



Neutral Citation Number: [2011] EWHC 3454 (TCC)

Case No: 11-497

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/12/2011

Before :

**THE HON. MR. JUSTICE RAMSEY**

Between :

A M P  
- and -  
Persons Unknown

**Claimant**

**Defendant**

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**Matthew Richardson and James Williams** (instructed by **Griffin Law**) for the **Claimant**

Hearing dates: 8 & 19 December 2011  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
THE HON. MR. JUSTICE RAMSEY

**Mr Justice Ramsey :**

**Introduction**

1. This is an application for an interim injunction to prevent transmission, storage and indexing of any part or parts of certain photographic images which are claimed to belong to the Claimant.
2. On 30 November 2011 I heard an application under CPR 39.2(4) for the Claimant to be given anonymity in these proceedings. I heard that application in private under CPR 39.2(3) on the basis that publicity would defeat the object of the hearing (CPR 39.2(3)(a)) because the purpose of that hearing was to determine whether the Claimant should be given anonymity. The hearing also involved confidential information and I considered that publicity would damage that confidentiality (CPR 39.2(3)(c)). The information provided the name and other personal information in respect of the Claimant which were sought to be kept confidential by the anonymity order. I also considered that the hearing should be held in private in the interests of Justice in dealing with the application for anonymity (CPR 39.2(3)(g)).
3. In determining whether or not to make an anonymity order under CPR 39.2(4) I had to consider whether non-disclosure of the identity of the Claimant was necessary in order to protect the interests of that Claimant. In considering whether to grant an interim injunction in relation to the photographic images I have also had to consider some of the matters which I dealt with when granting the anonymity order. It is therefore convenient now to set out both my decision on whether to grant an interim injunction and also to deal with the anonymity order which I previously made.

**Background**

4. Evidence which sets out the background has been submitted on behalf of the Claimant. Whilst at University in June 2008 her mobile phone was stolen or lost. It did not have a user password lock activated. The police were notified and the phone was reported as stolen.
5. The phone contained digital images of the Claimant which had been taken in or about August 2007 using the digital camera on that phone. These digital images included images of an explicit sexual nature which were taken for the personal use of her boyfriend at the time. The Claimant is alone in the photos and her face is clearly visible. The phone also contained other digital images of her family and friends.
6. Shortly after the loss or theft of her phone, the digital images were uploaded to a free online media hosting service that is used to upload and share images. The Claimant was informed by strangers on Facebook that the images had been uploaded and that her name and Facebook profile had been attached to them. She accordingly contacted the online media hosting service and the images were removed promptly in about August 2008. In about July 2008 the Claimant was contacted on Facebook by someone who stated their name was Nils Henrik-Derimot. That person threatened to expose her identity and to post the images

widely online and tell her friends about the images if she did not add him as a friend on Facebook. She deleted these Facebook messages and blocked the sender.

7. At about the same time her father's business public relations team were contacted and allegedly threatened and blackmailed about some images but it was not specified that the images were of her.
8. On 2 November 2008 the images were uploaded to a Swedish website that hosts files known as "BitTorrent" files. The images have since been downloaded an unknown number of times by persons unknown. The images have been uploaded so that her name is appended to each of the images and can therefore readily be searched for when using online search engines. This has led to the link to the BitTorrent files being at the top of the list of search engine searches for her name. Her Solicitors have been able to have many of these links removed from those search engines using the Digital Millennium Copyright Act in the United States. By these proceedings the Claimant wishes to prevent the spread and indexing of the image files by preventing their storage and transmission within this jurisdiction.

#### **BitTorrent technology**

9. These proceedings have been brought in the Technology and Construction Court because the use of BitTorrent technology raises complex technical issues. The Claimant relies on witness statements dated 7 and 18 December 2011 from Professor Andrew Murray, a Professor of Law at the London School of Economics who has a special research interest in information technology law and cyber regulation. He provides an explanation of the concept of BitTorrents and what remedy might be appropriate to avoid further transmission, storage and indexing of any part or parts of the digital photographic images which the Claimant seeks to protect by these proceedings.
10. BitTorrent is a peer to peer file sharing protocol used for distributing large amounts of data over the internet. The BitTorrent protocol is used to download files quickly by reducing the server and network impact of distributing large files. Rather than downloading a file from a single source server, as is the case with the conventional HyperText Transfer Protocol (HTTP), the BitTorrent protocol allows users to join a "swarm" of users to download and upload from each other simultaneously.
11. The person who wants to upload a file using the BitTorrent protocol creates a descriptor file known as a ".torrent" file which contains a description of the file. In this case that descriptor file contained the Claimant's name. This ".torrent" file is distributed by conventional means using webpages, emails or mobile phones. The file being distributed is divided into segments called pieces.
12. The person downloading files must first download BitTorrent client software. That person can then download a file with a ".torrent" file descriptor. That ".torrent" file is then downloaded by acting as a "leecher" but when a piece of a file is downloaded that user then becomes, in turn, an uploader or "seeder" of that piece of the file. In this way the distribution of files depends not just on the original source of the file, as in conventional protocols, but using BitTorrent client

software each user who downloads the file becomes, in turn, a seeder facilitating the distribution of a particular file by allowing pieces of that file to be uploaded by other users downloading the file.

