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Judgment: approved by the Court for handing down | *Delivered:* **10/03/2017**
*(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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FRANCIS CUSHNAHAN

Plaintiff:

and

BRITISH BROADCASTING CORPORATION

and

JEREMY ADAMS

Defendants:

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STEPHENS J

Introduction

[1] The plaintiff, Francis Cushnahan, has commenced proceedings against the first defendant, the British Broadcasting Corporation ("the BBC") and the second defendant, Jeremy Adams, who is the Editor of "Spotlight," a BBC Northern Ireland current affairs programme. The proceedings relate to a number of publications by the BBC including the broadcast of two Spotlight programmes, namely:

(a) A programme entitled "Selling Northern Ireland: Mandy McAuley uncovers a scandal at the heart of the sale of Northern Ireland property loans." ("Spotlight One"). It was broadcast on Monday 29 February 2016. It was re broadcast on 6 March 2016 (5/1784). The BBC's standard policy for most programmes is that they are made available to the public on iPlayer for 30 days after its last broadcast on a channel. In accordance with that policy Spotlight One remained available to view on the BBC iPlayer until 5 April 2016. (1/173/34).

(b) The second was entitled "The NAMA Tapes: Corruption and Cover-up: Mandy McAuley uncovers secret recordings that expose corruption around NAMA's billion pound Northern Ireland property deal." ("Spotlight Two"). It was broadcast on 6 September 2016. It was re-broadcast on 7 September 2016. It remained available to view on the BBC iPlayer until 8 October 2016. (1/173/35).

[2] The plaintiff states that both Spotlight programmes allege either that he was criminally corrupt or that he was reasonably suspected of such corruption. In essence the Spotlight programmes allege that the plaintiff, whilst a member of the Northern Ireland Advisory Committee ("NIAC") of the National Asset Management Agency ("NAMA") and whilst being paid by NAMA, was at the same time acting on behalf of and being paid by the purchaser of NAMA's Northern Ireland loan portfolio and on behalf of and being paid by developers who owed money to NAMA. In particular that one developer, Mr Miskelly, paid the plaintiff £40,000 in cash in August 2012. The plaintiff is concerned that the BBC will re-broadcast one or other or both of the Spotlight programmes or alternatively will broadcast another programme ("Spotlight Three") containing further material alleging that he was corrupt or is suspected of corruption. He has brought this application seeking an interlocutory injunction to prevent such eventualities. The context in which the plaintiff seeks an interlocutory injunction is that in July 2015 the National Crime Agency ("NCA") commenced a criminal investigation into the sale by NAMA to Cerberus Capital Management ("Cerberus") for £1.241 billion of its loans to Northern Irish property developers. The plaintiff is a suspect in that criminal investigation, which is ongoing.

[3] The plaintiff primarily asserts that he is entitled to an interlocutory injunction on the basis that any further broadcast by the BBC stating that he is corrupt or is suspected of corruption would be a contempt of court under the strict liability rule in the Contempt of Court Act 1981 or a common law contempt of court or would be a breach of his rights under Article 6 ECHR in any potential criminal trial to an impartial tribunal and his presumption of innocence. The plaintiff also asserts that he is entitled to an interlocutory injunction on the basis of the tort of misuse of private information, under the Protection from Harassment (Northern Ireland) Order 1997 to prevent anticipated harassment and also under the Data Protection Act 1998 to prevent an anticipated failure by the BBC to comply with the data protection principles. The plaintiff, whilst asserting in correspondence that both Spotlight One and Two were defamatory of him, has not sued for defamation. This application involves a consideration of the interplay between the various causes of action and also the interaction between strict liability contempt under the Contempt of Court Act 1981, common law contempt of court and Article 6 ECHR.

[4] For their part the defendants have applied under Order 18 Rule 19(d) of the Rules of the Court of Judicature (Northern Ireland) 1980 to strike out the plaintiff's action on the grounds that its institution and or its continuation amounts to an abuse of the process of the Court as it is contended that in reality the plaintiff's claim is for

the protection of his reputation and has been brought on grounds other than defamation as an improper attempt to circumvent the rule in *Bonnard v Perryman* [1891] 2 Ch. 269; and (b) the plaintiff's claim is an application in respect of alleged contempt of court which he states has already been committed and for which the plaintiff does not have the consent of the Attorney General, as required by section 7 of the Contempt of Court Act 1981 and at common law. Furthermore that these proceedings have been brought after the plaintiff sought and was refused the consent of the Attorney General and that this was not disclosed to the Court when the plaintiff's proceedings were issued.

[5] On 5 October 2016, when the plaintiff's application first came into my list for directions, I imposed a reporting restriction order under section 4(2) of the Contempt of Court Act 1981 which still remains in force, see *Cream Holdings Limited and others v. Banerjee and others* [2004] UKHL 44 at paragraph [22]. I considered that an injunction was necessary to enable the court to hear and give proper consideration to this application for an interlocutory injunction before arriving at a concluded view as to whether to maintain the reporting restriction order. I should also record that the court order incorrectly fails to identify section 4(2) as the jurisdiction under which the reporting restriction order was made.

[6] Mr O'Donoghue QC and Mr Girvan appeared on behalf of the plaintiff instructed by Johnsons. Mr Simpson QC and Mr Scherbel-Ball appeared on behalf of the defendants instructed by C & J Black. I am grateful to counsel for their assistance in relation to the complex legal issues and to both firms of solicitors for the meticulous way in which the factual issues were addressed and for the orderly preparation of the voluminous papers.

Further introductory matters

(a) The interlocutory injunction which the plaintiff seeks

[7] As originally framed the order which the plaintiff sought was to compel the defendants "to both remove and to take steps to prevent the further broadcast or publication … of the two Spotlight programmes". However, there is material in the Spotlight programmes which does not suggest corruption on the part of the plaintiff and about which the plaintiff could not complain. Furthermore, the desired requirement on the BBC "to take steps" suggests that what was being sought was an interlocutory mandatory injunction rather than a prohibitory injunction. The reason for the suggestion that the BBC should "take steps" is contained elsewhere in the plaintiff's application in that the two Spotlight programmes are available on YouTube in breach of the BBC's copyright. Initially, it was suggested that the BBC should be compelled to require YouTube to remove the two Spotlight programmes by commencing proceedings against YouTube if necessary. I was subsequently informed that the plaintiffs did not seek such an order, but rather that the order sought was to prevent or prohibit the BBC from re-broadcasting the two Spotlight programmes. The issue then arose as to whether such an order would be effective as

the BBC would still be at liberty to broadcast a different programme based on different material but containing the same basic allegation of corruption or the suspicion of corruption on the part of the plaintiff. These points then led the plaintiff to seek an order that until the trial of this action or further order the defendants whether by themselves, their servants or agents or otherwise are restrained from broadcasting or publishing any allegation accusing or evidence suggesting that the plaintiff is guilty of any criminal offence arising from: (a) the plaintiff's membership of NIAC; (b) the plaintiff's alleged involvement in the sale or any attempted sale of the NI loan portfolio which was ultimately sold to Cerberus in or around April 2014; and (c) the plaintiff's communications with John Miskelly as described in the BBC Spotlight One and Two programmes. Mr Simpson stated that such an injunction was obviously far too wide given that if there was a decision to prosecute the plaintiff then the BBC would be prevented from reporting that decision. Furthermore, the BBC would be prevented from publishing a fair and accurate report of any criminal trial if one was to take place nor could it publish a report of what might be said in future in the Northern Ireland Assembly or in Dáil Éireann. For his part Mr O'Donoghue does not seek to prevent such reporting but rather to prevent investigatory programmes of the same nature as Spotlight One and Spotlight Two. If in the event I grant an interlocutory injunction I will allow the defendants to articulate the appropriate exceptions.

(b) Legal principles in relation to an interlocutory injunction and Article 10 ECHR

[8] In this case the defendants' Article 10 rights to freedom of expression are engaged. Section 12(1) of the Human Rights Act 1998 provides that:

> "This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression."

