



Litigation & Dispute Resolution Update

June 2008

Children: right to privacy vindicated

Case: Murray v Big Pictures (UK) Limited [2008] EWCA Civ 446

Background. Everyone has the right to respect for his private and family life, his home and his correspondence (*Article 8(1), European Convention on Human Rights*). In *Campbell v MGN Limited*, the House of Lords established a right to privacy and held that Naomi Campbell's Article 8 rights had been infringed by the publication of photographs of her outside a Narcotics Anonymous clinic, where she had been receiving treatment ([2004] 2 AC 457). The proximity to the treatment centre was said to differentiate the factual position from what would have been the outcome had she been photographed in public generally.

Facts. Express Newspapers in England published a picture of JK Rowling's son in April 2005. The picture was taken covertly by a photographer using a long range lens while the family was walking out of a café. JK Rowling and her husband on behalf of their son commenced proceedings seeking:

- An injunction to prevent further publication of the photograph and from publication of any other similar photograph taken of him without his consent.
- Damages or an account of profits for breach of confidence, the infringement of his right to privacy and the misuse of private information.

The English High Court dismissed the case. It followed the *Campbell v MGN Limited* decision and held that, in law there remained an area of innocuous conduct in a public place which did not raise a reasonable expectation of privacy. The claimants appealed.

Decision. The Court of Appeal allowed the appeal and ruled that the pictures of JK Rowling's son might have infringed the child's privacy. The court held that the question of whether there was a reasonable expectation of privacy under the European Convention of Human Rights was a broad one, which took account of all the circumstances of the case. In particular, the court held that a child of famous parents, who had not sought publicity for their children, could expect the same degree of protection as a child of ordinary parents and the law should generally protect children from intrusive media attention. It therefore held that the High Court judge was wrong to strike out the child's claim on the ground that he had no arguable case and that he had a reasonable expectation of privacy. The court directed that there be a trial of all the issues between the parties.

Comment. While the common law in this jurisdiction has been equally slow to establish a "right to privacy" a Privacy Bill was published in 2006 but it remains on the shelf for now.

Green Paper on enforcement of judgments in the EU

In March 2008, the European Commission presented a Green Paper on the effective enforcement of judgments in the EU which seeks views on how to improve the transparency of debtors' assets. At present, information about debtors' assets is generally achieved at national level through different sources of information, in particular, registers and a debtor's own declarations. It is proposed that a number of measures could help ensure that the creditor obtains reliable information within a reasonable period of time such as:

- Drawing up a manual of national enforcement laws and practices.
- Increasing the information available in and improving access to the individual national registers.
- Exchange of information between enforcement authorities.
- Measures relating to the debtor's declaration such as the introduction of a European Assets Declaration.

For more information see: http://ec.europa.eu/civiljustice/news/com_2008_0128/com_2008_0128_en.pdf



Employer liable for employee's suicide

Case: Corr (Administratrix of the Estate of Thomas Corr (Deceased)) v IBC Vehicles Limited [2008] UKHL 13

Facts. In 1996 Corr, a maintenance engineer, suffered a serious accident at work in which he was nearly decapitated. In addition to his physical injuries, he developed post traumatic stress disorder and depression. Prior to the accident Corr had no history of psychiatric problems. Corr's depression deepened and in 2002 he committed suicide by jumping from the top of a multi storey car park. His widow, who was also the administratrix of his estate, brought a negligence claim on behalf of his estate against his employer IBC. She also brought a claim under the Fatal Accidents Act 1976 for financial loss attributable to his suicide.

Her claim under the Fatal Accidents Act 1976 was rejected by the English High Court on the basis that his suicide was not a foreseeable result of his accident. The Court of Appeal overturned this decision on the basis that the class of harm on which the claim was founded was depression (IBC had admitted liability for this) and that there was a direct chain of causation between the accident and the suicide. Their reasoning was that so long as the kind of harm, in this case the psychiatric illness, was reasonably foreseeable, the defendant was liable for it. IBC appealed.

Decision. The House of Lords unanimously upheld the Court of Appeal decision. One of the first issues it considered was the scope of the duty of care that an employer owes to its employees. They held that IBC owed Corr a duty to avoid causing him psychological as well as physical injury and that Corr had suffered both types of injury. They held that although the law "*does not generally treat us as our brother's keeper, responsible for what he may choose to do to his own disadvantage*", Corr had acted in a way that he would not have done but for the injury from which IBC's breach had caused him to suffer. Therefore his conduct in taking his own life could not be said to fall outside the scope of the duty that IBC had owed him.

Comment. Although this is a UK case and there is no equivalent here (yet) to the Fatal Accidents Act, it is clear that employers must be aware of the risk that where an employee suffers from depression and/or psychiatric illness following a workplace accident, it is open to a court to find that the employer is liable for all the reasonably foreseeable consequences flowing from that workplace injury even where it results in suicide. The House of Lords made it clear that the question of the employer's liability is a factual one and rests on the issue of causation. Apart from statutory duties under the Health, Safety & Welfare at Work Act 2005, employers have a duty under the law of tort to take reasonable care for the health and safety of employees in the workplace.

