THE HIGH COURT

[2021] IEHC 446

[2021 No. 3775P.]

BETWEEN

PORTAKABIN LIMITED AND PORTAKABIN (IRELAND) LIMITED

PLAINTIFFS

AND

GOOGLE IRELAND LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 2nd day of July, 2021

Introduction

1. This is an application for a so-called *Norwich Pharmacal* order directing the defendant, Google Ireland Limited, to provide the plaintiffs' solicitors with the subscriber registration information associated with a Gmail account, irishpeople2021@gmail.com. The plaintiffs' object in seeking the order is to discover the identity of the person or persons responsible for sending e-mails to the plaintiffs' customers which are said to be defamatory of the plaintiffs and damaging to their businesses. Besides, the plaintiffs hope to identify the person or persons responsible for the sending of anonymous letters to the plaintiffs' customers and management.

The application

2. The first plaintiff is an English registered company which is in the business of providing modular buildings and portable cabins. The second plaintiff is the Irish registered subsidiary of the first plaintiff, operating in Ireland. The defendant is a technology company which offers a variety of services, including a free e-mail service known as Gmail.

3. On 10th March, 2021 and 8th April, 2021 a number of the plaintiffs' customers received e-mails from a Gmail account irishpeople2021@gmail.com. The author of the e-mails signed himself or herself "*John Smith*" which the plaintiffs believe, not unreasonably, is a pseudonym. The e-mails were addressed by name to senior managers in the plaintiffs' customers and were sent to the specific e-mail addresses of those executives. The e-mails suggested, variously, that the plaintiffs were having difficulty obtaining regulatory approval for its products, that they did not meet the prescribed specifications and standards, and that one of the plaintiffs' senior managers had resigned because of ongoing issues which he was said to have had with the quality of the plaintiffs' products.

4. These e-mails are thought by the plaintiffs to be part of a wider chain of events dating back to October, 2020 when anonymous letters were sent to the plaintiffs' customers and management which are said to have contained allegations of criminal misconduct against various identified individuals. Those allegations were the subject of an external review which found no evidence to substantiate any of them and the plaintiffs' belief is that they were untrue. The first plaintiff has engaged an external forensic and integrity services provider who had opined that there is a strong likelihood that the e-mails and letters were written by the same person.

5. The plaintiffs' case is that the letters and e-mails are seriously defamatory of the plaintiffs, their executives, and third parties, and damaging to the reputation and business of the plaintiffs. Their object in seeking to establish the identity of the author is to bring legal proceedings against him or her for damages. If, as is thought may very well be the case, the author is a Portakabin employee, the plaintiffs intend to take appropriate disciplinary steps against him or her.

6. The plenary summons in this case was issued on 19th May, 2021 and on the same day I heard an *ex parte* application for an early return date for the motion, which was made returnable for 8th June, 2021. There must have been a newspaper report of the *ex parte* application because, in the meantime, I was sent an anonymous letter, the fact and content of which I brought to the attention of counsel on the hearing of the motion.

7. The author of the letter identified himself or herself as the "*whistleblower*" behind the e-mails sent using the alias John Smith. The author sought on the one hand to justify the communications and on the other offered an assurance that there would be no further communications to the plaintiffs' customers and that the Gmail account which had been used had been deleted. The author expressed apprehension of the consequences of being identified and asked that I would not to give up his or her identity.

8. Not unusually in these applications, the defendant did not appear but corresponded with the plaintiffs' solicitors as to the form of order which the court might be asked to make and spelling out its intention as to what it would do in the event that an order were to be made. The language used by the defendant's legal department was a little imprecise inasmuch as it indicated that if and when an order was made and served it would notify its subscriber of "*the request*" so that its subscriber would have an opportunity to seek relief from the order but in the circumstances, I was content to proceed on that basis.

9. There was a further caveat in Google's correspondence to the effect that if any order made was not consistent with the draft which had previously been reviewed, it reserved the right to raise any positions relevant to the issue, with which I was not entirely satisfied was a position which it was entitled to take. While it must be acknowledged that the defendant has dealt very efficiently with the application, has set out its position very clearly in correspondence, and – as is usual on these applications – has not sought an order for costs, I am not entirely convinced that it is correct in principle that a defendant should allow an application to go uncontested on the basis that it will apply to re-open any order with which it might be dissatisfied. As far as the instant application is concerned, there was no material difference between the terms of the draft order to which the defendant had in correspondence signified its agreement and the order which, in the event, the court was satisfied to make so the issue did not arise.