Section 12(3) is in the following terms:

> "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish the publication should not be allowed."

Section 12(4) provides:

> "The court must have particular regard to the importance of the Convention right to freedom of expression, and where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material …, to –
>
> (a) the extent to which –

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published."

[9] In relation to the test under section 12(3) Lord Nicholls in *Cream Holdings Limited and others v Banerjee and others* [2004] UKHL 44 stated at paragraph [22]:

> "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 of success at the trial 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 prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the 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 on article 10 and any countervailing Convention rights. *But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite.* Circumstances 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." (emphasis added).

That is the test which I seek to apply.

[10] By section 12(4) of the Human Rights Act 1998 this court is enjoined to have particular regard to the importance of the Convention right to freedom of expression. In *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 Lord Nicholls at page 200, letters G-H, stated:

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by

> the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

The court is also enjoined under section 12(4) to consider whether the material has or is about to become available to the public and to consider the public interest for the material to be published.

(c) Legal principles in relation to an interlocutory injunction in defamation proceedings and the interplay with claims based on other causes of action

[11] In defamation proceedings where the defendant contends that the words complained of are true and asserts that he will plead and seek at trial to prove the defence of justification, the court will not grant an interlocutory injunction, unless, exceptionally the court is satisfied that such a defence is one that cannot succeed, see *Bonnard v Perryman* [1891] 2 Ch 269. If the "nub" of the plaintiff's claim is the protection of reputation he cannot avoid the restrictions set out in *Bonnard v Perryman* by formulating the claim in confidence, privacy or some other cause of action see *Hannon v News Group Newspapers Limited* [2015] EMLR 1. The authorities establish that where the real cause of action is defamation other causes of action could not be invoked in order to obtain a remedy which was not open in defamation see *Hannon v News Group Newspapers Limited* [2014] EWHC 1580 (Ch).

[12] In *Service Corporation International plc & Anor v Channel 4 Television Corporation & Anor* [1999] EMLR 83 in the context of an application for an interlocutory injunction Lightman J considered the relationship between a claim in defamation and claims based on other causes of action. In that case the plaintiff's initial basis of complaint was defamation but when seeking an interlocutory injunction the plaintiff disclaimed defamation and relied instead on breach of confidence, trespass and copyright. Lightman J stated:

> "The reason that defamation is not and cannot be invoked is because no interlocutory injunction could be granted on this ground in view of the defendants' plain and obvious intention to plead to any such claim the defence of justification. The invocation of other causes of action is necessary if there is to be any arguable claim to an interlocutory injunction. The rule prohibiting the grant of an injunction where the claim is in defamation does not extend to claims based on other causes of action despite the fact that a claim in defamation might also have been brought, *but if the claim based on some other cause of action is in reality a claim brought to protect the plaintiff's reputation and the reliance on the other cause of action is merely a device to circumvent the rule, the overriding need to protect freedom of speech requires that the same rule be applied*: see *Mick Rodata v Rivendale*

> [1991] FSR 681 and *Golf Oil v Page* [1987] 1 Ch 327 at 334. I have great difficulty in seeing the three alternative claims made in this case as other than attempts to circumvent the rule and to seek protection for the plaintiff's reputation." (emphasis added).

I consider that this is an illustration of the principle that if the "nub" of the plaintiff's claim is the protection of reputation he cannot avoid the restrictions set out in *Bonnard v Perryman* by formulating the claim in confidence, privacy or some other cause of action.

(d) Whether in relation to its journalism and editorial decisions the BBC is a public authority

[13] Section 6(1) of the Human Rights Act 1998 provides that it "is unlawful for a public authority to act in a way which is incompatible with a Convention right." Section 6(3) provides that "public authority" includes:

> "(a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature …."

Section 7(1) provides that:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) may –
>
> (a) bring proceedings against the authority under this act in the appropriate court or tribunal; or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."

In the plaintiff's Writ (1/7) and at paragraph [38] of Mr Tweed's affidavit sworn on 29 September 2016 (2/734) it was asserted that the BBC is a public authority for the purposes of section 6 of the Human Rights Act 1998 and that the broadcast of Spotlight One and Two and the anticipated broadcast of Spotlight Three is incompatible with Article 6 of the Convention. In response it was contended on behalf of the BBC that in relation to its journalism and editorial decisions these bare assertions that it was a public authority were made without supporting authority or citation; being simply wrong in law and in fact.

[14] At the hearing of the interlocutory application the plaintiff did not seek to establish the factual basis for his assertion that the BBC was a public authority. At

paragraph [4] of Mr Johnston's affidavit sworn on 28 October 2016 (1/90a) it was stated that the BBC is operationally and constitutionally independent of the State in respect of its journalism in accordance with its Royal Charter. In addition to that evidence a number of authorities were referred to on behalf of the BBC. I consider that the way in which this issue developed at this interlocutory hearing lacked detailed factual analysis. The issue is a mixed question of fact and law. The conclusion to which I come at this interlocutory stage is provisional awaiting the final trial of the action.

[15] In respect of the submission that the BBC is not a public authority in relation to its journalism and editorial decisions, the defendants relied on the decision in *Cohn v BBC* [2012] EWHC 4037 at paragraphs [19] to [20], on the addendum judgment of Weatherup J in *ABC v BBC and Conway* [2015] NIQB 86 at paragraph [9] and on the decision in the *Commissioners for Her Majesty's Revenue and Customs v The Open University* [2016] EWCA Civ 114 in which Lord Justice Lewison considered the position of the BBC at paragraphs [85] and [86]. The BBC contends that the approach in these authorities mirrors the approach of the ECtHR in *Osterreichischer Rundfunk v Austria* (App No: 35841/02), 7 December 2006 in which the applicant was the Austrian Broadcasting Corporation (ORF) which complained that there had been a violation of its right to freedom of expression as provided in Article 10 of the Convention. The Austrian government asserted that the applicant did not have locus standi within the meaning of Article 34 of the Convention. The applicant contested the government's view contending that although it was a legal person established by public law and provided a public service it did not exercise any sovereign powers comparable to that of an administrative authority. Also it contended that if one followed the government's argument, public law broadcasting companies would not be able to rely on the provisions of the Convention, whereas their private competitors could, which would not be in conformity with the concept of the Convention. On the facts of that case the ECtHR concluded that the Austrian legislator had devised a framework which ensured the Austrian broadcastings editorial independence and its institutional autonomy. Consequently, the Austrian broadcasting qualified as a "non-governmental organisation" within the meaning of Article 34 of the Convention and was therefore entitled to lodge an application under Article 10 of the Convention.

[16] The decision in *Osterreichischer Rundfunk v Austria* was fact sensitive. The conclusion at this interlocutory stage where there has been no detailed factual analysis is that the plaintiff has not satisfied the court that he will probably ("more likely than not") succeed at the trial in establishing that the BBC is a public authority in relation to its journalism and editorial decisions. Furthermore, I do not consider that the plaintiff has established a lesser degree of likelihood which would in some circumstances suffice as a prerequisite; see *Cream Holdings Limited and others v Banerjee and others.*

(e) When, for purposes of Article 6(1) of the Convention, does a person become subject to a criminal charge?

[17] The conclusion that the plaintiff has not satisfied the court he will probably ("more likely than not") succeed at the trial in establishing that the BBC is a public authority in relation to its journalism and editorial decisions does not mean that Article 6 is irrelevant. Whether Article 6 is engaged does impact on other aspects of this case including the question as to whether under section 4(2) of the 1981 Contempt of Court Act this court should impose a reporting restriction order in relation to these civil proceedings. The question as to whether Article 6 is engaged also impacts on Mr O'Donoghue's alternative submission. He contended that even if the BBC was not a public authority, so that no claim could be brought under section 7(1) of the HRA 1998 against it for breach of the Article 6 Convention right to a fair trial, that this court still had jurisdiction to grant an injunction as this court was a public authority and so should not act in a way which was incompatible with a Convention right by refusing to grant an injunction.