EU Mediation Directive approved

In April 2008 the European Parliament adopted a Directive on certain aspects of mediation in civil and commercial matters. Each member state must enact legislation to give effect to its rules within three years. The Directive is only applicable to cross-border disputes and the practice and procedure of mediation will remain within the control of each member state. It defines a cross-border dispute as one in which the parties are domiciled or habitually resident in different member states.

Key elements of the Directive include:

- Giving judges the right to invite parties to have recourse to mediation.
- Enabling parties to give any agreement reached through mediation similar status to court judgments in order to aid enforcement.
- Preserving confidentiality so that any submissions in mediation may not be used in any subsequent legal proceedings.
- Permitting an agreement arising from a mediation, which is enforceable in one member state to be recognised and declared enforceable in the other member states;

It also specifically states that parties' claims will not be statute barred as a result of time spent on mediation.



Discovery and privilege

Case: Tír na nÓg Projects Ireland Ltd v The County Council of the County of Kerry [2008] IEHC 48

Background. The purpose of discovery is to make available such documentation that exists and must be shared, whether it is in support of or undermines the respective parties' case.

Legal professional privilege protects against compulsory disclosure of communications made between a client and his lawyer in which advice is sought or given within a relevant legal context. Litigation privilege applies only where litigation is anticipated or is, in fact, underway.

Facts. The plaintiff sought a declaration that the defendant, Kerry County Council (KCC) had been deemed to grant planning permission for a holiday home development as KCC had not made a decision within the time specified in the Planning and Development Act 2000. The issue arose as to whether KCC had been in default and whether it involved a material contravention of the relevant development plan. Discovery of a single document which contained legal advice from KCC's solicitor was sought. KCC argued that the document had been placed in error on the public file, had been withdrawn, and could not be the subject of an order for discovery by virtue of legal professional privilege and/or litigation privilege.

Decision. Clarke J in the High Court in directing discovery of the document in question ruled that any privilege attaching to it had been waived by KCC. The document in question was relevant to the issues arising in the pleadings and while the document provided legal advice, it was available on a public file. The question of whether privilege can be said to have been waived in relation to the document in dispute turns on whether, objectively speaking, the plaintiff and its advisors should have realised that the disclosure of the document was by mistake. On the facts it was held that there was no error in this inclusion as there was no explanation given by KCC as to how it was put on the public file by mistake. The legal professional privilege attaching to it therefore had been waived.

In-house lawyer privilege

The Law Society has written to the Attorney General to express its support for intervention by Ireland in the high profile Akzo Nobel case concerning in-house lawyer privilege. The Court of First Instance (CFI) decision that in relation to Commission competition investigations, communications between in-house counsel and their internal clients will not be protected by legal professional privilege, is currently under appeal to the European Court of Justice (ECJ) (*Case C-550/07 P Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*). The Law Society believes the communications and advices of in-house solicitors should enjoy solicitor/client privilege in the same way as those of solicitors in private practice.

Background. Legal professional privilege protects against compulsory disclosure of communications made between a client and his lawyer in which advice is sought or given within a relevant legal context. However, on 17 September 2007, the CFI upheld a decision of the European Commission that documents seized during a Commission investigation into anti-competitive practices were not covered by legal professional privilege. The CFI also set out the procedure that Commission officials should follow if a dispute as to privilege arises during an on-site investigation.

Comment. It is hoped that the result of the ECJ appeal will bring the issue of legal professional privilege for in-house lawyers into line with their colleagues in private practice.



Company directors' obligations

Case: Director of Corporate Enforcement v McGowan & anor [2008] IESC 28

Background. Section 160(2)(f) of the Companies Act 1990 provides a disqualification order can be made against an officer of a company when the court is satisfied a person "has been persistently in default in relation to the relevant requirements".

Facts. The directors of a wood products company failed to comply with their legal obligation to file prescribed returns with the Registrar of Companies for 13 consecutive years. The High Court held that the respondents had acted irresponsibly but had not been in persistent default, since they had not been held guilty of any default by a court. While finding the failure to make returns "reprehensible", the High Court found it was not "persistent" and, given those and other findings, refused to make disqualification orders against the errant directors.

The Director of Corporate Enforcement appealed the decision.

Decision. The Supreme Court held that the High Court had erred in its interpretation of section 160(2)(f). The court ruled that to "persist" involves not just continuing to do something but also includes an element of determination. Each failure to file over the 13 year period was the commission of a criminal offence and thus met the requirements of "persistent failure".

The court held that the main purpose of disqualification was to protect the public, not to punish. In this case, the company was a small private firm trading profitably and the court considered the 12 employees' interests and the fact that disqualification would impact on the firm's intention to discharge its liabilities to the Revenue. In these circumstances, it held that a disqualification order was not warranted.

Upcoming event

Beauchamps Solicitors are sponsoring the first Thomson Reuters Corporate Restructuring Conference in Dublin in October/November 2008. Gabriel Daly a Partner in the Litigation and Dispute Resolution department will be speaking at this event.

Litigation and Dispute Resolution Department

If you have any queries on the contents of this update or if there are other topics you would like to see us address in future editions please contact any of the Litigation and Dispute Resolution solicitors below.

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