

THE HIGH COURT

[2020 No. 3091 P.]

BETWEEN

PARCEL CONNECT LIMITED TRADING AS FASTWAY COURIERS

AND

A & G COURIERS LIMITED

PLAINTIFFS

AND

TWITTER INTERNATIONAL COMPANY

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 5th day of June, 2020

Introduction

1. This is an application on behalf of the plaintiffs for what has come to be known as a *Norwich Pharmacal* order directing the defendant to disclose to the plaintiffs such information as it holds relating to the identity of the person or persons who created and/or control an account on the eponymous social media platform operated by the defendant.
2. The plaintiffs claim to have been wronged in a number of respects by entries posted on the identified Twitter account. The premise of the action is that the defendant is responsible for the wrongs complained of. The premise of the application, to adopt the formulation of Lord Reid in *Norwich Pharmacal v. Customs & Excise* [1974] A.C. 133, is that even if the defendant is not legally responsible for the wrongdoing - or perhaps whether or not the defendant is a concurrent wrongdoer - it has nevertheless got so mixed up in the wrongdoing of the operator of the account as to have facilitated the wrongdoing that it has come under a duty to assist the plaintiff by disclosing the identity of the wrongdoer.

The evidence

3. The plaintiffs are companies incorporated in the State who, together with associated companies identified as the Parcel Connect Group, offer a range of what are described as parcel logistic services including a courier distribution service under the business name Fastway Couriers, a network of pick-up and drop-off points at convenience stores, a service that allows the plaintiffs' customers to receive goods from UK retailers who do not deliver to Ireland, and delivery services linked to online sales by a number of retailers.
4. The Fastway Service operated by the first plaintiff is part of a global network of couriers operated under franchise from a New Zealand company. The franchise to carry on the Fastway business in Ireland is owned by the second plaintiff.
5. The defendant is a company incorporated in the State. It is said to be a subsidiary of Twitter Inc. and to be involved in the operation of the Twitter social media platform. The evidence is that the defendant is identified on the Twitter website as the service provider and data controller for users of the service within the European Union and the European Economic Area.

6. In July, 2013 the second plaintiff created a Twitter account in the name of *Fastway Couriers IRE* with a user name or Twitter handle *@fastwayireland*, but never used it.
7. In December, 2019 the plaintiffs became aware of a Twitter account in the name of *Fastway Couriers Ireland* with a Twitter handle *@fastwayIRE*. Besides the first plaintiff's trade name, the operator of the account was using the Fastway logo, which is a registered trademark.
8. The plaintiffs initially corresponded with the defendant through a portal on the defendant's website and later by e-mail asking that the account be removed on the ground that it was pretending to represent the plaintiffs' business and brand. In support of this application the plaintiffs have exhibited copies of screenshots of the account taken on various dates. Whatever the initial impression of a visitor to the site may have been – and there were a number of entries posted by the plaintiffs' customers and by customers of the retailers for whom the plaintiffs provide services – it seems to me that no one who read the entries posted by *@fastwayIRE* could sensibly have believed that the account was operated by the plaintiffs. For example, the postings in response to apparently genuine enquiries as to when parcel deliveries might be expected suggested that parcels had been flung over the rainbow and into fields, left in caves for a few weeks, and the contents eaten by drivers. Apart from such silliness, many of the entries were crass and vulgar. It is not necessary to set out the detail.
9. To the right of each entry, under the heading "*Fastwah? Couriers Irel...*" and the plaintiffs' logo, there was a statement "*Official*customer service account for ALL LIES! Where's your package? F[---] knows ** parody account, don't cry***". The affidavit of the plaintiffs' finance director and company secretary, Mr. Brian Walsh, says that this entry is a "bio" which is supposed to identify the person to whom the account relates and potentially its purpose.
10. In early April, 2020 the plaintiffs instructed solicitors who wrote to the associate general counsel of the defendant. The account was suspended for a few days but then restored. The plaintiffs' request that the account be removed was passed on to the account holder – thereby identifying the complainant and the grounds of complaint – but the defendant declined to identify the account holder to the plaintiffs' solicitors. By e-mail of 11th April, 2020 the defendant advised that it had investigated the complaint and determined that the material did not violate its terms of service, or rules.
11. By monitoring the account, the plaintiffs saw that on 14th April, 2020 the name of the account was changed from *Fastway Couriers Ireland* to *Fastway Couriers Ireland?*, on 20th April, 2020 to *Fastwah? Couriers Ireland* and on 28th April, 2020 to *Fartway Deliveries Ireland*. The plaintiffs are unaware of the reason, if any, for these changes of name, or whether they were prompted or directed by the defendant.
12. This action was commenced by plenary summons issued on 29th April, 2020 and on the following day an order was made by Twomey J. permitting short service of a motion returnable for 7th May, 2020. The first relief claimed in the general indorsement of claim