[18] In *Attorney General's Reference No 2 of 2001* [2003] UKHL 68 Lord Bingham of Cornhill addressed the question as to when, for purposes of Article 6(1) of the Convention, does a person become subject to a criminal charge. The case concerned the requirement that a criminal charge be heard within a reasonable time but the question as to when a person becomes subject to a criminal charge does not depend on which Article 6 right is being considered. Lord Bingham stated that:

> "In seeking to give an autonomous definition of "criminal charge" for Convention purposes the European Court has had to confront the problem that procedural regimes vary widely in different member states and a specific rule appropriate in one might be quite inappropriate in another. Mindful of this problem, but doubtless seeking some uniformity of outcome in different member states, the Court has drawn on earlier authority to formulate a test in general terms."

He went on to state that the test was to be found in paragraph 73 of the Court's judgment in *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, 27 and then also stated that the formulation which gives effect to the Strasbourg jurisprudence was that as a general rule, a person become subject to a criminal charge "at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him." He added that as the Court of Appeal correctly held (at p 1872, para 10 of its judgment in that case) "that the period will ordinarily begin when a defendant is formally charged or served with a summons, but it wisely forbore (pp 1872-1873, paras 11-13) to lay down any inflexible rule".

[19] In *Ambrose v Harris* [2011] UKSC 2435 and at paragraph [62] Lord Hope stated that "the test is whether the situation of the individual was substantially affected". That in addressing that test "a substantive approach, rather than a formal approach,

should be adopted". That such an approach "should look behind the appearances and investigate the realities of the procedure in question". This suggests that the words 'official notification' should not be taken literally, and that events that happened after the moment when the test is to be taken to have been satisfied may inform the answer to the question whether the position of the individual has been substantially affected.

[20] The test which I seek to apply substantively is that a person becomes subject to a criminal charge whenever the situation of the individual is substantially affected.

(f) The BBC's intention as to further Spotlight broadcasts

[21] The plaintiffs have enquired of the BBC as to whether it intends to rebroadcast Spotlight One or Two. The plaintiff has also enquired as to whether the BBC intends to broadcast a further Spotlight programme ("Spotlight Three"). The response from Mr Simpson, during the hearing, was that "as of *today* the BBC has no plans to broadcast a third programme" (emphasis added). That reply leaves open the question as to whether the BBC had plans in the past to broadcast Spotlight Three. It also leaves open the potential for the BBC in the future to have plans to broadcast Spotlight Three. No further response was forthcoming from the BBC.

[22] On 6 February 2017 Johnsons on behalf of the plaintiff wrote to the NCA stating that they understood that the BBC had now commissioned Spotlight Three with a theme which relates to claims made by Barry Lloyd. It is apparent from newspaper articles that Mr Lloyd is reputed to have e-mails from 2010 to 2012 which show him and the plaintiff working on prospective deals (4/1761(L)) and that he has contacted the BBC. That letter and the newspaper articles were exhibited in this application. The response of the BBC was as set out by Mr Simpson.

[23] The BBC has raised concerns about the pace of the criminal investigation in Northern Ireland (1/175/44). It considers that only after and because of the revelations in Spotlight Two has NAMA referred concerns to the Garda (1/175/44). The BBC maintains that there is a strong continuing public interest in Project Eagle. The BBC continue to broadcast an excerpt from Spotlight Two which shows a visual reconstruction together with a covert audio recording of what purports to be Mr Miskelly paying Mr Cushnahan £40,000 in a carpark of a Belfast hospital. I consider that there is ample material to be included in Spotlight Three. On the basis that the BBC is prepared to continue publishing reconstructed images of what purports to be the plaintiff receiving £40,000 in cash in highly dubious circumstances and also based on the material which is available to the BBC and the BBC's strong conviction that publication is in the public interest I consider that it is likely, on the balance of probabilities, that the BBC will broadcast Spotlight Three unless criminal proceedings are active. Also based on the contents of Spotlight One and Two I consider that Spotlight Three will not only allege that the plaintiff is suspected of corruption but will assert actual corruption.

(g) Advance scripts of the programme

[24] The BBC declined the NCA's request to make available to them in advance of the broadcast of Spotlight One and Two a script of the programmes. The BBC contends that this is vital to maintaining its editorial control. It is in contrast to the approach taken by the Sunday Times which provided the Attorney General with a copy of the article which it proposed to publish in advance of publication, see *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54 at 59 letter h. In adopting this attitude the BBC relied on the fact that in *Lord Browne of Madingley v Associated Newspapers Limited* [2008] QB 103 at paragraph [11] there was no adverse comment by the Court of Appeal in circumstances where the defendant newspaper did not provide a draft of the article to the plaintiff. The BBC also relied on the judgment of Munby J in *Re B (A Child) (Disclosure)* [2004] 2 FLR 142 at paragraphs [139] to [148] and on the judgment of the Court of Appeal in *Leary v BBC (Court of Appeal Transcript dated 29 September 1989).* The case of *Leary* concerned an appeal by the BBC against an injunction restraining the showing of a TV programme. The plaintiff contended that the programme would be a contempt of court. The BBC refused or did not accede to the plaintiff's solicitor's request to have sight of the script of the programme. Lord Donaldson MR stated:

> "I am very concerned that no one should think that on a speculative basis you can go to the courts and call upon the publisher of printed material or television or radio material to come forward and tell the court exactly what it is proposed to do, and invite the court to act as a censor. That is not the function of the court. It is different, of course, if there is solid evidence as to what the content of the publication will be and that evidence leads the court to conclude that prima facie there will be a Contempt of Court. Then it would no doubt be right that the defendant should be invited; but not compelled, to tell the court what in fact he intends to publish, because of course if he does not and there is a prima facie case that there will be a contempt he will find himself faced with an injunction. That is not the same thing as setting the courts up as a censorship body to which people must submit material on pain of being prohibited from publishing it."

[25] In this case the BBC has refused to make available to the NCA in advance of broadcast a script of Spotlights One and Two. On that basis I consider it unlikely that they will make available a script of any future programme in advance of publication either to the NCA, to the plaintiff or to the Attorney General. However, this means that if there is a prima facie case that there will be a contempt of court and the BBC maintains that approach, then an injunction will issue.

(h) Other press coverage

[26] The defendants have gathered together a number of articles which were published in the press in relation to the plaintiff. In a schedule (2/530-532) the articles published in the period 3 July 2015 to February 2016 are listed. All these articles were prior to the broadcast on 29 February 2016 of Spotlight One. The articles were published in amongst others the Irish Times, the Irish News, the Belfast Telegraph, the Guardian, the Irish Post, the Newsletter and the Sunday Times. Then there are a collection of articles after Spotlight One and before Spotlight Two (2/612-619). Those articles are then followed by a further collection after Spotlight Two (2/620-658).

[27] I consider that there was considerable public debate about the role played by the plaintiff irrespective of Spotlight One and Two. However, both Spotlight programmes conveyed information graphically to the public and they both engendered further press articles and also provoked action by for instance NAMA making a reference to An Garda.

(i) The present position in relation to the NCA investigation

[28] On 5 December 2016 the plaintiff was informed by the NCA that "the investigation is ongoing and Mr Cushnahan remains a suspect". He was also told that the timeframe "is expected to be at least 6 months" and that the NCA "will be in touch if and when" they needed to interview him further (4/1761E). The plaintiff states that there has been no further request to him to attend for a further interview and that he has received no further indication of a likely timeframe for the NCA investigation. If the NCA abide by the 6 month timeframe then they will have concluded their investigation by June 2017. Thereafter, depending on the outcome of the investigation the papers could be referred to the Public Prosecution Service, who in turn may commence criminal proceedings against the plaintiff. On the basis of the present information I anticipate that if there are any criminal proceedings involving the plaintiff that they will come to trial by, at the earliest, May, June or September 2018.

