England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2001] EWCA Civ 1897
Case No: A2/2001/0558

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
MR JUSTICE OWEN

Royal Courts of Justice
Strand,
London, WC2A 2LL
Wednesday 19th December 2001

B e f o r e :

LORD JUSTICE ALDOUS
LORD JUSTICE SEDLEY
and
LADY JUSTICE ARDEN

Totalise Plc — **Claimant**

- and –

(1) The Motley Fool Limited
(2) Interactive Investor Limited — **Defendants**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr J. Higham QC and Mr J. Abrahams (instructed by Stephenson Harwood for the Appellant Interactive Investor Limited)
Mr P. Moloney QC (instructed by Dibb Lupton Alsop for the Respondent Totalise Plc)

HTML VERSION OF JUDGMENT

Lord Justice Aldous:

1. This is the judgment of the Court in an appeal brought by the second defendant, Interactive Investor Ltd, with permission of this Court against that part of the order of Owen J of 23rd February 2001 ([2001] 1 P & T 764) which ordered them to pay costs of £4,817.

2. Interactive were an operating subsidiary of a company listed on the London Stock Exchange. Since the hearing before the judge, they have become part of an Australian Group and have changed their name to Ample Interactive Investor Ltd. Their principal business is the provision of financial information to individual investors through their website. One service they offer consists of a series of "discussion boards" relating to particular companies on which users of the website can post information and opinions likely to be of interest to other investors. Before a user can make a posting on Interactive's discussion boards, the user must register and enter into a contract containing Interactive's standard terms. These proceedings arise out of use of that service. Another service is the provision of a portfolio tracker system through which individuals can track their investments without professional help.

3. On 31st January 2001 Interactive were sent a letter by solicitors acting on behalf of the claimants Totalise Plc. That letter complained about the content of a number of postings on Interactive's website by a person using the nickname "Zeddust". The letter alleged that the postings contained defamatory statements and that both individually and, when taken together, were maliciously designed to call into question the competency and integrity of Totalise's management team, the solvency of Totalise and generally to cause as much damage to Totalise's reputation as possible. The letter went on to inform Interactive that the solicitors had written to the first defendants, The Motley Fool Limited, to complain about similar postings made by Zeddust. The letter requested confirmation that the postings would be removed, that Zeddust's posting rights be immediately withdrawn and that the identity and registration details of Zeddust be disclosed.

4. Interactive replied by letter dated 1st February 2001. The letter stated that the postings would be removed and that the account of Zeddust had been suspended on 31st January 2001. As to the request for details of Zeddust, the letter said:

> "We also note your request for contact details of the author 'Zeddust', and advise that Interactive Investor is not able to provide this data to you. The Data Protection Act 1998 and our Terms and Conditions and Privacy Policy do not allow Interactive Investor from disclosing personal details about any account to a third party in these circumstances."

5. On the same day solicitors acting for Totalise wrote stating that they had instructed both leading and junior counsel to advise on and conduct a "Norwich Pharmacal" application to obtain disclosure of the identity of Zeddust.

6. On 5th February 2001, Totalise issued a claim form naming Motley Fool Limited as first defendants and Interactive as the second. The claim was for disclosure and production in a witness statement of the full name and address of Zeddust and all documents which were or had been in the possession, custody or power of the defendants relating to the identity of Zeddust. That application was what can be referred to as a *Norwich Pharmacal* application having regard to the decision of the House of Lords in Norwich Pharmacal Co v Customs & Excise Commissioners [1974] AC 133.

7. Those proceedings came before Owen J on 15th February 2001. At the hearing in chambers Interactive was not represented by counsel, but Mr Kiddell of Stephenson Harwood appeared on their behalf. He

made no submissions as to whether the order should be made as Interactive's attitude was purely neutral. The solicitor acting for the first defendant did submit that the order sought should not be made and advanced supporting arguments.

