

CREAM HOLDINGS LIMITED v BANERJEE

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Introduction

[339] Cases involving a conflict between privacy or confidentiality, on the one hand, and freedom of expression, on the other, are often resolved at the interlocutory stage. The test adopted for awarding an interlocutory injunction is therefore of considerable practical importance, especially in cases with media defendants. Under Anglo-Australian law, the balance between privacy/confidentiality and freedom of expression will commonly be determined by the application of the test for granting interlocutory relief. In the United Kingdom, the established test has been replaced, in cases where the relief granted might affect freedom of expression, by a statutory test set out in s 12(3) of the *Human Rights Act 1998* (UK) (HR Act). To date, English courts that have applied the s 12(3) test have adopted different standards. In the instant case, the House of Lords resolved these differences by adopting a higher threshold than the pre-HR Act test, but allowing for the flexible application of the statutory standard. The practical effect of this new test on English plaintiffs seeking to restrain public disclosure under the extended English action for breach of confidence remains to be seen.

Facts

The plaintiffs in *Cream Holdings Limited v Banerjee*,² the Cream group of companies, are a prominent Liverpool business that runs nightclubs, dance festivals and a merchandising business. When Ms Banerjee, in-house accountant of the company, was dismissed, she took copies of documents allegedly disclosing illegal and improper activities. Ms Banerjee passed copies of the documents to the 'Echo', the publisher of two leading Merseyside newspapers. The newspapers published articles alleging corruption involving a director of the companies and a local council official. The plaintiffs sought an injunction against Ms Banerjee and the 'Echo' to restrain publication of further confidential information. The defendants argued that publication was justified in the public interest.

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[340] **Section 12 of the Human Rights Act and interlocutory relief**

In the United Kingdom, the general law relating to the publication of confidential information (and 'private' information) is modified by the HR Act. Section 12 of the HR Act applies where a court is 'considering whether to grant any relief' that might affect the right to freedom of expression established under art 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR).

Section 12(3) of the HR Act provides that relief that might affect freedom of expression is not to be granted so as to restrain publication before trial unless 'the court is satisfied that the applicant is likely to establish that publication should not be allowed'. Section 12(4) goes on to provide that the court must have 'particular regard' to the importance of the art 10 right and, in relation to journalistic, literary or artistic material, to:

- (a) the extent to which —
 - (i) the material has, or is about to, become available to the public; or
 - (ii) it is, or would be, in the public interest for the material to be published;
- (b) any relevant privacy code.

The wording of s 12 of the HR Act has given rise to considerable uncertainties.³ One issue that has arisen is the extent to which s 12(3) modifies the accepted test, under English and Australian law, for awarding an interlocutory injunction, as established by *American Cyanamid v Ethicon Ltd.*⁴ The test in *American Cyanamid* may be summarised as requiring the plaintiff seeking interlocutory relief to establish that:

- (1) there is a 'serious question to be tried' (meaning a 'real prospect' of success at trial);
and
- (2) the 'balance of convenience' weighs in favour of granting an injunction.

² [2004] UKHL 44 (14 October 2004).

³ For a discussion of some of the issues see David Lindsay, 'Naomi Campbell in the House of Lords: Implications for Australia' (2004) 11(1) *Privacy Law and Policy Reporter* 4.

⁴ [1975] AC 396.

Previous cases interpreting s 12(3) and *American Cyanimid*

The interpretation of s 12(3), and its relationship to the accepted standard for awarding an interlocutory injunction, had come before the English courts a number of times before the instant case, resulting in inconsistent statements as to the effect of s 12(3). The underlying issue is whether s 12(3) and, in particular, the use of the term 'likely' in that sub-section, establishes a higher threshold for awarding an interlocutory injunction than the *American Cyanimid* test?

In *Douglas v Hello!*⁵ Keene LJ stated that s 12(3):

... requires the court to look at the merits of the case and not merely to apply the *American Cyanimid* test. Thus the court has to look ahead to the ultimate stage and to be satisfied that the scales are likely to come down in the applicant's favour.⁶

His Lordship expressed the test as 'whether this court is satisfied that the applicant is likely to establish at trial that publication should not be allowed'.⁷

Sedley LJ, rather cryptically, maintained that, although s 12(3) 'does not replace the received test (or [341] tests) for prior restraint, [it] qualifies them by requiring a probability of success at trial'.⁸ None of the members of the Court of Appeal, however, considered it necessary to be more specific on the s 12(3) test in allowing the appeal against an injunction in *Douglas*.

