

## **AAA privacy claim – no anonymity for covertly filmed lap-dancers**

The High Court has rejected an application for anonymity and a speedy trial in a privacy case.<sup>1</sup> The claim was brought by the operators of two Spearmint Rhino lap-dancing clubs, along with nine individuals employed as performers at the clubs. It related to covertly filmed footage taken at the clubs in February 2019 by two private investigators engaged by a campaigning organisation, Not Buying It.

In light of the evidence put forward by the individual claimants, the court did not consider an anonymity order to be necessary or proportionate, as the evidence did not justify a derogation from the fundamental principle of open justice. The application for expedition was also refused, on the basis that the defendants had provided appropriate undertakings to the claimants in relation to the footage. The court also regarded the claimed risk that the defendants' computer systems could be hacked in the period before trial as "fanciful".

### **Background**

The first nine claimants were employed as performers in lap-dancing clubs owned and operated by the tenth and eleventh claimants, under the name Spearmint Rhino. The first and second defendants were the chief executive and corporate body of a campaigning organisation, Not Buying It. Not Buying It campaigns against lap-dancing clubs, particularly when they breach the regulatory framework and specific conditions attached to their licences, on the stated basis that "such breaches cause harm to those who work within such venues and society generally". The third and fourth defendants were private investigators who were engaged by Not Buying It to visit Spearmint Rhino clubs in Camden and Sheffield and to shoot covert footage.

Not Buying It contended that the footage, shot in February 2019, showed that there had been several breaches of the operating licences for the Camden and Sheffield clubs. It intended to use the footage as evidence in licensing hearings in Sheffield and London. It also wished to publicise what it claimed to have discovered, although it had said that it would not, without consent, disclose any footage or include in written evidence anything that identifies any individual performer.

The claimants brought proceedings for misuse of private information and breach of the Data Protection Act 2018. They then sought an interim injunction to restrain the defendants from circulating, publishing or causing the publication of any of the footage, or from making any use of it that infringed their privacy. They also sought directions for a speedy trial and for the identities of the individual performers to be anonymised in the proceedings.

The claimants and Not Buying It reached agreement on the terms of an undertaking to be provided by Not Buying It, and so it was unnecessary for the court to adjudicate on the merits of the application for an interim injunction.

### **Issues**

So the issues for the court to determine were:

- (a) whether the individual performers should be granted anonymity in the proceedings; and
- (b) whether a speedy trial should be ordered.

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<sup>1</sup> *AAA v Rakoff* [2019] EWHC 2525.

## **Decision**

### Anonymity

Mr Justice Nicklin was critical of several aspects of the claimants' approach, including that they could not provide a sealed copy of the claim form to the court, and that the claim form had not been served on the defendants (although they had been provided with an unsealed copy). This arose because, under Rule 16.2 of the Civil Procedure Rules and paragraphs 2.2 and 2.6 of the Part 16 Practice Direction, the name and address for each claimant must be stated in the claim form. Under paragraph 2.5 of the Practice Direction, if a claim form does not show a full address, the claim form will be issued but retained by the court, and will not be served until either the claimant has supplied a full address or the court has dispensed with the requirement to do so. The claimants in this case had failed to make an application for anonymity of the individual performers before issuing the claim form. So their belated anonymity application was an attempt to correct that position retrospectively.

The court found the individual claimants' position difficult to understand. They had only sought an order permitting them to issue the claim form anonymising their names (and then for initials to be used in place of their names in the proceedings), but had not sought an order prohibiting publication of their real names or their identification as claimants in the proceedings. Nicklin J struggled "to see what the point of such an order would be". If there was no justification for withholding the individual claimants' names from the public in the proceedings, he noted that "the court should not artificially place obstacles in the way of reporting of the case by adopting measures that simply make it more difficult for the media to report information upon which the court has placed no restriction".

It became clear during the hearing of the claimants' application that the individual claimants did not in fact seek any restriction on reports of the proceedings that identified that they were the claimants in the proceedings and were Spearmint Rhino performers. Rather, they contended that there would be unjustifiable interference with their Article 8 rights (i.e. their right to respect for private and family life under the European Convention on Human Rights) if details from the footage came into the public domain as a result of the issue of the claim on their behalf. Nicklin J did not, however, consider an anonymity order to be either a necessary or proportionate response to those concerns.

The defendants had not served a defence, which was unsurprising because they would not be required to do so until they had been properly served with the claim form. Yet Nicklin J considered that, in relation to misuse of private information, there was at least the prospect that one or more of the defendants would contend that publication of the footage (or description of its contents) would be justified in the public interest. He noted that it remained to be seen whether the fair disposal of that issue would require any analysis of the detail of what could be seen in the footage. If, however, it was necessary to resolve at trial any issue of what the footage showed and/or what it amounted to, the court had the ability to adopt measures that would properly respect any Article 8 issues that arose. In short, the fact that there might be an issue that needed to be addressed later in the proceedings would not justify an order anonymising the individual performers now.

### Expedition

The claimants' application for expedition was also refused. In light of the undertakings that had been provided by Not Buying It, Nicklin J did not consider there was "any particular urgency" that justified the court in "advancing the determination of this case at a trial ahead of other litigants whose cases are pending before the court". He commented that the claimants were not in a very strong position in that regard, as they had not yet managed to serve the claim form on any of the defendants. The court also gave short shrift to an argument advanced by counsel for the claimants that, despite the undertakings given by Not Buying It, there was a risk that their computers might be hacked, rejecting it as "fanciful".

### Anonymity pending appeal

The judgment was handed down without including the names of the individual performers in order to preserve their appeal rights. If no appeal is lodged, or if an appeal is unsuccessful, a further copy of the judgment will be issued with the individual performers' names included.

### **Comment**

The judgment serves as a cautionary reminder that the courts will not simply “wave through” applications for orders that involve derogations from the fundamental principle of open justice. The general rule is that court proceedings are public. Derogations from the principle of open justice can only be justified in exceptional circumstances, when strictly necessary to secure the proper administration of justice.

As a starting point, the principle recognises that there is a public interest in knowing the names of parties and witnesses in all cases. There is no general exception where privacy or confidentiality is in issue. The burden of establishing a case for derogation lies on the person seeking it, and must be established by clear and cogent evidence.

In this instance, the individual claimants provided neither clear nor cogent evidence to support their application for anonymity. The basis on which counsel for the claimants sought anonymity for the individual performers shifted during the hearing, but culminated in stating that they were unconcerned about being identified as Spearmint Rhino performers. That fundamentally undermined the application for anonymity.

In procedural terms, the claimants had also erred by not making an application for anonymity before issuing the claim. That would be the “norm” in cases in which derogations from open justice are sought and can genuinely be justified, such as certain cases involving trade secrets and certain privacy cases.

Besides, if granted, the order that the performers sought in order to correct that error retrospectively (i.e. for their names to be withheld from the claim form) would, as the court noted, have been of little or no practical effect in any event, as it was not coupled with a reporting restriction prohibiting their identification.

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