8. The judge, in his judgment of 19th February 2001, concluded that he had jurisdiction to make the order requested. He went on to hold that there was no reason under the Data Protection Act 1998 for the defendants to withhold the information sought. He also rejected a submission, made on behalf of the first defendant, that the order would be contrary to section 10 of the Contempt of Court Act 1981. He then considered whether, in the exercise of his discretion, he should grant the relief and concluded:

> "I have no hesitation in finding that the balance weighs heavily in favour of granting the relief sought. To find otherwise would be to give the clearest indication to those who wish to defame that they can do so with impunity behind the screen of anonymity made possible by the use of websites on the internet. It follows that I propose to make an order against both defendants in the terms sought by the complainant."

9. After judgment, counsel for the claimants sought an order that the defendants should pay his client's costs. After hearing submissions, the judge concluded that he should make such an order. He said:

> "In my judgment the situation that arises in such cases is very different from what could be described as the classic *Norwich Pharmacal* situation. I consider that there is considerable force in Mr Moloney's argument that those who operate websites containing discussion boards do so at their own risk. If it transpires that those boards are used for defamatory purposes by individuals hiding behind the cloak of anonymity then in justice a claimant seeking to establish the identity of the individuals making such defamatory contents ought to be entitled to their costs.
>
> I have come to the conclusion that it was perfectly plain from the outset that the postings on both websites were highly defamatory and that, accordingly, the claimants were the victims of a sustained campaign amounting to an actionable tort. There was no other way in which the claimants could have proceeded, save by requiring identification of Zeddust from both defendants.
>
> I accept that the defendants had to carry out the balancing exercise, but in my judgment there was only one answer to that balancing exercise, namely that they should have complied with the requests made by the claimant. In those circumstances, I order the defendants to pay the claimant's costs of this application/action."

The judge then summarily assessed the costs to be paid by Interactive at £4,817.

10. Mr Higham QC who appeared on behalf of Interactive submitted that the judge had exercised his discretion upon wrong principles. He submitted that the actions of his client were perfectly proper. The Data Protection Act 1998 was difficult to construe and arguably prevented disclosure without a court order. Whilst the Act might not prevent disclosure of Zeddust's name, it strongly indicated that personal data should not be disclosed to third parties without the consent of the data subject, save in exceptional circumstances. Further, the judge had failed to place any weight on the fact that Interactive was contractually obliged not to reveal the identity of its users. That was a particularly relevant factor, having regard to Interactive's published privacy policy. To support that submission he referred us to the terms and conditions upon which Interactive contracted with Zeddust which prevented Interactive from passing on Zeddust's information to any other person except in circumstances which do not apply in this case, and also to the published privacy policy which precluded Interactive giving the information required.

11. Mr Higham also submitted that the judge had failed to distinguish between the attitude of Interactive and that of the first defendant. The first defendant had opposed the grant of the order, whereas Interactive had not. It had left to the judge the question of whether an order should be made which overruled their obligation of confidence and exposed Zeddust to litigation.

12. Mr Higham went on to point out that in the present case Interactive were under an obligation of confidence, whereas that was not the position in the *Norwich Pharmacal* case. It followed that the Court should be more inclined to make the applicant pay costs than in the *Norwich Pharmacal* case where the applicant had to pay the costs of the Customs & Excise Commissioners. He directed our attention to these passages in the speeches of Lord Reid and Lord Cross which he submitted indicated the correct approach that the judge should have adopted. At page 176 Lord Reid said:

> "But there may be other cases where there is much more doubt. The validity of the patent may be doubtful and there could well be other doubts. If the respondents have any doubts in any future case about the propriety of making disclosures they are well entitled to require the matter to be submitted to the court at expense of the person seeking the disclosure. The court will then only order discovery if satisfied that there is no substantial chance of injustice being done."