Subsequently, in *Imutran Limited v Uncaged Campaigns Limited*⁹ Sir Andrew Morritt VC was a little more specific on the use of the term 'likely' in s 12(3), stating that:

Theoretically and as a matter of language likelihood is slightly higher in the scale of probability than a real prospect of success. But the difference between the two is so small that I cannot believe that there will be many (if any) cases which would have

⁵ [2001] QB 967.

⁶ *Ibid* [150].

⁷ *Ibid* [153].

⁸ *Ibid* [134].

⁹ [2001] 2 All ER 385.

succeeded under the American Cyanimid test but will now fail because of the terms of s 12(3).¹⁰

This formulation of the s 12(3) test was approved by Lord Woolf CJ in *A v B plc*.¹¹

In *Theakston v MGN Limited*,¹² however, Ouseley J specifically rejected an argument that the test under s 12(3) was whether the case has a 'real prospect of success', opining that:

... I have some difficulty in seeing how the approach required by s 12(3) can be other than that the claimant must show that it is more probable than not that he will succeed in obtaining an injunction at trial.¹³

The cumulative effect of the previous cases was that there were two incompatible views on the standard required by s 12(3):

- (1) The view expressed in *Imutran*, and approved in *A v B plc*, that the test was not 'discernibly different' from the *American Cyanimid* standard; or
- (2) The view adopted in *Theakston*, that s 12(3) required the higher standard that the plaintiff show that it is 'more probable (or likely) than not' that he or she will succeed at trial.

The approach of the lower courts

The English courts in *Cream* were required to confront these conflicting authorities. At first instance, Lloyd J awarded an interlocutory injunction, concluding that s 12(3) only required the plaintiff to establish a 'real prospect of success' and not that success was 'more likely than not'. In adopting this approach, Lloyd J was guided by the approval given *Imutran* by the Court of Appeal in *A v B plc*.

The appeal to the Court of Appeal was dismissed. The three members of the Court of Appeal agreed that the standard to be applied under s 12(3) was the lower standard of

¹⁰ Ibid [17].

¹¹ [2002] 3 WLR 542, [11(iii)].

¹² [2002] EWHC 137.

¹³ Ibid [19].

whether the plaintiff had a ‘real prospect of success at trial’. [342] According to the court, however, the adoption of this standard did not mean that there is no difference between the *American Cyanimid* test and the s 12(3) test. As Simon Brown LJ put it:

The distinction is that under *American Cyanimid* the court is concerned only to find a serious question to be tried, not to resolve either conflicts of fact or difficult questions of law so as to gauge the merits of the claim ... It seems to me that there will indeed be a number of claims for injunctive relief which now will fail when earlier they would have succeeded: they will fail because the court is now required by s 12(3) actually to consider their merits (so as to reach a judgment as to the prospects of their eventual success) and cannot grant relief unless satisfied on cogent evidence that the claim does indeed have a real prospect of succeeding at trial notwithstanding the defendant’s *ex hypothesi* conflicting right to freedom of expression.¹⁴

In their reasoning, both Simon Brown and Sedley LJ attributed some importance to the rule of statutory interpretation set out in s 3 of the HR Act, which requires that legislation ‘be read and given effect in a way which is compatible with’ the ECHR rights. Although a strict reading of in s 12(3) might suggest the higher standard of ‘more likely than not’, applying the rule of statutory interpretation seems to support a lower standard. The significance attributed to s 3 was explained most clearly in the judgment of Sedley LJ, who said:

It seems to me ... that the natural meaning of the word ‘likely’ in the immediate context of s 12(3) of the Human Rights Act is ‘more probable than not’ ... To say this is not to cast doubt on the many instances in which, in other contexts, the statutory purpose has been held to require one of the milder meanings of ‘likely’ also found in the dictionary ...

I am satisfied that ‘likely’ in s 12(3) is quite capable of bearing its milder meaning. While the logical difficulty remains of something being likely but its opposite being more likely, the practical usage of the word to convey something which is reasonably or realistically possible has ample judicial support in other contexts; and the full present context is larger than s 12(3) or s 12 itself, for it includes s 3.¹⁵

¹⁴ [2003] EWCA Civ 103, [56].

¹⁵ *Ibid* [69], [70], [76].

In adopting this reasoning, Sedley LJ raised the issue of whether the 'milder' interpretation of 'likely' was required by s 3 in all cases, or only in cases implicating a ECHR right other than freedom of expression, without feeling compelled to resolve this question in the instant case. Arden LJ agreed with the interpretation of 'likely' in s 12(3) adopted by the other members of the court, but considered that this followed from the context of the provision and textual analysis, and not from the application of s 3.

