

**IN THE DISTRICT COURT
AT THAMES**

**CIV-2017-075-000062
[2017] NZDC 7913**

IN THE MATTER OF: An application for orders under the Harmful Digital Communications Act 2015

BETWEEN [MICHAEL HARPER] AND [EILEEN SMITH] (on behalf of [Molly Smith-Harper])
Plaintiffs

AND WWW.INSTAGRAM.COM, SNAPCHAT AND FACEBOOK
Defendants

Hearing: On the papers

Appearances: On the papers

Judgment: 12 April 2017

DIRECTIONS OF JUDGE R E NEAVE

Application

[1] The plaintiffs have applied for orders under the Harmful Digital Communications Act 2016 (“HDCA”) on behalf of their daughter against three online content hosts.

[2] The orders sought are that the online content hosts :

- (a) Tell the Court who posted or sent the communications complained of;
- (b) Identify to the Court the anonymous communicators.

[3] The three defendants are simply identified in terms of their domain name.

Evidence

[4] The plaintiffs have filed an affidavit in support of their application in which they depose that content sent predominantly through the three defendants over a period of some time makes abusive and insulting reference to their daughter's :

- (a) Sexual behaviour;
- (b) Appearance; and
- (c) Other aspects of her life.

[5] The communications have been prolific, persistent and sent through false identifies to ensure the anonymity of the person or persons responsible. The communications also urge, on occasions, that their daughter commit suicide and that the communications have been prolific and persistent.

[6] The plaintiffs state that their daughter has suffered significant harm, she has disengaged from education, reported some suicidal ideation, and has been in receipt of counselling. She still reports and appears distressed and the communications have caused significant stress to the whole family. The plaintiffs have attached to their affidavit copies of various postings.

Findings

[7] I find :

- (a) That the plaintiffs are the parents or guardians of an affected individual for the purposes of s 11(1)(a) of the HDCA;
- (b) The defendants are online content hosts;

(c) The communications constitute serious and repeated breaches of communications principles¹ in particular :

- (i) Principle 5 : the communications have been used to harass an individual;
- (ii) Principal 9 : the communications have been used to incite or encourage an individual to commit suicide.

I think it is also arguable that there are breaches of :

- (iii) Principle 2: that the communication is threatening, intimidating or menacing;
- (iv) Principle 3: would be grossly offensive to a reasonable person in the position of an affected individual;
- (v) And Principle 4: the communications are arguably indecent or obscene.

[8] I am satisfied having regard to the contents of the plaintiff's affidavit and the annexures to it that :

- (a) There has been a serious breach and repeated breach of one or more of the communication principles as outlined above; and
- (b) The breach is caused or is likely to cause serious emotional distress to the plaintiff.

[9] I am therefore satisfied that the plaintiff meets the threshold for proceedings under s 12 of the HDCA Act.

¹ See S 6 HDCA

Mode of Hearing

[10] The plaintiff has applied for orders without notice but without setting out the grounds for such an order that can be discerned from the application. In deciding whether to consider an application without notice, it is necessary to have regard to the principles of natural justice – see s 15(2) HDCA. Notification of the proceedings is an essential part of the right to natural justice² and departure from this right should only occur to the extent that can be demonstrably justified in a free and democratic society – see ss 5 and 27 New Zealand Bill of rights Act 1990.

[11] No reasons are provided as to why the application must be dealt with without notice. Furthermore, given the application is entirely in relation to the digital content hosts, without their cooperation and involvement, any orders are pointless.

[12] I therefore direct that the application be dealt with as if it had been made on notice – see rr 21(3)(a) and 24 Harmful Digital Communications Rules 2016.

[13] I consider that the determination of the application on the basis of the written material alone will be appropriate and meets the objectives of s 3(b) HDCA and I therefore direct that the hearing be held on the papers as soon as is practicable.

Other directions

[14] Because of the nature of the orders in relation to the defendants, it is necessary that a technical adviser be appointed – s 17(3) HDCA. I direct that the Registrar or Deputy Registrar of the Court appoint a technical adviser who is available to consider the application at the earliest practicable date. I also direct that the technical adviser advise as to the best form of service of the proceedings on the online content hosts, who have not been properly identified in the application.

² *Combined Beneficiaries Union v Auckland COGS Committee* [2009] 2 NZLR 56 (CA) at [11]; see also Andrew and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed. Thomson Reuters, Wellington 2015) at [25.2.16].

[15] I would have happily made interim orders against the defendants, but because of the difficulties in service and failure to identify them in a proper fashion, there seems to me little that can be done that will be effective.

[16] There is an order that the residential address, telephone number and email address of the plaintiffs be kept confidential and not disclosed to any person.

[17] Further, given that it is inappropriate for the Court to become directly and actively involved in the conduct of the proceedings and that the plaintiffs appear in person, I direct that the Court appoint an amicus to investigate in the identification and service of the proceedings. In the first instance, I suggest Mr A J F Wilding, barrister of Christchurch. If he is unavailable, the Registrar is to discuss the appointment of an alternative with me.

R E Neave
District Court Judge

Signed this day of 2017 atam/pm