13. At page 199 Lord Cross said:

> "Secondly, although in any case which was on all fours with this case or any subsequent case which may be decided, the commissioners or any other person who was asked for a name would no doubt give it without putting the applicant to the expense of obtaining an order of the court; in any case in which there was the least doubt as to whether disclosure should be made the person to whom the request was made would be fully justified in saying that he would only make it under an order of the court. Then the court would have the right to decide whether in all the circumstances it was right to make an order. In so deciding it would no doubt consider such matters as the strength of the applicant's case against the unknown alleged wrongdoer, the relation subsisting between the alleged wrongdoer and the respondent, whether the information could be obtained from another source, and whether the giving of the information would put the respondent to trouble which would not be compensated by the payment of all expenses by the applicant. The full costs of the respondent of the application and any expense incurred in providing the information would have to be borne by the applicant."

14. The principle expressed in those speeches was, Mr Higham submitted, consistent with Part 48.1 CPR which is concerned with pre-action disclosure. There the general rule is stated as "the Court will award the person against whom the order is sought his costs – (a) of the application; and (b) of complying with the order made on the application." However the court is given a discretion to make a different order "having regard to all the circumstances" which are stated to include the extent to which it was reasonable to oppose the application and whether the parties had complied with relevant pre-action protocols.

15. Mr Higham submitted that a party should be paid the costs in circumstances (a) where the party had a genuine doubt that the person seeking disclosure was entitled to it; (b) where the party was under a legal obligation not to reveal the identity of the third party, or where the legal position was not clear, or the respondent was in any reasonable doubt as to his obligations; (c) where there was a risk that proceedings could be brought against the party if the disclosure was voluntarily given; (d) where the party would suffer damage if he was seen to be providing the disclosure voluntarily or otherwise had a legitimate interest in not being seen providing the disclosure voluntarily; or (e) the disclosure could infringe a legitimate interest of somebody else.

16. Mr Higham submitted that all those conditions were satisfied in this case. He submitted that the contract between Interactive and Zeddust was clear in that it prohibited disclosure of the information sought. Second the information sought was personal data, the disclosure of which was governed by the Data Protection Act 1998. To a person in Interactive's position it was not at all obvious, absent a ruling from the court, that any of the conditions apply. There was, he submitted, a material risk that if Interactive had made a disclosure without an order of the Court, proceedings might have been brought against them. Third there was the issue of privacy. Internet users are acutely aware of the potential of the internet to invade privacy and thus respectable website operators invariably take great care to ensure their users are comfortable that their privacy is being respected. That was the position in this case. Fourth, Interactive were not in a position to judge whether Zeddust had a legitimate interest

which should be protected, in particular whether disclosure would infringe on Zeddust's right of freedom of expression. Further this was a case in which the order for costs was particularly unfair as Interactive had not sought to influence the court, and the court had to exercise a discretion when deciding to overrule the obligations of confidence imposed by the contract between Zeddust and Interactive.

17. Mr Higham submitted that Interactive were caught in a conflict not of their making. If they simply handed over the information, then they could be liable for proceedings for breach of contract and perhaps under the Data Protection Act. It was wrong to penalise them in costs for leaving the decision to the Court, particularly as Totalise would be expected to recover their costs from Zeddust as part of the costs of the action that they intended to take. By awarding costs to Totalise, the court had ensured that the proper person, Zeddust, could in practice avoid paying those costs. That he submitted, was contrary to justice.

18. Mr Patrick Moloney QC, who appeared on behalf of Totalise, reminded us that this was an appeal on costs alone. He drew to our attention Part 44.3 CPR which provides that as a general rule the "unsuccessful party" should pay the costs of the "successful" party. Important as that principle is, it cannot apply to *Norwich Pharmacal* applications. That was made clear by Lord Reid and Lord Cross. Such applications are not really inter partes disputes to which Part 44.3 is specifically directed. Interactive did not resist the Court making the order and therefore cannot properly be called an "unsuccessful party". A closer analogy is with applications for pre-action discovery to which Part 48.1 applies.

