

Reputation Matters Bulletin – July 2015

Injunctions were in the news recently when Denis O'Brien and our client, IBRC, were involved in high profile injunctions against RTÉ. We thought it would be topical to set out some practical tips regarding injunctions, as well as a brief analysis of recent defamation judgments.

Practical Tips - Injunctions - when are they the right choice?

Companies facing the threat of a damaging publication have options. An injunction is sometimes described as "the nuclear option". Injunctions can be very effective in the right circumstances. However, careful consideration is needed before seeking an injunction.

Possible grounds for an injunction:

Defamation

As shown by the *Byrne v Fitzpatrick* decision (noted below), defamation injunctions are difficult to obtain. The courts are generally reluctant to restrain publication in advance, viewing this as a serious interference with freedom of expression. A strong defamation case will not guarantee a plaintiff an injunction restraining publication. It must be shown that there is no reasonable defence, a high bar.

Breach of confidence

Confidentiality injunctions are generally taken by businesses seeking to restrain publication of confidential, non-personal information, such as a business plan. The court will balance the public interest in maintaining confidentiality, and the public interest served by publishing the confidential information. A claimant may find it easier to succeed in restraining publication on breach of confidence rather than defamation grounds (as there are a number of defences to a defamation action whereas public interest is the only possible justification if a breach of confidentiality can be shown). In practice, it will only be in exceptional circumstances where the publication of confidential information will be in the public interest, such as where the material relates to a political issue or has been the subject of a state inquiry.

Privacy

Privacy injunctions are taken by individuals seeking to restrain the publication of personal information, such as private financial information. Once again, the court will balance the competing rights of freedom of expression and the right to privacy. Generally, the courts are less reluctant to grant privacy injunctions as it can be more difficult to prove a public interest in publishing inherently private information.

Before seeking an injunction you should consider:

- The difficulty, outlined above, in obtaining one;
- The expense;
- The publicity involved in seeking an injunction may outweigh the benefit of obtaining one. In the UK so-called "super-injunctions" can protect the identity of the individual seeking the injunction, but this is not possible in Ireland. The fact that an application has been sought may attract more publicity than the underlying story, irrespective

of the outcome. Various individuals have obtained an injunction restraining publication of particular material only to find that the media reports the injunction application itself. This may defeat the object of the exercise by generating more publicity than the original publication.

Nevertheless an injunction may still be the right move when faced with the imminent publication of damaging material. However, given the risks and downsides, this option should only be deployed where the potential benefits clearly outweigh the potential financial and reputational cost and risk.

Recent Decisions

1. O'Brien v Radio Teilifis Eireann, IBRC v Radio Teilifis Eireann

On 30 April 2015, Denis O'Brien sought an injunction in the High Court, to prohibit RTÉ from broadcasting its report containing details of his private banking affairs. The businessman argued such a publication would breach his right to privacy and confidentiality in his bank dealings.

We acted for IBRC who in separate proceedings made a similar application, claiming the report would breach their duty of banker/customer confidentiality and would also involve the unlawful publication of documents which were subject to legal professional privilege.

RTÉ opposed the applications on grounds including the right to freedom of expression and public interest.

Judge Donald Binchy granted the injunctions sought by both Denis O'Brien and IBRC. In short, Judge Binchy held that the defendants failed to establish a meaningful connection between the issue of public interest identified (i.e. the alleged failures of corporate governance at IBRC) and Denis O'Brien's private banking information such as would override the private and confidential nature of that material.

2. Byrne v Fitzpatrick P/U S&T Ivor Fitzpatrick & Co

This recent decision illustrates the Courts' approach to injunction applications and in particular, the emphasis on whether the defendant has a reasonable defence.

A Dublin jeweller, Des Byrne, was refused a High Court injunction which would restrain Danske Bank plc and Ivor Fitzpatrick & Co solicitors from publishing a judgment which had been granted against him and his son. The judgment, registered in the Central Office of the High Court, was subsequently set aside by Judge Cross, as against the son. Notice of the judgment was published by *Stubbs Gazette*, the *Sunday Business Post* and *SoloCheck.ie*. The defendants argued that the judgment was only set aside as against the son, and continued to subsist against Des Byrne. On that basis, both Danske Bank and Ivor Fitzpatrick based their defence in truth and absolute privilege. Judge Stewart refused injunctions restraining publication as he was satisfied that these were reasonable defences.

3. Contostavlos v News Group Newspapers Ltd 2015/15 IA

A recent decision involving celebrity Tulisa Contostavlos (N-Dubz singer and former X-factor judge) illustrates the importance of complying with the one year deadline for issuing defamation claims.

The Defamation Act 2009 allows the one year time limit to be extended to a maximum of two years if the interests of justice so require and if the prejudice to the plaintiff due to the refusal of an extension would outweigh the prejudice to the defendant by allowing an extension.

Judge Kearns denied Ms Contostavlos permission to extend the time limit for a defamation claim against the Irish Sun. The article named her a drug dealer and led to her being charged with intent to supply a class A drug.

Judge Kearns rejected the claimant's argument that the time limit should be extended in the absence of any evidence of prejudice to News Group Newspapers, ruling that the time limit would only be extended if Ms Contostavlos could show good reason for her delay. Despite finding that Ms Contostavlos had been "cruelly deceived by a shabby sting operation", Judge Kearns expressed surprise that she had not issued legal proceedings more rapidly, and refused to extend the time limit.

4. Froze v Dublin Bus

A recent Circuit Court case illustrates the danger of an inadequate apology.

Lana Froze was awarded €10,500 in damages for defamation, after being humiliated by a bus driver who falsely accused her of fraud. The bus driver, claiming Ms Froze had failed to pay the sufficient fare for her journey, ordered her to disembark before her destination, in front of other passengers. The driver refused to proceed until Ms Froze eventually disembarked.

In assessing damages Judge Groarke noted the inadequacy of the apology offered by Dublin bus, which made no reference to the humiliation suffered, or the fact that Ms Froze had done nothing wrong. By contrast, in a damages assessment in a similar case, *Ralph v Mamas & Papas (Retail) Limited*, Judge Linnane was impressed by the fact that an immediate and comprehensive apology had been offered.

KEY CONTACTS



Kenan Furlong

Partner

T: +353 1 649 2260

E: kfurlong@algoodbody.com



Paula Mullooly

Professional Support Lawyer

T: +353 1 649 2540

E: pmullooly@algoodbody.com



Mark O'Shaughnessy

Associate

T: +353 1 649 2015

E: mshaughnessy@algoodbody.com



Cathal Grennan

Associate

T: +353 1 649 2236

E: cgrennan@algoodbody.com



Justine Hession

Solicitor

T: +353 1 649 2618

E: jhession@algoodbody.com



Eva Morris

Solicitor

T: +353 1 649 2247

E: emorris@algoodbody.com

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