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Judgment: approved by the Court for handing down | *Delivered:* **14/4/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

JAMES HUGH ALLISTER

Plaintiff;

-and-

IAN PAISLEY JUNIOR, DEREK J DOUGLAS AND J C PRINT LIMITED

Defendants.

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GILLEN J

Application

[1] This is an application for an interlocutory injunction by the plaintiff to restrain the publication and distribution of an election leaflet printed by the third named defendant and published by the second named defendant on behalf of the first named defendant. The plaintiff and the first named defendant are each candidates for the North Antrim constituency in the forthcoming General Election.

[2] The plaintiff has issued a writ against the defendants alleging a libel contained in the leaflet entitled "In North Antrim Vote Paisley" published in April 2010. On page 7 of the leaflet, which is devoted to matters relating to the candidature of the plaintiff, and under the heading "Confronting the Lie"(hereinafter called the "heading ") the document states:

> "Despite being elected to European Office in 2004 in 2004/2005 tax year Jim Allister personally received an additional £182,451 from the taxpayer in criminal legal aid fees ON TOP OF HIS MEP SALARY AND ASSOCIATED BENEFITS; in 2005/2006 he received

> £54,146 from the taxpayer in criminal legal aid fees."(hereinafter called "the impugned words")

[3] It is the contention of the plaintiff that the inescapable and intended meaning and inference of this paragraph is that while being publicly paid as a member of the European Parliament he was working and earning income as a barrister practising in the criminal courts. It is common case that he was not so engaged . In his affidavit of 11 April 2010, Mr Allister adds:

> "Having regard to earlier references on this page of the leaflet I believe the intention and effect is to present me as a hypocrite and dishonest in my criticism of 'double-jobbing', which has been something upon which I have criticised Members of Parliament who are also Members of the Legislative Assembly at Stormont and which has been a live political issue of considerable public interest.
>
> 5. Till taking my seat in the European Parliament in June 2004 I was a Senior Counsel primarily operating in the criminal courts, but upon taking my seat I never appeared thereafter in court in any criminal case. By reason of the arrangements attaching to the payment of fees due by Legal Aid there always has been a significant time lag between work done and receipt of payment for same."

[4] At paragraph 7 Mr Allister goes on to aver:

> "In what is anticipated as a closely fought election in North Antrim the distribution of such defamatory material will be gravely damaging to my candidature and character in circumstances where damages will not undo the severe wrong done to me. Nor, I believe, is it of public benefit that such a falsehood should be published and circulated to every home across the constituency."

[5] In the first instance the matter came before Higgins LJ on Sunday 11 April 2010 by way of an ex parte application. An interim injunction was granted restraining the defendants from publication or distribution of the leaflet containing the impugned words pending this hearing.

[6] The matter now comes before me as an inter partes hearing. I have had the benefit of an affidavit from Mr Paisley , a skeleton argument from Mr

Scoffield on behalf of the defendants and evidence from Mr Allister , none of which was before Higgins LJ.

[7] As directed by Higgins LJ, on the morning of the hearing the first named defendant filed an affidavit on his behalf in which, inter alia, Mr Paisley asserted that the words used "stated merely that Mr Allister received monies in criminal legal aid fees in specified tax years. They do not say that he was working as a criminal barrister at that time; nor that he was earning income as a barrister practising in the criminal courts at that time." He accepts that the press release from the Northern Ireland Legal Services Commission (NILSC) website disclosing the payments to Mr Allister note that the payments may represent payment for work covering a number of years and that payments may be made a number of years after a case concludes. At paragraph 19 Mr Paisley notes:

> "I have no difficulty conceding that the payment received by Mr Allister may have been in relation to criminal cases completed before he became a MEP."