(j) The involvement of and the response to date by, the Attorney General

[29] In correspondence to the Attorney General it was repeatedly and incorrectly asserted to him on behalf of the plaintiff at a time when criminal proceedings were not active that they were active. The consistent response from the Attorney General was that the criminal proceedings were not active within the meaning of the 1981 Act. Furthermore in relation to common law contempt of court by letter dated 8 September 2016 (4/1734) Ian Wimpress, solicitor to the Attorney General, stated that:

> "… you will aware that it is necessary to demonstrate an intention to interfere with the administration of justice. The Attorney does

not consider on the material available to him that it can be plausibly suggested that the BBC has been acting with such an intention."

The Attorney General has declined to institute proceedings for contempt of court and has declined to consent to the plaintiff commencing proceedings.

[30] After these proceedings were commenced and by letter dated 9 November 2016 Johnsons sent the Attorney General the affidavits filed on behalf of the BBC of Peter Johnston and David Jordan, again seeking the Attorney General's consent for contempt proceedings under the 1981 Act. The Attorney General replied on 10 November 2016 stating that the material that had been furnished comprised certain affidavit evidence filed by the BBC in response to the plaintiff's application for an injunction. It went on to say that it would be helpful to the Attorney to see the totality of the affidavit evidence filed in this matter.

[31] Upon learning of that correspondence the response to the plaintiff's solicitors from the BBC by letter dated 17 November 2016 was that it was entirely inappropriate that the plaintiff's solicitors should have sent this material to any other person as neither of these affidavits, nor any exhibit, had yet been opened in court or referred to in court. That the affidavits, with their exhibits, were filed in response to the plaintiff's application for an injunction and that a litigant filing an affidavit in proceedings brought against it is entitled to know that such affidavit evidence will not be used by his opposing party for purposes other than the litigation. It was suggested on behalf of the BBC that in the circumstances it was an abuse of the procedure of the court for the plaintiff's solicitors to have sent this material to the Attorney General. They required the plaintiff's solicitor's immediate undertaking that no further material would be supplied to the Attorney General in advance of the court's consideration of this matter. It was also suggested that sending the material to the Attorney General was prima face, in breach of the court's reporting restriction order of 5 October 2016.

[32] This approach on behalf of the BBC was incorrect. The Attorney General is the appropriate officer to safeguard the public interests. He should be assisted rather than obstructed in the discharge of his duties. The BBC through Mr Scherbel-Ball recognised that was the correct position and agreed to the totality of files 1-5 being made available to the Attorney General. I have indicated that a CD recording of the court hearing can also be made available to the Attorney General. Whatever the outcome of the plaintiff's application a copy of the court's judgment will be made available to the Attorney General who can consider whether he wishes to intervene in the proceedings and if an injunction is not granted whether he wishes to appeal to the Court of Appeal , see *Millen v Brown* [1984] 10 NIJB. Furthermore, he can give his own independent consideration to the question as to whether he wishes to apply for an injunction.

Factual Background

[33] In order to understand the background to Spotlight One and Two it is not necessary to set out the entire factual sequence. In summarising the facts I emphasise that I do so for the limited purposes of this interlocutory application. At trial either in these proceedings or in any other proceedings, entirely different factual findings could be made.

[34] Apart from those already mentioned the individuals involved included:

(a) Mr Brian Rowntree who was also a member of NIAC;

(b) Brown Rudnick, an international law firm which has a number of offices including one in London. It acted on behalf of PIMCO and then on behalf of Cerberus;

(c) PIMCO who was the original proposed purchaser of the NI loan portfolio from NAMA but withdrew from the transaction;

(d) Cerberus who was the eventual purchaser;

(e) Tughans Solicitors who acted in Northern Ireland on behalf of Brown Rudnick for PIMCO and then subsequently for Cerberus;

(d) Ian Coulter managing partner in Tughans Solicitors;

(e) Frank Daly, Chairman of NAMA;

(f) Ronnie Hanna, Head of NAMA's Asset Recovery;

(g) David Gray, an accountant;

(h) Paul Tweed of Johnson, Solicitors who is the plaintiff's solicitor in relation to these civil proceedings; and

(i) John Rice of John J Rice & Co, Solicitors who is the plaintiff's solicitor in relation to the criminal investigation being carried on by the NCA.

[35] The plaintiff is a prominent businessman in Northern Ireland having been involved in the banking sector. He was awarded a CBE in 2001 for his services to the Northern Ireland economy. He has connections with leading politicians, in particular from the Democratic Unionist Party. He has held a number of public positions including as a director of the Office of the First and Deputy First Minister, as Chairman of the Harbour Commissioners and as a non-executive member of the audit committee of the Northern Ireland Housing Executive.

[36] Spotlight is BBC Northern Ireland's flagship current affairs programme which provides in depth investigation and analysis behind the stories behind the news headlines (1/91/8).

[37] NAMA was brought into existence at a time of financial crisis which had forced the government of the Republic of Ireland to step in to underwrite the banking system. NAMA acquired property loans from Irish banks under the Republic of Ireland's National Asset Management Agency Act 2009 ("the NAMA Act"). Those loans were secured on properties, not only in the Republic of Ireland, but also, for instance, in Northern Ireland. NAMA's role was of crucial importance in Northern Ireland in that it had taken control of debts and secured assets of 56 debtors based here ("the NI loan portfolio"). That loan portfolio was secured on over 900 properties, of which half were in Northern Ireland. The total indebtedness of that portfolio amounted at its height to £4.5 billion. The loans had the potential to involve the bankruptcy and insolvency of many prominent business leaders in Northern Ireland and to adversely affect the Northern Irish economy.

[38] Shortly after 21 December 2009, when NAMA commenced operating and given that its decisions would affect the economy in Northern Ireland, it was decided that there should be a Committee of NAMA to advise it in relation to loans secured on properties in Northern Ireland. This led to the establishment of NIAC in January 2010. The plaintiff was nominated as a member of NIAC by Mr Wilson, the then Finance Minister of the Northern Ireland Executive, and in May 2010 NAMA approved his appointment to NIAC. He was reappointed to NIAC on 18 June 2012. In the event he served on NIAC between May 2010 and 8 November 2013 (5/1783). He resigned citing personal reasons including his own and his wife's ill health.

[39] As its title suggests NIAC provides advice to NAMA and has no separate plenary powers.

[40] The first meeting of NIAC was held on 12 May 2010 at which it was noted that any and all information relating to the Committee was confidential (1/151/6). Section 202 of the NAMA Act sets out express statutory confidentiality restrictions on the part of those working for NAMA.

[41] During NIAC meetings and in annual statements of interest, the plaintiff declared his involvement as an advisor, mainly on a non-fee basis to six debtors and to a third party engaged in a joint venture with a seventh debtor. It was estimated that the loans of the six debtors represented about half of the value of the NI loan portfolio.

[42] By virtue of section 172 of the NAMA Act a debtor was prohibited from obtaining the release of any secured properties unless the full amount of the debt was repaid. However, such a prohibition did not apply to a purchaser of the NI loan portfolio. Such a purchaser could release a property to the original debtor even if that debtor did not repay the full amount of the debt. In the event the NI loan

portfolio was sold on 20 June 2014 to Cerberus for £1.241 billion and subsequently Cerberus has, for consideration, released a considerable number of the properties to the original debtors.

[43] The subject matter of both Spotlight programmes was the project named by NAMA as "Project Eagle" which was the sale by it in April/June 2014 to Cerberus of the NI loan portfolio. (5/1784/17).

[44] The BBC Spotlight team commenced an investigation in relation to Project Eagle in order to "better inform the public of this highly important financial matter and some apparent irregularities concerning NAMA" (1/92/12). The investigation included the role which, amongst others, the Plaintiff played in advising NAMA, commercial bidders for Project Eagle and Northern Ireland based debtors whose assets were controlled by NAMA.

[45] The date upon which the Spotlight investigation commenced is not clear but it must have been before 21 April 2015 which was the date of a meeting in the Malmaison Hotel, Belfast which was covertly recorded.