13. Conventionally, to prevent users from being able to download files, it would be possible to identify the relevant source used to provide the download and seek to prevent downloads from that site.
14. However, to prevent the transmission, storage and indexing of the relevant “.torrent” files it is necessary to identify the users who have downloaded the files using the BitTorrent protocol. The relevant files can then be deleted by these users and, in addition, these users can be prevented from acting as seeders of parts of the file which will prevent them distributing the images which are the subject of the current claim.
15. Professor Murray says that each seeder can be identified by way of their Internet Protocol Address (“IP Address”) while they are seeding. He says that it would therefore be possible to obtain the IP Address of every seeder in the swarm and identify from that address their physical location, name and address from their Internet Service Provider. He says that, as a result of that action, it would be possible to identify the IP address of each computer seeding a particular “.torrent” file and details of the person allowing the seeding to take place. They could therefore be served with an order requiring them to take steps to stop their account from being used.
16. Professor Murray considers that, given the characteristics of the Claimant, it is unlikely that many of the seeders will be outside the jurisdiction of this Court. He says that, in those circumstances, it is likely that if a large number of the seeders can be found the distribution of the “.torrent” file by the BitTorrent protocol would cease to occur because of the want of seeders.
17. He says it is also possible to prevent internet search engines from indexing particular sites or files which contain specific words; in this case the descriptor file containing the Claimant’s name could be filtered out on that basis. He says that this would then prevent wide-scale access to the “.torrent” file and again because of a lack of seeders the distribution by the BitTorrent protocol would cease to occur.
18. Finally he says that although the “.torrent” descriptor files are likely to be hosted outside the jurisdiction it is a relatively trivial matter for an internet service provider to block access to a site outside the jurisdiction using currently available technology.

**The defendants**

19. The claim in this case has been brought against “Persons Unknown”. The reason for that is that until seeders of the relevant digital photographic image files have been identified by way of their IP Addresses whilst they are seeding and their addresses have been obtained from their Internet Service Provider, they cannot be made a party to these proceedings. It is submitted on behalf of the Claimant that the number of potential Defendants and the need to move rapidly to prevent

increasing numbers of seeders militates against identifying individual defendants at the present time.

20. The Claimant submits that a procedure which required further applications to add additional Defendants when they are identified, would be cumbersome and lead to unnecessary costs and time being spent which would be contrary to the overriding objective under the CPR. Instead, it is submitted that, by identifying the class of persons unknown by reference to their particular characteristic, namely any person in possession or control of any part or parts of the relevant files containing the relevant digital photographic images, would be a sufficient description of the Defendants to enable them to be served with any order which the court might make. If, at any stage, it became necessary to proceed further against any particular Defendant for failing to comply with any interim order, the Claimant submits that the particular Defendant could then be specifically identified.
21. In the circumstances of this case, for the reasons set out by the Claimant, I consider that it is appropriate for the proceedings to continue in the name of “Persons Unknown”.

**The order sought in this case**

22. The question of whether I should make an order in this case requires consideration of the appropriateness of granting relief on the two grounds relied upon by the Claimant. First, the Claimant seeks relief to preserve the right to respect for her private and family life under Article 8 of the Convention under the Human Rights Act 1998. Secondly, the Claimant seeks relief under Section 3 of the Protection from Harassment Act 1997 in the form of an injunction to restrain an actual or expected breach of the terms of that Act.
23. I now turn to consider each of those forms of relief.

**The Law of Privacy**

24. In order to obtain relief on the first ground the Claimant must initially establish that her right to respect for private life under Article 8 is engaged. She must then, secondly, establish that relief is appropriate having regard to the right to freedom of expression under Article 10 and also taking into account the matters set out in section 12 (3) of the Human Rights Act 1998.
25. The test under Article 8 is whether the Claimant has a reasonable expectation of privacy in relation to the digital photographic images. As Lord Hope said in Campbell v MGN Limited [2004] 2 AC 457: “*The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the Claimant.*”
26. In Murray v Express Newspapers Limited [2009] Ch 481 the Court of Appeal stated at [36]:

