Law Report

Limiting freedom of expression by agreement

Court of Appeal
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Mionis v Democratic Press SA and Others

Before Lady Justice Gloster, Lady Justice Sharp and Lord Justice Lindblom
[2017] EWCA Civ 1194
Judgment: July 31, 2017

In balancing the public interest in holding parties to an agreement settling litigation, against the public interest in the right to freedom of expression under article 10 of the European Convention on Human Rights, the court was obliged by section 12 of the Human Rights Act 1998 to consider the convention right to freedom of expression when granting relief that could affect that right.

However, the fact that defendants had, with the benefit of expert legal advice, entered into a settlement agreement voluntarily restricting their article 10 rights was an important part of the section 12 analysis and it would require a strong case for the court to conclude that such a bargain was disproportionate.

The Court of Appeal so held in allowing the appeal of the claimant, Sabby Mionis, from the decision of Sir David Eady, sitting as an additional judge of the Queen's Bench Division ([2014] EWHC 4104 (QB)) in proceeding between the claimant and the defendants, Democratic Press SA, John Fillipakis, Alexander Tarkas and Andreas Kapsabelis.

Mr Richard Rampton, QC, and **Ms Jane Phillips** for the claimant; **Mr Andrew Caldecott, QC**, and **Mr Adam Speker** for the defendants.

Lady Justice Sharp said that the claimant, a businessman with dual Greek and Israeli nationality, issued proceedings for libel against the defendants, who were all connected to a Greek language newspaper, in respect of articles published in hard copy and online, claiming damages and an injunction to prevent the repetition of the defamatory allegations complained of. The most serious defamatory allegation was that the claimant had knowingly and dishonestly facilitated tax evasion on a huge scale.

The parties compromised the proceedings after negotiations by their solicitors on their behalf. The settlement agreement stayed the libel proceedings except for the purpose of enforcing the settlement terms, which included the taking down of the articles complained of from the website, an undertaking in clause 3.1 not to republish any of the allegations and an undertaking in clause 3.2 not to publish any reference to the claimant or his immediate family. The undertaking in clause 3.2 was extremely broad.

The claimant applied to enforce the settlement agreement after the publication of two further articles. The defendants denied they were in breach of the settlement agreement. The judge refused relief.

The right to freedom of expression, which included the right to receive and impart information, was undoubtedly one of the foundations of a democratic society. The public interest in freedom of the press, subject to proportionate restrictions necessary to protect the rights of others, was firmly established at common law and in convention jurisprudence. The right to freedom of expression, however, was never regarded as absolute in domestic law or under the convention.

It was plain from article 10(2) that any national restriction on freedom of expression could be consistent with article 10 only if it was prescribed by law or directed to one or more of the objectives specified in the article and was shown by the state to be necessary in a democratic society.

Section 12 of the 1998 act reflected the central importance attached to the right to freedom of expression. It had been passed to buttress the protection afforded to freedom of speech at the interim stage and applied where the court was considering whether to grant any remedy or order, including a permanent injunction, which might affect the convention right to freedom of expression.

By requiring the court to have particular regard to the importance of that convention right in section 12(4), the court was not to place extra weight on the matters to which that subsection referred.

Section 12(4) underlined the need to have regard to the contexts in which the jurisprudence had given extra weight to freedom of expression while at the same time drawing attention to considerations that could nonetheless justify restricting that right.

One such context was where the proceedings related to journalistic material, where by section 12(4)(a)(ii) the court had to have regard to the extent to which it was, or would be, in the public interest to be published.

Section 12 explicitly required the court to consider the convention right to freedom of expression, before granting relief that could affect the exercise of that right, notwithstanding the relevant restriction appeared in a contract between private parties.

The contrary interpretation would imply a substantial and unwarranted limitation on the scope of section 12. The court had a duty as a public authority to refrain from acting incompatibly with convention rights, and section 12 imposed an obligation on the court to uphold convention rights when exercising its discretionary powers in the circumstances delineated in section 12.

However, the fact that the parties had entered into an agreement voluntarily restricting their article 10 rights could be, and in the present case was, an important part of the analysis that section 12 required the court to undertake.

While each case had to be considered on its facts, where the relevant contract was in settlement of litigation, with the benefit of expert legal advice on both sides, particularly where article 10 issues were in play, it would require a strong case for the court to conclude that such a bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles.

There were obvious advantages to both sides of the present litigation in reaching a settlement, as there were for litigants generally. Settlement also served the administration of justice and the public interest more generally by freeing court resources for other cases. The law therefore encouraged and facilitated the mutual resolution of disputes by various means for very sound reasons of public policy, and there was obviously an important public interest in the finality of settlement.

The parties decided, with expert legal advice, to enter into a contract that compromised their legal proceedings, using the settlement mechanism of a Tomlin order, on terms that went beyond the ambit of the dispute. In the event of a breach of a Tomlin order enforcement could take place within the existing action by a summary procedure, applying to convert the contractual obligations into ones enforceable by judicial process.

No admission of liability had been made, but settlement was a form of risk management and the defendants had a number of options short of settlement. In deciding to settle, those options were no longer open. The defendants had agreed to abide by terms that expressly limited what they could publish in the future. In return the claimant gave up his right to pursue the litigation, to the obvious benefit of the defendants.

In the circumstances there was no reason to doubt the validity of the settlement agreement on ordinary contractual principles or that the parties, who were on equal footing for that purpose, went into it voluntarily with their eyes fully open, both as to their obligations under the contract and the potential consequences of any breach. On the facts there was nothing disproportionate about holding the parties to their bargain.

Lady Justice Gloster and Lord Justice Lindblom agreed.

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