[46] On 21 April 2015 the BBC carried out covert audio and visual recording of a meeting involving the plaintiff, Mr Gray and Mr Miskelly, a developer who owed money to NAMA. That meeting took place in the Malmaison Hotel, Belfast. Mr Miskelly also covertly audio recorded the meeting. The BBC's visual recording and Mr Miskelly's audio recording formed a significant part of both Spotlight One and Spotlight Two programmes.

[47] Shortly after the Malmaison Hotel meeting, the plaintiff and Ian Coulter met funders in London including PIMCO. It is suggested that the plaintiff who was on NIAC to advise NAMA was not only meeting with developers who owed money to NAMA but was also actively seeking to sell the NI loan portfolio without NAMA's knowledge to PIMCO.

[48] Subsequently in September 2013 Brown Rudnick made what purported to be "an unsolicited approach" to NAMA indicating that its client PIMCO was interested in acquiring the NI loan portfolio. On 7 October 2013 NIAC met at Tughans' offices in Belfast and Frank Daly, the NAMA Chairman, informed NIAC, including the plaintiff, of the "unsolicited approach" by PIMCO. It is asserted that no declaration was made at this meeting by the plaintiff that he had already met PIMCO. The proposed sale to PIMCO progressed but on 10 March 2014 PIMCO informed NAMA that its compliance staff had discovered that PIMCO's proposed fee arrangement with Brown Rudnick included also the payment of fees to Tughans and to a former external member of NIAC. PIMCO named that individual as the plaintiff. On 13 March 2014 PIMCO withdrew as a purchaser. Subsequently, Cerberus entered a bid on 1 April 2014 with NAMA in the amount of £1.241 billion. On 3 April 2014 the NAMA board decided to sell the NI loan portfolio to Cerberus. On 20 June 2014 the sale was completed.

[49] The completion of the sale to Cerberus was followed by a statement in September 2014 by Tughans that Mr Coulter had instructed Tughans' Finance Director to move a portion of the £7.5m fee payable to Tughans to an Isle of Man bank account controlled by Mr Coulter. In October 2014 Cerberus began selling the Northern Ireland loan portfolio. On 5 January 2015 Mr Coulter resigned as Tughans' managing partner and on 27 January 2015 Tughans made a report to the Law Society.

[50] On 7 July 2015 TD, Mick Wallace, named Tughans Solicitors in Dáil Éireann as having acted for Cerberus stating that £7m ended up in an Isle of Man bank account which was "reportedly earmarked for a Northern Ireland politician". On 7 July 2015 Stormont's Finance Committee opened an inquiry and a Dáil Public Accounts Committee opened hearings into Project Eagle (1/154).

[51] In July 2015 the NCA criminal investigation began (5/178A) (1/929/8). It can be seen that the Spotlight investigation had commenced prior to the NCA investigation.

[52] On 9 February 2016 the plaintiff voluntarily attended the NCA at Musgrave Street Police Station for an interview under caution. He was accompanied by his solicitor, Mr Rice. He was interviewed between 9.20 am and 2.30 pm. In Mr Rice's affidavit sworn on 28 September 2016 it is stated that he could:

> "Confirm for the purposes of Article 6 paragraph 1 of the European Convention of Human Rights that at this interview the plaintiff was provided with official notification by the NCA as the competent authority of an allegation that he had committed a criminal offence."

Mr Rice went on to state that:

> "It was also made clear at that interview that a criminal prosecution was "on the cards" for the purposes of "common law contempt of court."

[53] The statement that the plaintiff was "provided with official notification … of an allegation that he had committed a criminal offence" did not condescend to particulars. It was not apparent as to whether this official notification was oral or in writing. No written notification was exhibited to the affidavit. If it was oral then the person giving the notification was not identified nor was his standing or authority. No details were given as to exactly what was said by the individual. Furthermore, there were no details given of the context in which this notification was given for instance as to whether it was at the beginning or at the end of the interview or whether it was a considered analysis with a clear expression of what the offence was and why it was considered that the plaintiff had committed it. There was no note or

record made by Mr Rice at the time recording what had been said exhibited to his affidavit. The context in which this notification purported to have been given was at the first interview of the plaintiff on suspicion of having committed an offence. It is possible to officially notify a person that an offence has actually been committed during or at the conclusion of such an interview but ordinarily the information obtained during the interview would be analysed by the investigating authority before a conclusion was reached. I consider that these averments were wholly insufficient to support the proposition that on 9 February 2016 the plaintiff had been officially notified that he had committed a criminal offence or that he had been charged within the meaning of Article 6 ECHR, as opposed to being interviewed under caution on suspicion of having committed an offence.

[54] I was confirmed in that conclusion by the fact that this official notification purported to have been given at the first interview yet there was no statement from Mr Rice of a similar notification being given to the plaintiff on the subsequent occasion when the plaintiff was arrested and interviewed on 31 May 2016.

[55] In relation to the statement by Mr Rice that at the interview on 9 February 2016 it was made clear that a criminal prosecution was "on the cards" for the purposes of common law contempt of court I considered that there having been no details supporting such a statement it could not be relied upon.

[56] On the second day of the hearing of this application the plaintiff filed a further affidavit from Mr Rice from which it became apparent that there was no express official notification nor was there any express statement that a criminal prosecution was "on the cards". Rather these were conclusions arrived at by Mr Rice based on the evidence which was put to the plaintiff during the interview. Mr Rice states that the evidence "if true and admissible in a criminal trial" was in his "opinion and experience as a solicitor evidence of criminal conduct on the plaintiff" (sic). Mr Rice added that indeed "on reflection I would now go further than that and state on oath that what he was notified about by the NCA was evidence of him committing a serious criminal offence."

[57] In relation to his earlier averment that a criminal prosecution was "on the cards" Mr Rice stated that this was his phrase and it was not a phrase used by the NCA interviewers. He went on to explain that it was:

> "Plain to him as the plaintiff's solicitor and to the plaintiff that the NCA possessed evidence of the plaintiff committing a serious criminal offence. Further, that there was no reason to suppose that the evidence would not be presented at a future criminal trial. From my own perspective as a solicitor acting for a client in such circumstances I had no doubt that from that date onwards while the investigation was ongoing the NCA had evidence which made it likely in his opinion that the plaintiff would be charged and prosecuted."

Mr Rice explains this is what he meant when he used the phrase "on the cards". It is apparent from this further affidavit that Mr Rice's statements are qualified. For instance he states that "he was in no doubt as his solicitor that the NCA had evidence which, I stress, *if true and admissible*, was evidence of serious criminality on his part" (emphasis added). He goes on to state that he has no doubt as his solicitor from representing the plaintiff that there is every likelihood of a prosecution and the plaintiff is under no illusion in that respect. I will give further consideration to the impact of this evidence later in this judgment.

[58] On 23 February 2016 there was a meeting between the NCA and the BBC (4/1681). The NCA maintained their position which I set out in a separate part of this judgment. A part of the note of that meeting is a comment, presumably by an individual in the NCA that "if it is too prejudicial then may as well pack up". (5/2074 – 2075) (4/1761(I)).

[59] Spotlight One was first broadcast on 29 February 2016. Jeremy Adams states that the audio recordings included the plaintiff's assertions and evidence that:

(a) he was involved in the PIMCO bid;

(b) he engaged with the First Minister on this issue;

(c) he was involved in negotiating commercial terms that PIMCO might sign up to;

(d) he claimed to be involved in the Cerberus bid but no-one was to know;

(e) he believed he was due a fee in relation to the successful Cerberus sale out of a pot of £6m which had not been paid, these clearly being the funds that had been moved out of Tughan's bank account to one Mr Coulter controlled;

(f) Mr Ronnie Hanna, a former NAMA Board member and its Head of Asset Recovery had acted in some way to the benefit or protection of debtors (which Mr Hanna denies);

(g) the First Minister's son, Gareth Robinson, had contacted Mr Miskelly and advised him to contact the Plaintiff, that the Plaintiff had then contacted Ronnie Hanna and but for that Mr Miskelly's "lights would have been out";

(h) but for the same process other debtors would have suffered that fate.