19. Mr Moloney submitted that the judge was not wrong in the way he exercised his discretion and therefore it was not appropriate for this Court to interfere (see Tanfern Ltd v Cameron-MacDonald [2000] WLR 1311 at 1317). The basis of that submission is correct. But we believe that the judge failed to take into account relevant matters which may have been the result of a failure to bring the relevant matters to his attention. That being so, the Court must look again at what should be the correct order. It is sufficient at this stage of the judgment to draw attention to the failure by the judge to consider the attitude of Interactive separately from that of the first defendant; the failure to consider the effect upon Interactive of voluntarily disclosing confidential details and the fact that Totalise could recover the costs from Zeddust if they were to bring a successful action for libel.

20. Mr Moloney submitted that the judge was entitled to distinguish the *Norwich Pharmacal* case as there was a clear difference between the position of Customs & Excise, which is a public body, and the provider of a website. That the judge had in mind. We accept that what was said in the *Norwich Pharmacal* case was directed to the facts of that case and therefore cannot be blindly applied in all *Norwich Pharmacal* applications. However the statements reflect the difference between such applications and normal inter partes proceedings.

21. Mr Moloney also drew attention to what he said was the basic merit of the order which the judge had made. If defendants to an application for discovery, pursuant to the *Norwich Pharmacal* procedure, could sit back and do nothing and expect their costs to be paid, then the time of the courts would be taken up with wholly formal and unnecessary disclosure applications to the prejudice of other court users. Further, a deterrent of double-cost liability would be incurred by the victim of anonymous web libels who would have to bear that burden before coming to grips with the libeller himself. That would encourage people to use the web as a vehicle for anonymous scurrilous allegations. Thus the judge was right to make an order which would discourage such events. A website provider should, when requested to give disclosure, take legal advice (if necessary, first seek the claimant's undertaking to cover its costs) and then provide the information requested unless there was a reasonable prospect that a court would not make the order. There was, he submitted, no reasonable prospect in this case that the order would not be made and therefore the order made was correct.

22. We accept that the court has a discretion as to the order for costs when deciding a *Norwich Pharmacal* application, but such applications are not truly ordinary adversarial proceedings as the defendant, whether it be a web provider, Customs & Excise, a telephone company or a bank does not normally resist the order being made. Such defendants have become mixed up in tortious acts and are only concerned that duties and rights, such as duties of confidence and legitimate interests of privacy, are

considered by the court. It is for the applicant to satisfy the Court that the order should be made, not for the defendant to take a view which could be wrong. We believe that that is emphasised by an analysis of the parties' submissions on the effect of the Data Protection Act 1998.

23. There was no dispute that the information requested by Totalise was covered by the 1998 Act. It was their submission that disclosure was appropriate having regard to section 35 and schedule 2. Section 35 exempts disclosure which is otherwise necessary for the purposes of establishing, exercising or defending legal rights. The effect of paragraph 5(a) of Schedule 2 is to allow disclosure for the administration of justice. However paragraph 6 states:

> "6.- (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.
>
> (2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to satisfied."

24. It is not necessary to construe section 35 or paragraphs 5 and 6 of Schedule 2, but it is manifest from paragraph 6 of Schedule 2 that no order is to be made for disclosure of a data subject's identity, whether under the *Norwich Pharmacal* doctrine or otherwise, unless the court has first considered whether the disclosure is warranted having regard to the rights and freedoms or the legitimate interests of the data subject. By virtue of s.10 of the Contempt of Court Act 1981, if applicable, the court must also be satisfied that disclosure is necessary in the interests of justice.

25. In a case such as the present, and particularly since the coming into force on 2 October 2000 of the Human Rights Act 1998, the court must be careful not to make an order which unjustifiably invades the right of an individual to respect for his private life, especially when that individual is in the nature of things not before the court: see the Human Rights Act 1998, s.6, and the European Convention on Human Rights, Arts. 10 and (arguably at least) 6(1). There is nothing in Art. 10 which supports Mr Moloney's contention that it protects the named but not the anonymous, and there are many situations in which – again contrary to Mr Moloney's contention – the protection of a person's identity from disclosure may be legitimate.