is a *Norwich Pharmacal* order but the summons and the motion also sought injunctions requiring the defendant to remove the account from the Twitter platform and a variety of orders restraining the publication of the material complained of. In the week or so between the date of issue of the motion and the date on which it was heard the account was removed. Mr. Holland S.C., for the defendant, informed the court that it had been deactivated by the account holder. In those circumstances, Mr. Donogh Hardiman, for the plaintiffs, did not pursue the claims for injunctive relief but asked that the court would make a *Norwich Pharmacal* order.

13. As to the substance of the application, the defendant's position is that any dispute arising out of the postings complained of is a dispute between the plaintiffs and the person or persons who operate the account. The defendant, by Mr. Holland, asserts that it espouses freedom of expression and privacy but says that it is not the publisher of, and has no obligation to monitor, and is not the arbiter of, the material posted on its platform. The defendant will not release user information unless pursuant to a court order. As to whether an order should be made and as to the basis upon which the court should consider the application the defendant, as Mr. Holland puts it, stands mute.

Legal principles

14. The jurisdiction of the court to make an order of the type 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 Prarmacal* 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.
15. Mr. Hardiman acknowledged the onus on the plaintiff to make out a strong *prima facie* case and quite properly referred the court to the language used by Finlay C.J. in *Megaleasing UK Ltd.* and the observations on the test as there articulated by Humphreys J. in *Blythe*. Mr. Holland, as I have said, did not argue that the test was other than as submitted by Mr. Hardiman.

Discussion

16. Mr. Hardiman argues that the owner of the account has been masquerading as, and using the voice of, his clients. Of that, I am entirely unconvinced. I accept that someone stumbling upon the account, or coming upon the account following a search for Fastway Couriers, might – until the name of the site was changed on 20th April, 2020 and possibly until the name was changed again on 28th April, 2020 – have very well formed the initial

impression from the name of the account and the username and the use of the plaintiffs' logo that the account was associated with the plaintiffs but any such impression, it seems to me, would have been immediately dispelled by a cursory reading of the entries. However, I do not believe that anything ultimately turns on that issue. If the owner of the account was not holding himself out or passing himself off as the plaintiffs, the plaintiffs nevertheless have good grounds for their complaint.

17. It is submitted that the plaintiffs have established a *prima facie* case that entries posted on the account by the username associated with the account are defamatory. The plaintiffs' business, it is said, is founded on efficient personal service to its customers and the respect and trust of their customers – in the sense of those who engage and pay for the delivery services, as well as of those to whom the parcels are to be delivered. I am not persuaded that the plaintiffs have made out a case to the requisite standard that the plaintiffs or their staff use foul and abusive language, but I am persuaded that they have a case to make that the postings mean that they are incompetent and inefficient and wrongfully and maliciously hold the plaintiffs up to ridicule. There may ultimately be issues as to whether the words complained of amounted to no more than vulgar abuse, or that no reasonable person would take them seriously but for present purposes I believe that the case is sufficiently made out.
18. It is further submitted that the use of the second plaintiff's name and logo infringes their trademark. That complaint too, in my view, has been sufficiently justified. The Fastway name and logo are both registered as EU and international trademarks in the name of the New Zealand franchisor, which has licensed their use by the second plaintiff and authorised proceedings in respect of the Twitter account complained of. I am satisfied that a strong *prima facie* case has been made out that the goodwill in the name and mark has been damaged by its use on the account and by its association with the comments posted using the username associated with the account.
19. It is further submitted that the creation and operation of the account has wrongfully interfered with the plaintiffs' business and contractual relations by creating the misapprehension that the account is operated by or associated with the plaintiffs. While I accept that the initial comments or questions posted by some members of the public who were expecting parcels show that they were misled, I find it difficult to believe that the misapprehension could have survived the answers, as in several cases it plainly did not. The plaintiffs have not in terms sought to make the case that the postings constituted malicious falsehood, but the case is made that the account derides and denigrates their business, which, coupled with malice, would come within s. 42 of the Defamation Act, 2009.