[60] On 5 May 2016 and in advance of Spotlight Two the BBC sent a right of reply letter to the plaintiff (4/1688).

[61] On 31 May 2016 the plaintiff was arrested for the offences of bribery, conspiracy to defraud and perverting the course of justice (1/82) and having been again interviewed under caution he was released on bail to appear at Musgrave Police Station on 27 July 2016 with restrictions including a residence condition.

[62] On 27 July 2016 the plaintiff was informed that his suspected involvement in the offences of bribery, conspiracy to defraud were still under active consideration but he was released from bail on the basis that he was willing to re-attend voluntarily for an interview at a future date. It was indicated to him that should he fail or refuse to re-attend for interview when requested he "may be re-arrested." (4/1705) (4/1706).

[63] Spotlight Two was first broadcast on 6 September 2016. It included a covert audio recording made by Mr Miskelly of a conversation between him and the plaintiff which took place in August 2012 in a car in a car park of a Belfast hospital, where Mr Miskelly was receiving medical treatment. The audio recording was played in association with a visual reconstruction. The recording commences with an inquiry by the plaintiff of Mr Miskelly as to how he is, to which the response is:

> "All right Frank. There's £40,000 in that and it's in bundles of two Frank."

There followed an exchange in which the plaintiff asks as to whether there was any query to Mr Miskelly about the withdrawal of that amount of money. Mr Miskelly states that there was not which leads to an assumption by the plaintiff that Mr Miskelly "had it in another place". There was an assurance by Mr Miskelly that no-one else knows about the payments and an assertion by the plaintiff that he had done "all this work" and was therefore "entitled to his fee". The plaintiff is then recorded as saying "I'm working on the basis that a deal can be done for NAMA and total assets can be bought out from Northern Ireland, that's private". The plaintiff is also recorded as expressing concern about a police enquiry for him and he asks how Mr Miskelly would react if they ask about the plaintiff's role. Mr Miskelly responds "I didn't even know … I don't know nothing about you. I don't really know your background. Only Gareth … the only way I know you Frank is through Gareth." The plaintiff is recorded as saying that he was working on a deal being done for NAMA "on the total assets to be bought out for Northern Ireland" and that he was "looking at the moment about a big American institution coming forward to make an offer". That it was envisaged that once the purchase was complete "the next thing they are going to do is agree with developers how they exit and if they've got a profit in already …" "they are going to seek to make sure it is shared."

[64] Jeremy Adams states that this and other audio recordings suggest that the Plaintiff:

(a) took large sums of money in cash from a NAMA debtor in August 2012 at a time when the Plaintiff was a serving member of NIAC;

(b) was concerned to know that no third parties knew of the payment;

(c) whilst a serving member of NIAC, was discussing with a NAMA debtor how he could escape from NAMA and cites the precise legislative provision (s172 of the NAMA Act) which restricts the debtor from acquiring an interest in his secured property from NAMA;

(d) claims to have access to a NAMA Board member and its Head of Asset Recovery, Ronnie Hanna, which he mentions when discussing cutting a deal on some of Mr Miskelly's property and claims to be able to access information from Mr Hanna;

(e) was involved in engaging American parties to purchase the NI loan portfolio and he had worked with Sammy Wilson on this, without NAMA's knowledge;

(f) expected that Mr Hanna would have an ongoing role in the portfolio after it was sold;

(g) was working with politicians to get favourable terms for the indebted property developers (again whilst a member of NIAC);

(h) was discussing arrangements as to how Gareth Robinson would be paid with Mr Miskelly;

(i) claimed to have declared to NAMA that he was working for Mr Miskelly;

(j) sought to cover his tracks by having Mr Miskelly sign a falsely dated engagement letter to suggest the engagement started after the plaintiff resigned from NIAC;

(k) was nervous of the US law enforcement agencies;

(l) tried to discourage Mr Miskelly from giving evidence to the Assembly Committee because of the questions Mr Miskelly might face on his relationship with the Robinsons and the plaintiff;

(m) queried Mr Miskelly on how he would answer certain questions and suggested the replies he should give on the plaintiff's role with reference to the time the plaintiff was on NIAC, whether the advice given related to NAMA and about payments;

(n) went over questions the NCA might ask Mr Miskelly and coached Mr Miskelly in the answers to give, including lying by denying that he had paid the plaintiff;

(o) had concerns that someone was taping his conversations and that these implicated him in a scandal.

[65] I consider that Spotlight One and Two were hard hitting investigative programmes employing powerful and relatively enduring images of highly dubious activities on the part of the plaintiff. I consider that they both amount to vilification of the plaintiff. I also consider that if Spotlight Three was broadcast it would be similar to Spotlight One and Two.

Public interest in Spotlight One and Two

[66] Jeremy Adams, Head of Television Current Affairs for BBC Northern Ireland has set out what he considers to be the public interest in both Spotlight One and Two. He states that he is firmly of the view that the broadcast of these programmes was significantly in the public interest and made an important contribution to a debate of general public concern. He asserts that the plaintiff's statements and actions as shown in the programmes suggest potential wrongdoing and potential breaches of the law and that the plaintiff's statements suggest a pattern of questionable behaviour and immoral behaviour. Furthermore, that his actions reveal a number of significant conflicts of interests in his role as a member of NIAC, as an advisor to a number of debtors whose properties were held within the NI loan portfolio, and as an adviser to bidders for the NI loan portfolio. He goes on to state that the public interest was heightened by the political influence and possible political interference in and around the Project Eagle sale. He believes that these were hugely important programmes that fully fulfilled the very highest demands of the public interest. He states that the secret recordings included by the BBC contained highly relevant evidence of hugely questionable and potentially criminal behaviour at the heart of major commercial transactions involving very substantial amounts of public funds. The recordings enabled BBC Spotlight to put into the public domain evidence of apparently significant wrongdoing at the heart of the largest sale of land in the history of Northern Ireland. The programmes examined the integrity of such an important transaction and one directly affecting what NAMA could recover for the benefit of the Irish taxpayer. He stated that almost all of the Northern Ireland debtors having land within this portfolio have purchased their properties back from Cerberus. Additionally, he stated that Spotlight Two raised concerns about the pace of the criminal investigation in Northern Ireland, which opened in July 2015, the lack of any enquiry in the Republic of Ireland and the lack of any apparent co-ordination between the two Governments. The Irish authorities appeared to be awaiting the outcome of the NCA investigation, despite the fact that it cannot look into allegations of breaches of or offences under the Irish NAMA Act. That only after, and because of the revelations in Spotlight Two has NAMA referred concerns to the Garda. Spotlight Two also pointed out the difficulties undoubtedly caused by the border in that the NCA has no jurisdiction in relation to breaches of the NAMA Act. The Irish enforcement authorities have (until after and probably as a result of the second programme) taken little or no action. He

considers that the reaction of the authorities to allegations of this kind and barriers to enforcement are also of interest to the public.

[67] There was no submission on behalf of the plaintiff at the hearing before me that Spotlight One and Two were not programmes in the public interest. There could be no sensible contention to that effect. Rather the emphasis on behalf of the plaintiff was on another obvious public interest being the integrity of the criminal process.

The attitude of the NCA and the BBC's response

[68] Prior to the broadcast of Spotlight One on 29 February 2016 the NCA became aware that the BBC was in the process of "making a documentary concerning Project Eagle and the allegations that had been made in respect thereof". By letter dated 12 February 2016 (1/100) the NCA informed the BBC that it understood that the BBC is "approaching potential witnesses and/or suspects of the NCA investigation and that detailed questions are being put to such persons". The NCA wished to put the BBC formally on notice that:

> "(i) the NCA investigation is ongoing and still in the process of collecting relevant evidence;
>
> (ii) the NCA has not interviewed all potential witnesses and/or suspects at this junction;
>
> (iii) the questioning of potential witnesses and/or suspects by the BBC out with the protections afforded by a criminal investigation may prejudice the ongoing NCA investigation or any future criminal proceedings; and
>
> (iv) broadcasting material concerning matters subject to the NCA investigation may prejudice the ongoing NCA investigation or any future criminal proceedings."