26. It is difficult to see how the court can carry out this task if what it is refereeing is a contest between two parties, neither of whom is the person most concerned, the data subject; one of whom is the data subject's prospective antagonist; and the other of whom knows the data subject's identity, has undertaken to keep it confidential so far as the law permits, and would like to get out of the cross-fire as rapidly and as cheaply as possible. However the website operator can, where appropriate, tell the user what is going on and to offer to pass on in writing to the claimant and the court any worthwhile reason the user wants to put forward for not having his or her identity disclosed. Further, the Court could require that to be done before making an order. Doing so will enable the court to do what is required of it with slightly more confidence that it is respecting the law laid down in more than one statute by Parliament and doing no injustice to a third party, in particular not violating his convention rights.

27. Mr Moloney has suggested that the issue need never come before a court: an intermediate party asked to disclose someone's identity can perfectly well act on their lawyers' advice as to what the likely outcome in court would be, and can look to the claimant for the cost of obtaining the advice. We doubt this. There are many factors which may be material to enforced disclosure beyond the deceptively simple fact advanced by Mr Moloney that defamation is a tort of strict liability. It is perfectly possible, for example, that a judge would refuse disclosure of the identity of a data subject whose attacks, though legally defamatory, were visibly the product of a deranged mind or were so obviously designed merely to insult as not to carry a realistic risk of doing the claimant quantifiable harm.

28. We also believe that it is legitimate for a party, such as Interactive, who reasonably agrees to keep information confidential and private to refuse to voluntarily hand over such information. That we believe was applicable to this case. Despite the submissions of Mr Moloney as to the effect of clause 12 of Interactive's Terms and Conditions, we are not convinced that Interactive were free to hand over the

material without coming to a view on the merits. That was not their task. The position could have been different, if they were in some way implicated or involved in the wrongful act.

29. We believe that Mr Higham is right. *Norwich Pharmacal* applications are not ordinary adversarial proceedings, where the general rule is that the unsuccessful party pays the costs of the successful party. They are akin to proceedings for pre-action disclosure where costs are governed by Part 48.3 CPR. That rule, we believe, reflects the just outcome and is consistent with the views of Lord Reid and Lord Cross in the *Norwich Pharmacal* case. In general, the costs incurred should be recovered from the wrongdoer rather than from an innocent party. That should be the result, even if such a party writes a letter to the applicant asking him to draw to the court's attention to matters which might influence a court to refuse the application. Of course such a letter would need to be drawn to the attention of the court. Each case will depend on its facts and in some cases it may be appropriate for the party from whom disclosure is sought to appear in court to assist. In such a case he should not be prejudiced by being ordered to pay costs.

30. The Court when considering its order as to costs, after a successful *Norwich Pharmacal* application should consider all the circumstances. In a normal case the applicant should be ordered to pay the costs of the party making the disclosure including the costs of making the disclosure. There may be cases where the circumstances require a different order, but we do not believe they include cases where:

    (a) the party required to make the disclosure had a genuine doubt that the person seeking the disclosure was entitled to it;

    (b) the party was under an appropriate legal obligation not to reveal the information, or where the legal position was not clear, or the party had a reasonable doubt as to the obligations; or

    (c) the party could be subject to proceedings if disclosure was voluntary; or

    (d) the party would or might suffer damage by voluntarily giving the disclosure; or

    (e) the disclosure would or might infringe a legitimate interest of another.

31. That does not mean that a party who supports or is implicated in a crime or tort or seeks to obstruct justice being done should believe that the Court will do other than require that party to bear its costs and, if appropriate, pay the other party's costs.

32. For the reasons given, we believe that the judge came to the wrong conclusion on costs. Interactive should have recovered their costs. We therefore would allow the appeal.

    Order: Appeal allowed; respondents to pay the appellant's costs here and below to be summarily assessed - below at £2,339.50 and in this court at £17,300; the costs already paid to be repaid within 28 days; summary costs to be paid within 28 days; permission to appeal to the House of Lords refused.

(Order not part of approved judgment)