Form of order

20. There was some debate as to the form of any order that might be made. Mr. Holland submitted, and Mr. Hardiman did not contest, that in principle orders must be clear and certain and leave those to whom they are addressed in no doubt as to what is required to be done, or not done. The order sought is an order requiring the defendant to disclose such information as it holds relating to the identity of the person or persons who created

and/or control the account and the Twitter handle. The plaintiffs, in the way of things, do not know precisely what information the defendant has but suggests that it will, or will likely, include a name, e-mail address, telephone number(s), date and time of registration, and IP addresses associated with each log-in and log-out. Mr. Holland submits that an order requiring the defendant to disclose such information as it has in relation to the identity of the owner and operator of the account “*including but not limited to*” the information which the plaintiffs specifically identify might be less than entirely clear but does not propose any alternative formulation. The defendant’s position, indeed, is that it has nothing to say as to what the information should be and does not warrant that such information as it has will be sufficient to allow the plaintiffs to establish the true identity of the owner and operator of the account.

21. The proposition that an order must be clear, precise and unambiguous is undoubtedly correct. I do not believe that the principle would be offended by the proposed formulation. The plaintiffs, it seems to me, cannot know precisely what information the defendant has in relation to the identity of the unknown person or persons, but it can, I think, reasonably hypothesise as to what information the defendant may have and, by reference to a list, forestall any doubt or issue as to its relevance to establishing the identity of the person or persons unknown. So, for example, the IP addresses associated with the devices used to access the account might not directly identify the owner or operator but might allow the plaintiffs to trace the person or persons associated with the IP address. I am satisfied that the listing of specific information will add to rather than detract from the clarity of the order. This approach is common enough in legislative drafting.
22. There is one final matter which was not addressed in argument, but which occurred to me on re-reading the authorities and it is whether the making of the order should be conditional upon an undertaking by the plaintiffs as to the use of the information they will obtain. In *EMI Records Ireland Ltd. v. Eircom Ltd.* the order was made conditional on an undertaking that the information disclosed would be used solely for the purpose of seeking redress in respect of the wrongdoing complained of, in that case the infringement of the copyright which was licensed to the plaintiffs. The jurisdiction invoked by the plaintiff on this application is a very specific one. It is a jurisdiction to order the disclosure of information as to the identity of an alleged wrongdoer for the specific purpose of allowing the plaintiffs to institute proceedings against him or her or them. It seems to me that in principle it must be inherent in the invocation of the jurisdiction that the order is sought and made on the basis of an implied undertaking (similar to that which is well established in the case of discovery of documents) that any information disclosed will not be used for any purpose other than the specific purpose for which it is sought but for the avoidance of doubt (and with a view to ensuring that the order is clear on its face) I will follow *EMI Records Ireland Ltd. v. Eircom Ltd.* and make the order expressly conditional on an undertaking that the information disclosed by the defendant will not be used for any purpose other than seeking redress in respect of the wrongs complained of. That undertaking may be given in writing by the plaintiffs’ solicitors.

23. On the plaintiffs' undertaking in those terms, there will be an order requiring the defendant, within seven days of service on the defendant of the perfected order, to provide to the plaintiffs, by e-mail to the plaintiffs' solicitors, any details which it holds relating to the identity of the person or persons who created or control the account which was created in or about December, 2019 and which has most recently borne the name "*Fartway Deliveries Ireland*" and the Twitter handle "*@fartwayIRE*" including but not limited to the name or names, e-mail address or addresses, telephone number(s) and all IP addresses associated with all log-ins and log-outs relating to the account.
24. While I have endeavoured to ensure that there will be no doubt or difficulty in compliance with the order, I will nevertheless give liberty to either party to apply.
25. By consent of the parties, the balance of the motion will be struck out and there will be no order as to costs.