[8] Mr Paisley goes on to aver that there is a separate public interest in the transparency of payments made to elected representatives from the tax payer in the relevant years when he was an MEP. Further he relies upon the fact that Mr Allister has repeatedly raised the issues of pay, benefits and expenses which are paid for by the taxpayer as an issue in the election campaign as constituting "exorbitant", "extortionate", "excessive" or "extravagant" payments from public funds on a number of occasions even where the payments made were within the relevant rules. Accordingly he argues that the question of monies received by candidates from the taxpayer, including Mr Allister is relevant to the campaign and of public interest to the electorate of North Antrim. In particular he alleges that the public are entitled to take a view about Mr Allister's reliance on his record of declining to claim certain expenses in light of his significant income from work as a senior counsel.

[9] Finally Mr Paisley claims in the course of his affidavit that the suggestion of "double-jobbing" now relied on by Mr Allister was not the intention of the wording used in his election literature but insofar as the wording could be so construed, he alleges that he is aware that Mr Allister did take on civil legal work whilst working as an MEP for which he charged and that therefore it is difficult to see how any material wrong has been done to his reputation.

Evidence

[10] In addition to the affidavits from the two candidates in this case, I permitted Mr Allister to be called to give evidence on oath before me. My reason for so doing was because the urgency of this case had resulted in Mr

Paisley, at short notice, supplying to the court and to the plaintiff an affidavit on the morning of the hearing containing inter alia the averment already referred to in this judgment that the plaintiff had taken on legal work whilst working as a MEP of a civil rather of a criminal nature. Rather than take up time by adjourning the case for a further affidavit in response, I permitted Mr Allister to give evidence before me.

[11] In the course of his evidence in chief and cross examination Mr Allister stated:-

- He had not taken up his position as an MEP until 20 July 2004.
- He had carried out no criminal work as a barrister after taking up his post as an MEP.
- Whilst an MEP, he had settled approximately 12 civil legal cases, with the approval of his political party, in circumstances where he had been closely connected to the cases for some time. He also appeared in court with carriage of a complex brain injury case with which he had had lengthy involvement to seek court approval on 21 January 2005.
- Thereafter the only new civil work he took on was a defamation action for a member of his party which he saw that through to a negotiated settlement about January 2008. At the request of another member of his party he had taken carriage to completion and settlement of another libel action.
- He gave advice to an individual known to him who had allegedly been libelled and charged a fee for this.
- He appeared before a tribunal on a pro bono basis for a professional client.
- Finally he took on three planning appeals, two of which were during the Summer vacation when the European Parliament was not sitting in 2006 and a further matter on 11 October 2005. He charged fees in all of these cases.

[12] He had publicly acknowledged participating in these cases in the course of a radio interview and so all this material was in the public domain .

[13] Whilst accepting that he had therefore been engaged in some civil work up until January 2008, he emphasised the sparse nature of that work over a period of 5 years.

Legal principles governing this case

[14] From a number of authorities put before me, I have distilled the following principles governing the jurisdiction to grant interim injunctions to restrain publication of alleged defamatory statements. I consider the principles to be as follows:

[15] The jurisdiction ought to be exercised only in the clearest of cases. (Coulson v Coulson (1887) 3 TLR 846 (Coulson's case) and Bonnard v Perryman (1891) 2 Ch 269 CA (Bonnard's case). The reluctance to grant peremptory injunctions is rooted in the importance attached to the right of free speech. Lord Coleridge in Bonnard at p284 said

> "The right of free speech is one which it is for the public interest that individuals should possess and, indeed, that they should exercise without impediment, so long as no wrongful act is done: and, unless an alleged libel is untrue, there is no wrong committed: but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed . . ."

That statement of the law has been endorsed and applied consistently since 1891.

[16] These sentiments are now underpinned by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms pursuant to the Human Rights Act 1998.

[17] A plaintiff seeking an interim injunction must be prompt in his application. The relief is discretionary and if he is dilatory he will probably fail. That did not arise in this case.

[18] An interim injunction will only be granted where four basic conditions prevail.

- The statement is unarguably defamatory
- There are no grounds for concluding the statement may be true
- There is no other evidence which might succeed
- There is evidence of an intention to repeat or public the defamatory statement

See Tugendhat J in Coys Limited v Autocherish Limited (2004) EWHC 1334 QBD.