*“The question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature*

*and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.”*

27. Mr Matthew Richardson, who appears on behalf of the Claimant, submits and I accept, that on the facts pleaded this is a case where the Claimant had a reasonable expectation of privacy both in relation to the explicit sexual photographs which she had taken for transmission to her boyfriend and also of the images taken of family and friends. I consider that a reasonable person of ordinary sensibilities in the same position as the Claimant would have a reasonable expectation of privacy in relation to those photographs. It seems to me that information which is stored on a person’s mobile phone would generally be information for which there would be a reasonable expectation of privacy. I consider that in this case the circumstances in which the photographs were taken, the nature and purpose of the intrusion caused by the distribution of the photographs, the absence of consent being given to the person who either stole or came into possession of the mobile phone and the effects on the Claimant demonstrate that this is a very strong case for the Claimant having a reasonable expectation of privacy and her right to respect for private life under Article 8 being engaged.

28. The second consideration is then the balancing of the Article 8 right with the Article 10 right. In Re S (a Child) [2005] 1 AC 593 Lord Steyn identified four propositions as emerging from Campbell v MGN Limited as being the appropriate approach to be applied by the court when both Articles 8 and 10 are engaged. At [17] Lord Steyn said:

“First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”

29. As Sir Mark Potter P said when considering those propositions in Clayton v Clayton [2006] EWCA 878 at [58]:

“There is express approval of the methodology in Campbell in which it was made clear that each Article propounds a fundamental right which there is a pressing social need to protect. Equally, each Article qualifies the right it propounds so far as it may be lawful, necessary, and proportionate to do so in order to accommodate the other. The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or trumps the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided on the basis of rival generalities. An intense focus on the comparative importance of the specific rights being

claimed in the individual cases is necessary before the ultimate balancing test in the terms of proportionality is carried out.”

30. Article 10 provides that everyone has the right to freedom of expression and this right includes the right to receive and impart information without interference. As Article 10 (2) states, the exercise of that freedom carries with it duties and responsibilities which include restrictions necessary for the prevention of crime, for the protection of the reputational rights of others and for preventing the disclosure of information received in confidence.
31. In the present case the rights of the users of BitTorrent client software to download the digital photographic images using the BitTorrent protocol and to disseminate them by seeding them have to be balanced against the rights of the Claimant under Article 8. As Lord Steyn said in Re S (a Child), there has to be a focus on the comparative importance of the specific rights being claimed in an individual case. In this case, the Claimant has the right to have her privacy respected in relation to the personal digital photographic images on her mobile phone. The images have come by either theft or loss of that phone into the hands of third parties who are seeking to disseminate them.
32. This is not a case where press freedom is at issue but it concerns the rights of individuals, not yet identified, to receive and impart information for which the Claimant has a right to privacy. In my judgment, focussing on the specifics of the rights and interests under Articles 8 and 10, these are circumstances where on the present facts, I am in no doubt that the balance falls strongly in favour of the rights of the Claimant to have her privacy respected.
33. It is however necessary further to consider whether an injunction before trial should be granted taking into account the matters in section 12 of the Human Rights Act. That section provides as follows:

*“(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.*

*(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied—*

*(a) that the applicant has taken all practicable steps to notify the respondent; or*

*(b) that there are compelling reasons why the respondent should not be notified.*

*(3) No such relief is 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.*

*(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material)...*”

34. As I have said above, I consider that, if granted, the interim injunction in this case might affect the exercise of the Convention right to freedom of expression and so this provision applies by section 12(1). In this case, as provided in section 12 (2), the respondents as “Persons Unknown” are neither present nor represented and the Claimant has not taken all practical steps to notify the Defendants. However I consider that there are compelling reasons why, in this case, the Defendants should not be notified. Essentially those reasons are the same reasons I have given above for allowing this matter to proceed by way of proceedings for an order against “Persons Unknown”. If each Defendant had to be notified before this relief could be granted it would effectively deprive the Claimant of the opportunity to obtain the immediate interim relief which would otherwise be appropriate to protect her Article 8 rights.
35. I do not consider that the material in this case can be described as journalistic, literary or artistic material or conduct connected with such material and therefore, in my judgment, section 12(4) does not apply.
36. I therefore conclude that sections 12(2) and 12(4) do not prevent an interim order from being made in this case and I now turn to section 12(3) to consider whether the Claimant is likely to establish that publication should not be allowed. As Lord Nicholls said in Cream Holdings Limited v Banerjee and the Liverpool Post and Echo Limited [2004] UKHL 44 at [22]:

*“In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the 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. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. 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 those mentioned above: 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.”*



37. In this case the circumstances in which the Article 8 rights of the Claimant have been infringed by the publication of photographs taken from a lost or stolen phone lead me to the conclusion, on the matters before me at this stage, that the Claimant is likely to establish at trial that publication should not be allowed. The users of the BitTorrent client software who are downloading and uploading those digital images have no rights in that information and that information is of a personal, private and confidential nature which the Courts should protect.
38. Having considered the matters set out in section 12 of the Human Rights Act 1998 I have come to the conclusion that, on the basis of the matters set out in the evidence and pleading, this is an appropriate case for me to grant interim relief in the form of an injunction.

