



JUDICIARY OF
ENGLAND AND WALES

WXY v Henry Gewanter, Positive Profile Ltd & Mark Burby

High Court

6 March 2012

SUMMARY TO ASSIST THE MEDIA

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

The High Court (Mrs Justice Slade) has today published its reasons for giving judgment for the Claimant against Mr Burby on claims in breach of confidence, privacy and harassment.

The Claimant brought proceedings against Mr Burby and others to restrain them from publishing or disclosing her private and confidential information and from harassing her. The proceedings against the First two Defendants were adjourned on their application by reason of the illness of the First Defendant.

On 9 September 2009 another High Court judge granted interim injunctions to restrain the Defendants from publishing such information. Various applications in the case were heard by another five judges. The interim injunctions remained in force albeit varied. No order for a 'super-injunction' was made.

Introduction:

The Claimant is a wealthy woman with close connections with a foreign Head of State and his family. She seeks final injunctive relief restraining the defendants from publishing or disclosing private or confidential information and from harassing the Claimant.

The principle categories of information in respect of which permanent orders are sought are:

1. an allegation that the Claimant had a sexual relationship with M ('the sexual allegation');
2. an allegation that she lied in denying it in legal proceedings ('the perjury allegation');
3. an allegation that during 'pillow talk' with M the Claimant had told him that the Head of State had provided support for terrorism ('the terrorism allegation');
4. information and allegations concerning attempts made by the Claimant to help the Third Defendant obtain payment of the Judgment Debt and of discussions about consideration of financial assistance to the Third Defendant by the Claimant;
5. information calculated to identify the Claimant as the Claimant in domestic and foreign proceedings against X. (para 2)

Preliminary applications:

The judgment sets out the background to preliminary applications in paras 7 - 17.

Outline background facts:

These are set out in paras 18 - 49.

The Relevant Legal Principles:

These are discussed in paras 50 - 70.

The Issues:

“The issues to be determined in considering the claims before [the Court] are:

- (1) Whether the information sought to be protected from publication or further publication is private or confidential and was or should have been known to be such by Mr Burby;
- (2) Whether Mr Burby has already published parts of the private and confidential information in this jurisdiction;
- (3) Whether Mr Burby's publications and threatened publications can be justified in the public interest;
- (4) Whether the private and confidential information has entered the public domain such that it is no longer protectable;
- (5) Whether Mr Burby's publications, threats to publish and the contacts he made with the media constitute a course of conduct amounting to harassment.” (para 71)

Privacy and confidentiality:

The Court considers this issue at paras 76 - 92.

Mrs Justice Slade concluded: “I find that at the latest by May 2007 Mr Burby knew that the sexual allegation was private as a result of which X was to be restrained from publishing it.” (para 77)

She went on to add: “... in my judgment it is clear from the evidence of the Burbys’ conduct and statements that they knew that their dealings with the Claimant regarding assistance in recovering the Judgment Debt and in proposing offers of financial assistance were confidential.” (para 88)

And: “From the comments made by Mr and Mrs Burby on the website it is apparent that they appreciated that her views and beliefs were communicated to them by the Claimant with the mutual expectation that they would remain private.” (para 90)

Public interest:

The Court considers this issue at paras 93 – 96 and 109

Motive:

Mrs Justice Slade held: “In my judgment, the postings and proposed postings on the website created by Mr Burby demonstrate a clear linkage between the Judgment Debt and actual or threatened revelations of private information relating to the Claimant. That Mr Burby's motivation for disclosing

private information relating to the Claimant was not as he claims 'To publicise [his] ill-treatment by [members of the Head of State's family]' is demonstrated by his publishing the fact that the Claimant was taking steps to assist him to recover the Judgment Debt. Such steps could not be characterised as 'ill-treatment'. Further, the document, entitled '...Scandal' shows that Mr Burby appreciated that if the Claimant were seen to be assisting him to recover the Judgment Debt she would suffer serious repercussions within her family. The disclosure of the assistance the Claimant was rendering would not demonstrate ill-treatment by her. I find that by making the postings on the A website about the Claimant, Mr Burby intended to put pressure on her to secure financial advantage for himself." (para 102)

Responsibility for making and publicising the publications:

The Court considers this issue at paras 103 -105.

Whether the material published on the website was already in the public domain:

The Court considers this issue at paras 106 - 108.

Mrs Justice Slade concluded: "In my judgment the fact that Mr Burby was intending to release the information in respect of which privacy is claimed 'piece by piece' shows that such information was not in the public domain or readily accessible. There is no reason which the Claimant cannot claim protection in respect of further publication of private information even though it may have been on some websites. The Claimant can also claim protection in respect of information which has not been published at all." (para 108)

Conclusions on the privacy/confidentiality claim:

The Court sets out its conclusions on this aspect at paras 109 - 111.

Mrs Justice Slade concluded: "In my judgment the Claimant has clearly established that the matters set out in the Schedule to the Particulars of Claim are private or confidential and that at material times Mr Burby knew or should have known them to be so. ... Mr Burby may be said to have Article 10 rights to 'tell his story'. However, even if his motives for publicising information regarding the Claimant had not been to exert pressure on her for his financial benefit, in all the circumstances his rights to publicise such information are of less weight than the Claimant's Article 8 rights.

"An additional factor to be weighed in the balance in deciding whether the Third Defendant should be restrained from publicising the perjury allegation and the terrorist allegation is the claimed public interest. Neither allegation is from an apparently reliable source. The perjury allegation is, in the words of Lord Goff in *Spycatcher*, 'A mere allegation of iniquity'. Further, I take into account that any public interest in publishing the perjury or the terrorism allegations did not require publication to the world at large. It was appropriate that an allegation of criminal conduct be made to the relevant police or security authority.

"The evidence establishes that Mr Burby was responsible for publicising private and confidential information of the Claimant on the website and giving such information to journalists. The information has had some exposure by reason of his actions. The flow of such information ceased or diminished after the service on Mr Burby of Maddison J's injunctions of August 2009. I accept the submissions made by Mr Eardley that the information has not entered the public domain so as to render it is no longer private and confidential. It still retains 'the basic attribute of inaccessibility'. It is not public property or public knowledge." (paras 109 - 111)

Harassment:

The Court considered this issue at paras 112 - 132.

Mrs Justice Slade concluded: "I find that Mr Burby harassed the Claimant within the meaning of the Prevention of Harassment Act." (para 132)

Conclusion:

Mrs Justice Slade concluded:

"In my judgment unless restrained, the Third Defendant is likely to resume publication of or threatening to publish private and confidential information of the Claimant and thereby to continue to harass her. The interim injunctions will continue in place pending a hearing to consider the terms of orders consequential upon this judgment." (para 133)

-ends-