The letter went on to state that:

> "In principle, the NCA is not opposed to the Spotlight programme being broadcast provided it does not prejudice the NCA investigation or any future criminal proceedings."

It went on to request the BBC:

> "(a) not to approach persons who may be witnesses and/or suspects in relation to the NCA investigation; and
>
> (b) that the Spotlight programme is not broadcast until either

(i) completion of the NCA investigation and any future criminal proceedings; or

(ii) until the NCA has had an opportunity to review the content of the programme and confirm that this does not prejudice the ongoing NCA investigation or any future criminal proceedings."

[69] By letter dated 16 February 2016 the BBC replied that whilst the letter from the NCA raised "broad concerns about prejudicing the criminal process" there had been no explanation as to how this prejudice would in fact arise. Accordingly, in "the absence of clear information demonstrating a risk of serious prejudice" the BBC intended to broadcast the Spotlight programme (1/104).

[70] This reply led to a further exchange of correspondence in which the NCA stated (1/105):

> "The NCA investigation is ongoing and we have not interviewed all potential witnesses and/or suspects at this juncture. I understand that the BBC is approaching potential witness and/or suspects of the NCA investigation and that detailed questions are being put to such persons. This content may be included in the proposed broadcast."

The NCA stated that it believed there was a genuine risk that future suspect and/or witness evidence may be influenced by the programme or by matters put to individuals by the BBC questioning, for example, by providing the opportunity to create an alibi or destroy relevant evidence. Further, the NCA expressed concern that matters contained in the programme may influence any future jury, in particular if persons have been questioned on relevant matters outwith the safeguards afforded by due criminal process. The NCA stated what it considered to be the real possibility that the Spotlight programme and investigation may prejudice the NCA investigation or any future criminal proceedings.

[71] The response of the BBC to these concerns was that it declined to make available a script of the programme and in effect requested the NCA to explain how it was suggested that the BBC's investigations and its broadcast would cause prejudice. For its part the NCA adopted the position that it was not appropriate for it to give detailed worked examples of prejudice.

[72] The plaintiff relies on this exchange between the NCA and the BBC to support the proposition that the BBC had the necessary specific intent under common law contempt of court. Mr Simpson contended that the fears of the NCA in relation to the destruction of evidence did not stand up to critical analysis. For instance prior to the plaintiff's first interview by the NCA on 9 February 2016 and by email dated

11 January 2016 the NCA informed the plaintiff as to the subject areas at the proposed interview (4/1669). At this stage there had been no search of the plaintiff's house and there appears to have been no concerns that the plaintiff having been informed of the subjects to be covered, might destroy evidence or liaise with potential witnesses. Furthermore the plaintiff's bail conditions imposed on 31 May 2016 had included a condition that the plaintiff was not to have any contact direct or indirect with John Miskelly, Ronnie Hanna, David Gray and Gareth Robinson. The expressed "grounds/reasons" were "interfering with witnesses or otherwise obstructing the course of justice/prevent interference" (1/80). That condition, with all other conditions, was removed on 27 July 2016 (4/1706) thereby allowing the plaintiff to discuss any issues he wanted with any of those individuals.

Contempt of Court

(a) General principles

[73] One of the features of the law relating to contempt of court was stated by Ralph Gibson LJ in *Leary v BBC (Court of Appeal Transcript dated 29 September 1989)* as being that the "primary defence of the administration of justice from unlawful interference by the press or by broadcasters is the heavy sanction of prosecution if a contempt is committed". I consider that another defence is an injunction to restrain an anticipated contempt but that the primary defence remains the heavy sanction of prosecution. Another feature is the role of the Attorney General who is the appropriate officer to safeguard the public interest which role is also contained in the Contempt of Court Act 1981 ("the 1981 Act"). Section 7 provides that:

> "Proceedings for a contempt of court under the strict liability rule … shall not be instituted except by or with the consent of the Attorney General or on the motion of a court having jurisdiction to deal with it."

I consider that two central features of the law of contempt of court are the heavy sanction of prosecution if contempt is committed and the important and central role of the Attorney General.

[74] In relation to the defence of the administration of justice by use of an injunction it is clear that those who have standing to apply are not restricted to the Attorney General. Not only does the Attorney, as the appropriate officer, have standing to apply but so also do other individuals. The plaintiff has standing to bring proceedings for injunctive relief in respect of an apprehended future contempt of court under either the strict liability rule or common law contempt of court (see *Peacock & Ors v London Weekend Television* [1986] 150 JP 71). However, if the plaintiff does not have the consent of the Attorney General he has no standing to bring the proceedings under the 1981 Act in relation to any contempt of court which is alleged to have been committed.

(b) Strict liability contempt

[75] Section 1 of the 1981 Act provides that the strict liability rule means:

> "The rule of law whereby conduct may be treated as a contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so."

[76] One of the limitations of the scope of strict liability contained in section 2 is that it "applies only to a publication which creates a *substantial risk* that the course of justice in the proceedings in question will be *seriously impeded* or *prejudiced*" (emphasis added). Seriously impeding or seriously prejudicing justice are distinct and separate concepts. It is contended on behalf of the plaintiff that if criminal charges are brought against him his criminal trial could be seriously impeded or seriously prejudiced in that members of the jury could be prejudiced against him depriving him of an impartial tribunal and of his presumption of innocence. It is also contended on his behalf that the broadcasts may deter or discourage witnesses from coming forward and providing information helpful to him which might help immediately to clear him of suspicion or enable his defence to be fully developed at trial see *Attorney General v MGN Ltd & Newsgroup Newspapers Ltd* [2011] EWHC 2074 (Admin) at paragraph 37. The plaintiff also relies on the decision of the Court of Appeal in *Attorney General v MGN Ltd & Newsgroups Newspapers Ltd* in which Lord Judge CJ held at paragraph (37) that:-

> "In our judgment, as a matter of principle, the vilification of a suspect under arrest readily falls within the protective ambit of Section 2(2) of the Act as a potential impediment to the course of justice."

The statutory scheme is that vilification of a suspect under arrest falls within section 2(2) of the 1981 Act as the criminal proceedings are then "active". However, following release otherwise than on bail without having been charged the proceedings are no longer active and vilification would no longer fall within the protective ambit of section 2(2).

[77] In relation to a substantial risk that the course of justice will be seriously impeded or prejudiced Mr Simpson referred to the precautions that can be taken during a criminal trial to safeguard an accused's fair trial rights, see for instance *R v Abu Hamza* [2007] QB 659 at paragraphs 77, 78, 86, 89, 91 and 92 and *Ali v United Kingdom* [2016] EMLR 5. The test for a judge at the criminal trial is "whether on balance of probability a fair trial will be impossible." That is different from the test for contempt of court under the strict liability rule. At paragraph 92 of *Abu Hamza* Lord Philips CJ stated:-

> "Our laws of contempt of court are designed to prevent the media from interfering with the due process of justice by making it *more difficult to conduct a fair trial*. The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial." (emphasis added)

The test for strict liability contempt is not whether a fair trial is rendered impossible but rather whether the publication creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced. The statutory scheme recognises that a degree of prejudice to proceedings is not a contempt of court. So in order to obtain an injunction to restrain an anticipated contempt of court under the 1981 Act it is not sufficient to establish that there is some anticipated prejudice but rather that the anticipated publication will create a substantial risk that the course of justice will be seriously impeded or prejudiced.