**Protection from Harassment Act 1997**

39. Section 1 of the Protection from Harassment Act 1997 provides, materially, as follows:

*(1) A person must not pursue a course of conduct—*

*(a) which amounts to harassment of another, and*

*(b) which he knows or ought to know amounts to harassment of the other.*

*(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.*

*(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—*

*(a) that it was pursued for the purpose of preventing or detecting crime,*

*(b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or*

*(c) that in the particular circumstances the pursuit of the course of conduct was reasonable.*

40. The term “harassment” is not defined in the 1997 Act but section 7(2) states that harassing someone includes “alarming the person or causing the person distress.” In Thomas v News Group Newspapers Limited and another [2001] EWCA 1233 Lord Phillips, MR said at [30]:

*"Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in s.7 and which is oppressive and unreasonable."*

41. In Dowson v Chief Constable of Northumbria Police [2010] EWHC 2621(QB) Simon J set out at [142] the following six matters which he considered had to be established on the facts in order to found a claim in harassment.

*(1) there must be conduct which occurs on at least two occasions,*  
*(2) which is targeted at the Claimant,*  
*(3) which is calculated in an objective sense to cause alarm or distress,*  
*and*  
*(4) which is objectively judged to be oppressive and unacceptable.*  
*(5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.*  
*(6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: 'torment' of the victim, 'of an order which would sustain criminal liability'.*

42. Section 4A of the Public Order Act 1986 uses almost identical words to those in the 1997 Act. There are similarities therefore between the two Acts, as acknowledged by Nicol J in S&D Property Investments Limited v Nisbet[2009] EWHC 1726 (Ch) at [68].

43. The 1997 Act has been applied to remarks on internet forums in Cray v Hancock [2005] All ER (D) 66 and to an internet based campaign in Petros v Chaudhari [2004] All ER (D) 173. In S v Director of Public Prosecutions [2008] 1 WLR 2847 the Divisional Court considered a case where a picture of had been placed online with an offensive caption. It was contended that the harassment, alarm or distress had not been caused to the complainant by the defendant's act because the complainant had not seen the photograph until shown it by a Police Officer. The Divisional Court dismissed the appeal and at [13] Maurice Kay LJ stated that "*Once the defendant with the requisite intent had posted the image to the... website he took the chance that the intended harassment, alarm or distress would be caused to the complainant*".

44. In this case, considering the six matters which Simon J set out in Dowson, I consider that, on the current evidence, there has been conduct on at least two occasions; the conduct was targeted at the Claimant; it was calculated, in an objective sense, to cause alarm or distress; objectively judged it would be oppressive and unacceptable in the context in which it occurred and, in my judgment would cross the line and be conduct which amounts to harassment, alarm or distress.

45. There is therefore a good arguable case that the conduct of disseminating the digital photographic images amounts to harassment of the Claimant under the Protection from Harassment Act 1997 and that this is a case where it is appropriate to grant an injunction.

#### Anonymity

46. As I have previously ordered, I consider that the circumstances of this case are such that the identity of the Claimant should be protected under CPR 39.2(4). By these proceedings the Claimant seeks to protect her rights to privacy under Article

8 and prevent harassment under the Protection from Harassment Act 1997. I consider that non-disclosure of the identity of the Claimant is therefore necessary to protect the interests of that Claimant.

**Conclusion**

47. In such circumstances on the basis of the matters set out in the evidence and pleading I consider that this is an appropriate case for the court to grant relief both in relation to a breach of the Claimant's right to privacy and also a breach of the provisions of the Protection from Harassment Act 1997.
48. On the basis of the evidence I am satisfied by the Claimant's cross-undertaking as to damages.
49. This is a case where the Claimant is entitled to an interim injunction to prevent the distribution of the digital photographic images, either by conventional downloading from a site or by downloading by the use of the BitTorrent Protocol.
50. I therefore grant an interim injunction in the following terms against persons unknown being those people in possession or control of any part or parts of the files listed in Schedule C to the order who are served with this order:
  - (1) shall immediately cease seeding any BitTorrent containing any part or parts of the files listed in Schedule C of this Order.
  - (2) must not upload or transmit to any other person any part or parts of the files listed in Schedule C of this Order.
  - (3) must not create any derivatives of any of the files listed in Schedule C of this Order.
  - (4) must not disclose the name of Claimant (or any other information which might lead to her identification) or the names of any of the files listed in Schedule C of this Order.