[GB] Court of Appeal judgment on enforcement of libel settlement agreement terms

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On 31 July 2017, the UK Court of Appeal issued an important judgment on the terms of a "Tomlin Order" preventing the publication of certain facts, and held that the grant of an injunction and an inquiry as to damages was not a disproportionate restriction on the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

During 2012 and 2013, a Greek language newspaper, Demokratia, published articles concerning a businessman, Mr Sabby Mionis, suggesting he was evading tax by holding funds in a Swiss bank. The former French Finance Minister Christine Lagarde had passed a list of Greek citizens who possessed Swiss accounts to the Greek government, which had been subsequently leaked to the media (the "Lagarde list"). Mr Mionis issued libel proceedings against the defendants, including the publisher and journalist. The defendants issued an application opposing the English court's jurisdiction. Before the hearing of this application, the defamation action was compromised by a settlement agreement between the parties comprised of a "Tomlin Order". The agreement included no publication and republication of articles whilst neither party would sue the other. Subsequently, however, two further articles were published and indirectly referred to Mr Mionis. Mr Mionis applied to the High Court asserting breach of the Tomlin Order and seeking an injunction and damages. His application was rejected in the High Court on the grounds that the settlement agreement was too vague and uncertain for it to be enforceable. Furthermore, applying Article 10 ECHR, the terms of the agreement had to be balanced against the public's interest to have the material published.

Mr Mionis appealed to the Court of Appeal, arguing that the High Court judge had failed to properly balance the enforcement of contractual terms against freedom of expression; also, the terms of the Tomlin Order were sufficiently clear to be enforceable. When applying Article 10, consideration had to be given to Section 12 of the Human Rights Act 1998, which states, "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." Pursuant to Section 12(4), "The court must have particular regard to the importance of the Convention right to freedom of expression ... and (a) the extent to which (i) the material has, or is about to, become available to the public; or (ii) it is, or would

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be, in the public interest for the material to be published." When applying Section 12, the Court stated, "the court can take account of the public interest in receiving information, as well the rights of the parties. However, the fact that the parties have entered into a voluntary agreement restricting their Article 10 rights can be ... an important analysis which Section 12 then requires this court to undertake." Moreover, confidentiality between parties had to be balanced against public interest in freedom of expression.

The parties had entered into an agreement having sought independent legal advice beforehand. The publisher had alternative options, including defending the action; making a financial offer to settle Mr Mionis's claim; or, alternatively, making an offer of amends which, if accepted, did not prevent the publisher from repeating the words complained of or from pleading justification in any future libel action Mr Mionis may bring. Instead, the publisher had entered into a contractual agreement and no evidence was produced to suggest that the contract had been induced by fraud, undue influence, misrepresentation or mistake. The publisher and the other defendants entered into the agreement "voluntarily with their eyes fully open." Applying Section 12, the Court stated that they "have recognised the cardinal importance of press freedom and the need for any restriction on that freedom to be proportionate and no more than is necessary to promote the legitimate object of the restriction." Article 10(2) permits restrictions on freedom of expression for, amongst other reasons, the protection of the rights of others, including the "private rights of the parties under an otherwise validly constituted contract of settlement". The wording of the agreement was sufficiently clear and certain to be enforced, including the indirect reference to Mr Mionis; thus his appeal was upheld. An injunction would be granted and the case remitted to the High Court for an inquiry as to damages.

Mionis v. Democratic Press SA [2017] EWCA Civ 1194, 31 July 2017

http://www.bailii.org/ew/cases/EWCA/Civ/2017/1194.html

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