. That is not because I think the future position will or may change, but simply because I cannot know what may happen hereafter.

Conclusion

35. In the circumstances, I conclude, first, that the defendant is not entitled to raise the question of the 1992 Act at this late stage, but second, even if she were, it would make no difference, as the Act does not even in its own terms prevent her identification as a party to the present proceedings. However, because the defendant is seeking to appeal my decision to the Court of Appeal, I will hand down this supplementary judgment in the same anonymised form as the original decision, and subject to the same terms.