[19] A procedural requirement imposed by S.12(2) of the Human Rights Act 1998 is that a person against whom the injunction is sought must be present or represented at the application, or notified about it, unless there are good reasons for not doing so. Section 12(3) of the Act stipulates that an injunction to restrain publication before trial is not to be granted unless the

applicant is likely to establish that publication should not be allowed. In Cream Holdings Limited v. Bannerjee [2005] 1 AC 253(Cream's case) the House of Lords ruled that the term "likely" was not to be given a rigid definition, but was to be applied pragmatically to the circumstances of each individual case. Lord Nicholls explained at paragraph 22 as follows:-

> "Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood needed to satisfy Section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of Section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospect of success "sufficiently favourable" the general approach should be that the courts will be exceedingly slow to make interim restraint orders where the application has not satisfied the court he will probably ("more likely than not") succeed at trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence and Article 10 and any countervailing Convention rights. But there will be cases where it will be necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite circumstance; where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

[20] Under Section 106 of the Representation of the People Act 1983(the 1983 Act), it is an illegal practice for a person before or during an election, for the purpose of affecting the return of any candidate at the election, to make or publish any false statement of fact in relation to the candidates personal character or conduct unless he can show he had reasonable grounds for believing, and did believe the statement to be true. A person making or

publishing such a statement may be restrained by interim or perpetual injunction by the High Court from any repetition of that false statement or a false statement of similar character and, for the purpose of granting an interim injunction, prima facie proof of the falsity of the statement shall be sufficient.

[21] I respectfully adopt the view expressed by the authors of Gatley on Libel and Slander, 11th Edition, at paragraph 27.36 who dealt with the necessary proof for an alleged infringement of the 1983 Act in the following terms:-

> "On an application for an injunction under this Act the burden lies on the plaintiff to prove that the statement is false, and the remedy is by injunction only. As prima facie proof is sufficient for an interim injunction, it would seem that the rule in Bonnard v. Perryman does not apply. If the defendant cannot displace a prima facie case of falsity, an injunction may be granted not withstanding the defendant's insistence that he can and will prove at trial the statement to be true."

[22] However the statement complained of must be a statement of fact and not merely of opinion. Moreover the statement must relate to the personal character or conduct of the plaintiff. The dividing line between what is personal and what is political is not always readily apparent or easy to draw.

Conclusion

[23] The jurisdiction to grant interim injunctions to restrain publication of defamatory statements must thus be only exercised in the clearest of cases. The importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. That principle is rarely more evident than in cases involving political debate and the period preceding an election so as to ensure that opinion and information of all kinds are permitted to circulate freely (see Bowman v UK 19 EHRR at paragraph 42).

[24] I have come to the conclusion that this not an instance of the "clearest cases" adumbrated by Lord Esher in Coulson's case. In doing so I make it clear that it is not sufficient at this stage for the plaintiff to have established that the impugned words are capable of being defamatory –that is for a later stage in the proceedings While the impugned words may be capable of being defamatory I am not satisfied that the statements are unarguably defamatory. Mr Kane QC, who appeared on behalf of the plaintiff with Mr Babington, argued that the juxtaposition of the heading and the impugned words to which I have earlier referred were in their natural and ordinary meaning or alternatively by way innuendo an assertion, maliciously made,

that the plaintiff had earned income as a practising barrister in the criminal courts whilst being publicly paid as a Member of the European Parliament and that he had "double jobbed".

[25] Mr Scoffield was in my view entitled to argue that the heading must be seen in the context of election rhetoric. In my view electioneering statements should not be perused with all the precision of a jeweller's scales and absent a specific or express allegation that the plaintiff was double jobbing, I consider it is not unarguable to assert that the impugned words can be set in the context of allegation and counter allegation made by two candidates over who has been guilty of exercising a measure of extravagance with public funds even in circumstances where there can be no suggestion that Mr Allister was not properly paid the legal aid fees in this instance. I believe that this is a classic case where it is for the jury eventually to construe these words and to decide whether they are libellous or not. I could not say that this is an instance where any jury would say that the matter complained of was libellous given the background electioneering material from Mr Allister exhibited in Mr Paisley's affidavit.