Legal principles

10. As I observed in Par*cel Connect Limited T/A Fastway Couriers v. Twitter International Company* [2020] IEHC 279, at para. 14, the jurisdiction of the court to make an order of the type now sought is well established:-

> *" … It was recognised by the Supreme Court in Megaleasing UK Ltd. v. Barrett [1993] ILRM 497. Finlay C.J., in a judgment in which all of the members of the court concurred, noted that Viscount Dilhorne in Norwich Pharmacal had traced the jurisdiction back to Orr v. Diaper (1876) 4 Ch. D. 92. McCarthy J. traced the jurisdiction in Ireland back to the Supreme Court of Judicature Act (Ireland) 1877. The court was unanimous that the power to make such an order was one which is to be exercised sparingly. The judgments in Megaleasing UK Ltd. spoke of a threshold test that the plaintiff was required to establish a very clear and unambiguous case of wrongdoing, but as Humphreys J. recently explained in Blythe v. Commissioner of An Garda Siochana [2019] IEHC 854, certainty or a high degree of certainty is not required. Rather it is sufficient, as Kelly J. put it in EMI Records Ireland Ltd. v. Eircom Ltd. [2005] 4 I.R. 148 that the plaintiff should make out a prima facie case of wrongful activity, or as Ryan P. put it in O'Brien v. Red Flag Consulting Limited [2017] IECA 258, a strong prima facie case."*

The purpose for which the information is sought

11. Counsel for the plaintiff quite properly drew attention to *Board of Management of Salesian Secondary College (Limerick) v. Facebook Ireland Limited* [2021] IEHC 287, a case which concerned anonymous posting of material on the internet. While drawing attention to the decision, counsel nevertheless argued that it was clearly distinguishable from the present case.

12. In *Salesian Secondary College* the applicant was the board of management of a secondary school which sought to establish the identity of the person or persons, thought to be either students or staff members, responsible for the publication of material which the judge described as coarse and vulgar; which ridiculed members of staff by reference to their personal appearance, weight and sexuality; and which complained of the high cost of food on campus and a change to the structure of the timetable. The applicant's object in seeking a *Norwich Pharmacal* order against Facebook was to discipline those responsible for the postings, whether students or staff. Simons J. proposed to refer questions to the Court of Justice of the European Union as to whether there was an implied right in articles 7, 8 and 11 of the Charter of Fundamental Rights of the European Union to post material anonymously on the internet, subject always to any countervailing objective of public interest, and as to the threshold to be met under the General Data Protection Regulation and/or the Charter before the provider of a social media platform could be compelled to disclose information which would tend to identify an otherwise anonymous account user. Simons J. also proposed referring a question as to whether it was necessary for a national court to attempt to put the potentially affected person on notice of the application and to provide them an opportunity to make submissions anonymously to the court as to whether the order sought should be made. In the event the application was withdrawn before the reference was made.

13. I am satisfied that the considerations which prompted Simons J. to propose referring the questions to the Court of Justice do not arise in this case. Simons J. noted that the jurisdiction to make disclosure orders had been recognised for several decades before the

advent of the internet but had proven to be adaptable to modern technology and had been used to compel service providers to disclose information which would identify otherwise anonymous wrongdoers. He gave, as examples, EM*I Records (Ireland) Limited v. Eircom Limited* [2005] 4 I.R. 148 – in which the order was made to allow the plaintiff to seek redress in respect of an infringement of copyright in sound recordings – and *Parcel Connect v. Twitter International Company* [2020] IEHC 279 – in which the order was made to allow the plaintiff to seek redress in respect of alleged defamation and damage to goodwill in the name and registered trademark of the plaintiff. What Simons J. characterised as the striking feature of the application before him in *Salesian Secondary College* was that the school did not seek disclosure in aid of any intended proceedings but rather for the purpose of "*dealing with*" those responsible for the postings by way of a " *disciplinary or pastoral response*".

14. The particular consideration which prompted the proposed questions for the Court of Justice was, as set out at para. 54, that:-

> *"The rights afforded to privacy, data protection and freedom of expression under EU law present a potential obstacle to the extension of the domestic law jurisdiction to grant disclosure orders." [Emphasis added.]*

15. The core issue identified by the court, at para. 78, was:-

> *"… whether the user of a social media platform, who has chosen to remain anonymous, is entitled to an expectation that that choice will be respected absent some countervailing public interest in disclosure."*

16. To which Simons J. immediately added:-

> *"Any expectation of anonymity must, of course, yield to the public interest in the prosecution of criminal offences, especially in respect of child abuse. Similarly, any expectation of anonymity must yield to the public interest in vindicating an individual's right to their reputation by way of proceedings for defamation."*

17. While it is true that in this case the plaintiff's declared object in seeking to identify the author of the e-mails and anonymous letters is to take disciplinary steps as well as to seek legal redress, I do not believe that this brings the case beyond the established jurisdiction to make the order sought. This is not a case in which the complaint is of a breach of school discipline or of the publication of coarse and vulgar abuse but of defamation and wrongful interference with contractual relations. The substance of the complaint is of wrongful damage to the plaintiffs' business and reputation. It seems to me that the communications complained of are all the more damaging if – as all the appearances are – they come from someone within the organisation and that it would be wholly artificial to contemplate that an employer who has made out a *prima facie* case of wrongdoing sufficient to warrant the making of a disclosure order and the institution of legal proceedings might not be able to take disciplinary action against an employee responsible for the wrongdoing complained of. In my view, the established public

interest in the protection of a person's reputation and business must extend to the taking of appropriate disciplinary action against a wrongdoer who happened also to be an employee.