Applying the 'real prospect of success' threshold, Simon Brown and Arden LJ held that the first instance judge had not misapplied the test and was entitled to grant an injunction. Sedley LJ, however, disagreed with this analysis, concluding that, given that the information was 'incontestably a matter of serious public interest',¹⁶ there was no real possibility of the plaintiffs succeeding at trial.

The standard adopted by the House of Lords

The House of Lords, in a decision delivered by Nicholls LJ, unanimously upheld an appeal and discharged the injunction on the basis that there was a public interest in disclosure of the information.

Nicholls LJ rejected the lower standard of a 'real prospect of success' adopted by the Court of Appeal but, in so doing, adopted a flexible approach to the meaning of the word 'likely' in s 12(3). First, His Lordship referred to the legislative history behind the section, which indicated that Parliament was concerned with the extent to which recognition of the ECHR rights, including the art 8 right to privacy, [343] would interfere with freedom of expression by imposing prior restraints on publication under the *American Cyanimid* standard. Section 12(3) was introduced to address these concerns by establishing a higher standard than the *American Cyanimid* test.

Secondly, Nicholls LJ pointed out that, although the higher test of 'more likely than not' would be consistent with the legislative intent, the application of this standard would not always be workable in practice. In particular, application of the higher standard might prevent the award of an interlocutory injunction as a temporary

¹⁶ Ibid [88].

measure to retain the *status quo* until the court is in a position to decide whether the plaintiff is likely to succeed at trial. Moreover, His Lordship referred to cases where disclosure of material might have extremely adverse consequences for a plaintiff, such as risk of personal injury, although the claim for confidentiality might be relatively weak. In such cases, application of the higher test might prevent the award of an injunction even in the face of potentially serious adverse consequences.

In general terms, Nicholls LJ concluded that s 12(3) requires the higher threshold, but that the courts must be flexible in applying this standard. His Lordship explained the approach to be adopted in the following terms:

There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of s 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial ... But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include ... where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.¹⁷

Unfortunately, Nicholls LJ did not expressly deal with the question of the extent to which s 3 of the HR Act applies to the interpretation of s 12(3), continuing a tendency of the House of Lords to leave issues involving the interpretation of the HR Act unresolved.¹⁸ Instead of referring directly to s 3, however, His Lordship maintained that the flexible approach adopted to the s 12(3) standard, allowing the standard to vary with the circumstances of the case, enabled ECHR rights to be appropriately taken into account. In this respect, Nicholls LJ stated that:

¹⁷ [2004] UKHL 44, [22].

¹⁸ See, for example, Lindsay, above n 3.

... the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the [344] parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights.¹⁹

In the instant case, Nicholls LJ, although applying a more stringent test than the Court of Appeal, agreed with Sedley LJ that the material proposed to be published was of 'serious public interest'.²⁰ His Lordship therefore discharged the injunction, concluding that:

On the evidence the Cream group are more likely to fail than succeed at the trial, and the Cream group have shown no sufficient reason for departing from the general approach applicable in that circumstance.²¹

Discussion

The decision of the House of Lords in *Cream*, following on from other decisions concerning the HR Act, is a further illustration of the extent to which English law, as influenced by that Act, has diverged from the law in other common law jurisdictions. The case, being essentially concerned with statutory interpretation, will have negligible effect on Australian law. Its main interest, for those outside of the United Kingdom, lies in the extent to which it forms part of the continuing, and far-reaching, impact of human rights on the development of English private law.

At the same time, it should be borne in mind that the award of interlocutory relief, regardless of the standard adopted, remains highly discretionary and context-dependent. In this, the flexible approach adopted by the House of Lords to the application of s 12(3) has much to recommend it. Given the high level of discretion preserved by the House in *Cream*, the decision may, in practice, not have much of an effect on the protection of privacy at general law in the United Kingdom. Whether it will result in less protection of privacy in cases against media defendants, however,

¹⁹ [2004] UKHL 44, [23].

²⁰ Ibid [24].

²¹ Ibid [25].

remains to be seen. Finally, it may be that the higher threshold adopted under the statutory test in *Cream* is not so different from the test for awarding an interlocutory injunction under Australian law as might be imagined. It has been contended that, although Australian courts have adopted the *American Cyanimid* test, the standard in Australia may be higher than the pre-HR Act English standard, requiring a ‘strong possibility’ of success.²² If that is the case, the differences between the *American Cyanimid* test as applied by Australian courts and the s 12(3) test adopted by the House of Lords may be even less than those between the English version of *American Cyanimid* and the statutory test.

²² See Meagher, Heydon and Leeming, *Meagher Gummow & Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002) [21–370].