[26] In this context a jury might take into account the fact that on the same page of the leaflet specific reference is made to Mr Allister leaving politics "to make his fortune at the Bar Library. He has only returned as a peace time politician" without any specific reference to him "double jobbing" or earning money when he was an MEP. I consider that it thus could be argued that there are no grounds for concluding that the impugned statement, if true, amounts to defamation or that they are false in their context having regard to the "delicate nature" of this jurisdiction.

[27] Mr Kane argued that the failure to specifically draw attention to the public statement by the Legal Services Commission that such fees may represent fees for work covering a number of years and for a variety of cases – a fact known to the first defendant – amounted to a bald assertion to the contrary by Mr Paisley. I believe this is a matter for a jury to determine. I consider that it is not unarguable that mere statement of reception of the fees without further explanation did not amount to the defamation alleged by Mr Kane.

[28] Thirdly, I am not satisfied that there are not other defences which *might* succeed in the absence of clear evidence of malice. Qualified privilege might arise in circumstances where a candidate asserts that he has an interest in exchanging such information with his electorate. Where an occasion is protected by qualified privilege the court should not grant an injunction to restrain a libel unless it could be shown that the impugned words were known by the defendants to be untrue so that they were clearly malicious. I believe there is much to be said for the view expressed by Griffiths LJ in Herbage Pressdram [1984] 1 WLR 1160 at 1164 when he said:-

> "Only if, at the interlocutory stage, the evidence of malice is absolutely overwhelming will the court intervene to restrain publication by way of an interlocutory injunction".

Similarly, I consider that the defendants *might* succeed in the defence of fair comment about a matter of public interest in the context of a debate about the receipt of large sums of public money where the acceptance or rejection of expenses etc are a live issue between the parties.

[29] I accept the argument of Mr Scoffield that where the alleged sting of the defamation is to be found in the charge of "double jobbing", even if the jury were satisfied that such an inference was to be drawn from the impugned words. The defence might succeed in the defence of justification on the basis the main imputation was true in so far as Mr Allister had admittedly carried on some civil work as a barrister whilst acting as an MEP albeit it was arguably of a minimal nature and did not involve criminal work .

[30] Turning to the provisions of Section 106 of the Representation of the People Act 1983, I am not satisfied that this is a case where I should exercise my discretion to grant an injunction. The plaintiff has not satisfied me that the statement is false in relation to his personal character or conduct. This is a serious allegation to make since it would amount to an illegal practice and a criminal offence with attendant adverse consequences upon conviction. Mr Scoffield in my view was correct to draw my attention to the views expressed by the author of Halsbury's Laws of England, 4th Edition, 2007 Reissue at paragraph 668 as follows:-

> "Although jurisdiction is conferred on the High Court to make orders before an election in restraint of false statements made in relation to a candidate, the guiding principle of otherwise is that the court should be extremely slow to intervene in the machinery of an election before it has taken place and should do so only in exceptional circumstances."

[31] I do not believe that this is one of those instances of exceptional circumstances. It is open to argument that the words complained of do not amount to an untrue statement of fact but are part and parcel of the political opinions that seem to have been the hallmark of the campaign to date between these two candidates in the context of allegations of extravagant public expense. Consequently I am not satisfied at this stage that there is prima-facie proof that the statements are false in the context of section 106 of the 1983 Act. I do not consider this case comes within the exceptions adumbrated in Creams's case given the lack of any express allegation of double jobbing.

[25] In coming to this conclusion I am conscious of the need to ensure the free expression of opinion by those who put themselves into the democratic process for election by the population at large. Section 12(3) of the Human Rights Act 1998 is relevant in this context and I am not persuaded that I should restrain publication in this case in the absence of me being satisfied that the applicant is likely to establish that publication should not be allowed. I pause to observe again that I am far from ruling that these words may not be capable of defamatory meaning or that a jury may not come to a conclusion favourable to the plaintiff. I am not satisfied, however, that it is appropriate that an interlocutory injunction should be granted at this time and accordingly I refuse the plaintiff's application.