Whistleblower?

18. In the anonymous letter sent to the court the author identified himself or herself as a "*whistleblower*". Colloquially, a whistleblower is someone, often an employee, who informs on or who reveals private information about a person or organisation regarded as being engaged in illegal or immoral activity. Some organisations facilitate and encourage anonymous communication but as I will explain, there is no general legal right to anonymity. Nor is the informant's characterisation or designation of himself or herself as a whistleblower determinative of whether he or she is or is not entitled to the protections afforded by law in respect of protected disclosures.

19. The Protected Disclosures Act, 2014 is entitled "*An Act to make provision for and in connection with the protection of persons from the taking of action against them in respect of the making of certain disclosures in the public interest and for connected purposes.*" The Act, in s. 5, provides quite an elaborate definition of a "*protected disclosure*" by reference to the subject of the disclosure and the person to whom and circumstances in which the disclosure is made. It confers a number of protections on persons who have made a protected disclosure, specifically by making provision for redress in case an employee is dismissed or penalised or otherwise suffers detriment. The Act, in s. 16, save in the circumstances and for the purposes specified, prohibits the disclosure by a person to whom a protected disclosure is made or referred of information that might identify the person by whom the protected disclosure is made. Section 14 of the Act confers immunity from civil liability for making a protected disclosure, other than a defamation action, in which case it will be a defence if the defendant can prove that the statement complained of was a protected disclosure within the meaning of the Act. While the Act, in s. 5(8) provides for a presumption in proceedings involving an issue as to whether a disclosure is a protected disclosure that it is a protected disclosure, it is a question of fact in each case.

20. The point of all of this, in so far as the author of the letters and e-mails sent to the plaintiffs' management and customers, and of the letter which was sent to the court, is concerned, is that there is no right to write anonymous letters.

21. The scheme of the Act is to extend (and at the same time confine) a series of protections to "*workers*" as opposed to statements or communications. This is true not only of the protections from dismissal, penalisation and other detriment but also of the protection of the identity of the maker of a protected disclosure which is directed to the person to whom a protected disclosure is made, and so is premised on the identity of the maker of the disclosure being known to the person to whom it is made. Moreover, the protections afforded by the Act apply to "*relevant information*" which has come to the attention of the worker in the course of his or her employment and which in the reasonable belief of the worker tends to show one of more of the listed relevant wrongdoings. Thus the test to be applied in determining whether a statement amounts to a protected disclosure entails an

objective assessment of the basis for the informant's belief. The publisher of a statement cannot bring himself or herself within the Act by simply declaring that he or she is a whistleblower. While in proceedings involving an issue as to whether a disclosure is a protected disclosure there is a presumption that it is, it will ultimately be a matter for the court to resolve.

22. The immunity from civil liability for making a protected disclosure conferred by s. 14 of the Act of 2014 expressly excepts a defamation action. If there is a tension between the presumption in s. 5(8) of the Act of 2014 that the disclosure is a protected disclosure, and the apparent requirement in s. 18(3) of the Defamation Act, 2009 for the defendant in a defamation action to prove that the statement to which the action relates is a statement to which para. 13A (introduced by s. 14(2) of the Act of 2014) of Part 1 of Schedule 1 applies, it is not immediately material. The point for present purposes is that the subject of a statement which he or she claims to be defamatory has a right to bring proceedings to vindicate his or her good name, the practical availability and the exercise of which are dependent upon establishing the identity of the maker of the statement.

Decision

23. I am satisfied that the plaintiffs have made out a sufficient case to warrant the making of the orders which they seek. The anonymous e-mails suggest that the plaintiffs' modular buildings may not be compliant with the relevant building regulations and are of poor quality and are calculated to damage the plaintiffs' business and their relationships with their customers and defamatory.

24. The anonymous letters are derogatory of the plaintiffs' management, suggesting that named managers are incompetent and dishonest. A letter to one customer suggested that the plaintiffs were giving, and so, inferentially, at least, the customer's purchasing staff were taking, back handers.

25. I do not, of course, make any finding as to the truth or otherwise of the statements complained of but proceed on the basis that the plaintiffs have adduced sufficient evidence which if accepted at trial would be a sufficient foundation for the action they propose to bring and the taking of disciplinary action against the author.

26. On the plaintiffs' undertaking that the information disclosed to them on foot of the order of the court will not be used other than for the purpose of instituting and pursuing legal proceedings seeking legal redress in respect of the statements complained of or, if the author is an employee, for taking disciplinary steps against that person, there will be an order directing the defendant to provide to the plaintiffs' solicitors by e-mail as soon as is reasonably practicable and at all events within 21 days of service of the order with the subscriber information and sign-up IP addresses and associated time stamps associated with Gmail account irishpeople2021@gmail.com to the extent that such information is in the possession or otherwise available to the defendant as of the date of the order.

27. By agreement of the parties there is to be no order as to costs.