

Injunctions to Restrain Publication

Carine Patry

cpatry@landmarkchambers.co.uk

Twitter: @CarinePatry1

Issues to be considered: 3 questions

- (1) Can an injunction be obtained in order to restrain publication of an OFSTED report before it is published?
- (2) If yes, then what principles will the courts apply?
- (3) Have there been any changes in the way the courts have addressed injunctions in this field and how likely is that to continue?

(1) Can an injunction be obtained?

- Remember that OFSTED is under a statutory duty to publish and therefore must do so, even if the inspected body has raised concerns
- But the answer is **yes**, sometimes, in limited circumstances
- Need to look briefly at the history of applications for injunctions in order to understand where we are now



2009: City College Birmingham Case

- This was an application for an injunction to restrain publication *prior* to permission having been granted (in a claim for judicial review)
- Burton J, hearing the case, was not being asked to consider permission at that stage, but concluded that it was an arguable case (the test for permission)
- But despite the fact that the claim was arguable and merited a full hearing was not enough, the judge concluded that there needed to be “exceptional circumstances” or “most compelling reasons”
- He declined to grant the injunction



Cases since City College Birmingham

- The City College Birmingham decision was used for many years as authority for how difficult it would be to obtain an injunction
- But in 2013, the tide started to turn
- In **Cambridge Associates Management v OFSTED** [2013] EWHC 1157, the Administrative Court granted an injunction pre-permission and the judge granting permission continued the injunction (although ultimately the challenge failed)
- Then in 2016 came **Interim Executive Board of X v OFSTED** [2016] EWHC 2004 (Admin)



Interim Executive Board of X v OFSTED

- A school with an Islamic ethos
- Had recently come out of special measures
- Then within 6 months had a further inspection, prompted by a visit from the Chief Inspector of Schools, who had expressed a concern about segregation of boys and girls from Year 5
- That further inspection had produced a disastrous report, due to be published over the summer
- The school sought a pre-publication injunction, prior to permission stage
- It was **granted** by Stuart-Smith J

Interim Board v OFSTED – continued

- Stuart-Smith J concluded that the material he had seen showed that the unpublished report was “infected by a pre-determined mindset or bias”
- There was compelling evidence that publication of the report would cause irreparable damage and also the school would go back into special measures
- Concluded that the C had established a pressing ground for an injunction in exceptional circumstances
- The matter then came before Jay J on a ‘rolled up’ hearing 3 months later
- He allowed the challenge on two grounds and required OFSTED to re-examine the report & allow comment but then they could publish

Interim Exec Board of Al-Hijrah & Durand



- Court of Appeal lifted anonymity because on any basis either criticisms would be justified or school would be vindicated
- They allowed OFSTED's appeal on 3 grounds
- Concluded that the school's policy of segregation was unlawful discrimination
- **Durand Academy Trust v OFSTED** [2017] EWHC 2097
- In that case, Holman J had made an interim injunction and OFSTED agreed to the continuation of it until determination of the claim, but then applied to lift it. McGowan J declined to lift it.
- Report was quashed

(2) What Principles do the courts apply?

- The Claimant in a public law injunction case has additional hurdles to overcome over & above a private law case
- There is a public interest in publishing OFSTED reports
- But this has to be balanced against the fact that defamatory statements may be published and damage of doing so may be irreparable
- The strength of the claim/nature of the circumstances will always be relevant in determining whether the grant an injunction
- Does there still need to be exceptional circumstances/compelling reasons? **Yes**

(3) Changes to Principles?

- So what has changed?
- City College Birmingham case: “exceptional circumstances”
- Interim Board of X: still “pressing need and pressing social need in exceptional circumstances”
- So nothing has changed but the courts do appear to be more willing to intervene
- Will often turn on the strength of the evidence of damage
- And each case will undoubtedly turn on its own facts