[78] The fact that the Strasbourg Court in *Ali v United Kingdom* [2016] EMLR 5 concluded at paragraph 91 that "it will be rare that prejudicial pre-trial publicity will make a fair trial at some future date impossible" does not mean that a pre-trial publication cannot amount to a contempt of court if a fair trial is possible. Furthermore, the fact that a future anticipated publication, though risking having an adverse impact on the impartiality of the court as well as on the presumption of innocence, does not mean that an injunction preventing an anticipated contempt will *only* issue if it is anticipated that a fair trial would be impossible.

[79] In assessing whether a publication did create a substantial risk that the course of justice in the proceedings in question would not only be impeded or prejudiced but seriously so the court would consider the following matters in particular, namely the likelihood of the publication coming to the attention of a potential juror, the likely impact of the publication on an ordinary reader at the time of publication and (crucially) the residual impact of the publication on a notional juror at the time of trial see *Attorney General v Random House Group Limited* [2010] EMLR 9.

[80] Another of the limitations of the scope of strict liability contained in section 2 of the 1981 Act is that it "applies to a publication only if the proceedings in question are active within the meaning of this section at the time of the publication." Schedule 1 applies for determining the times at which proceedings are to be treated as active. That Schedule states that "criminal proceedings" means proceedings against a person in respect of an offence, …" and that "criminal, … proceedings are active within the meaning of section 2 …" "from the relevant initial step specified in paragraph 4 or 4A until concluded as described in paragraph 5." In so far as relevant to this case, the initial steps of criminal proceedings are arrest without warrant. Again, in so far as relevant to this case, criminal proceedings are concluded by discontinuance … which will occur in the case of proceedings in … Northern Ireland commenced by arrest without warrant, if the person arrested is released, otherwise than on bail, without having been charged.

[81] It can be seen from this statutory scheme that during the course of a criminal investigation criminal proceedings may become active if a suspect is arrested without warrant, then no longer be active if released otherwise than on bail without having been charged, only to become active again if the suspect was, for instance, orally charged or re-arrested either with or without a warrant or served with an indictment or other document specifying a charge. There may be a variety of reasons for the release of a suspect by the investigating authority otherwise than on bail and without having been charged. Those reasons may range at one end of the spectrum to a positive decision that there is insufficient evidence to charge the suspect with the consequence that it will be highly unlikely that there will be criminal proceedings. At the other end of the spectrum there may be a perceived need on behalf of the investigating authority prior to charge to gather further evidence which combined with an assessment that the personal circumstances of the suspect are such that bail is not necessary, leads to the release of the suspect otherwise than on bail without having been charged. At that end of the spectrum there may have been no change in relation to the likelihood of criminal proceedings but the timescale within which they will be commenced could be affected. Accordingly, following arrest without warrant, release otherwise than on bail without having been charged, does not mean that criminal proceedings will not again become active and taken on its own will not inform as to whether it is likely that criminal proceedings will become active again.

[82] That is the effect of the statutory scheme contained in section 2 of the 1981 Act. Mr Simpson correctly pointed out that the plaintiff had not sought to obtain a declaration that section 2 was incompatible with Article 6 of the Convention and that no notice had been served in accordance with Order 121 of the Rules of Court (Northern Ireland) 1980. Mr Simpson also pointed out that there is no authority suggesting that section 2 is incompatible with Article 6 despite a considerable volume of litigation in relation to the 1981 Act.

(c) Common law contempt

[83] Section 6(c) of the 1981 Act maintains common law contempt by providing that:

> "Nothing in the foregoing provisions of this Act … restricts liability for Contempt of Court in respect of conduct intended to impede or prejudice the administration of justice."

For the purpose of these proceedings it is only necessary to state that common law contempt requires proof of a specific intent on the part of the publisher to impede or prejudice the administration of justice.

(d) Reporting restriction order under section 4(2)

[84] Section 4(1) of the 1981 Act limits the circumstances in which the publisher of a report of legal proceedings will be held liable. Its effect is that, even though a publication may create a substantial risk that the course of justice will be seriously impeded or prejudiced, a person who comes within section 4(1) will not be held liable. Section 4(1) provides:

> "Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith."

Section 4(2) then gives a means of protection against prejudice to the administration of justice by providing for postponement of reporting. Section 4(2) provides:

> "*In any such proceedings* the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in *those proceedings*, or in any other proceedings pending or imminent, order that the publication of any report of *the proceedings*, or any part of *the proceedings*, be postponed for such period as the court thinks necessary for that purpose." (emphasis added).

The phrase "in any such proceedings" must refer to the legal proceedings of which a contemporaneous report will be made if postponement were not ordered. The words "those proceedings" and "the proceedings" refer to the same proceedings. The plaintiff's application for an interlocutory injunction in the present legal proceedings is held in public. A publisher will not be held liable for publication of a fair and accurate report of the present proceedings even if in relation to criminal proceedings against the plaintiff they cause a substantial risk that the course of justice will be seriously impeded or prejudiced. This court would have jurisdiction to grant an order under section 4(2) if the "other proceedings", that is the criminal proceedings against the plaintiff, were pending or imminent. In *R v Lees* [2002] NICA 19 the Court of Appeal stated that "proceedings cannot be regarded as pending until they have been commenced." No criminal proceedings have been commenced against the plaintiff in this case. Carswell LCJ giving the judgment of the court considered the extent of the meaning of the word "imminent." He stated that:

> "In its *ordinary sense* the word carries a connotation of some event which is impending or threatening (see *R v Beaverbrook Newspapers [1962]* NI 15, 21 per Sheil J) and by extension from that minatory sense it signifies that the event is due to take place shortly." (emphasis added)

In that ordinary sense there has to be both (a) an event which is impending or threatening; and (b) the event is due to take place shortly. The Court of Appeal also gave consideration to an extended sense of the word "imminent" in the context of section 3 of the Human Rights Act 1998 and the right to a fair trial under Article 6 ECHR. The Court of Appeal held that it would be stretching the word "imminent" a considerable distance to regard a retrial after a successful appeal as being within the ordinary sense of that word. Amongst other factors even if a retrial was ordered by the Court of Appeal it could not be heard before a number of months had elapsed. However, if the retrial was considered as an extension of the appeal and regarded as stemming from it, one could regard the appeal and the new trial as imminent. *R v Lees* is authority for an extended meaning being given to the word "imminent" having regard to section 3 of the Human Rights 1998 and Article 6 ECHR.

The application of strict liability contempt to the facts of this case

[85] The plaintiff's Writ (1/7) contains a number of allegations in relation to the Contempt of Court Act 1981 as follows:

(a) The defendants pursued a course of conduct amounting to persecution and trial by media of the plaintiff when at all material times the defendants were aware that criminal proceedings against the plaintiff were active and/or reasonably contemplated.

(b) Each of the defendants has been guilty of … Contempt of Court in breach of the Contempt of Court Act 1981 and the plaintiff is entitled to injunctive relief to prevent further … statutory Contempt of Court.

In so far as the plaintiff makes a claim for statutory contempt which he alleges has been committed and given that he does not have the consent of the Attorney General under section 7 of the 1981 Act. That part of the plaintiff's claim is struck out.

[86] The plaintiff was arrested without warrant on 31 May 2016 so that criminal proceedings were active on that date. On the same day he was released without having been charged but on bail. This meant that the criminal proceedings remained active. He was released, otherwise than on bail, without having been charged, on 27 July 2016. Accordingly criminal proceedings were no longer active as at 27 July 2016. The strict liability rule only applied to publications between 31 May 2016 and 27 July 2016.

[87] A positive decision was taken by those in the BBC responsible for the Spotlight programmes not to publish any material when the criminal proceedings were active. Spotlight One was broadcast before that period and Spotlight Two was broadcast after that period. The plaintiff initially alleged that "the BBC continued to publish (Spotlight One) in this period via the YouTube social network with which it partners and with whom it has entered into a content ID agreement". The response

of the BBC was that it did not publish Spotlight One on YouTube and that if it was broadcast on YouTube whilst criminal proceedings were active then this was in breach of BBC copyright. Mr O'Donoghue accepted that the publication on YouTube was not publication by the BBC and that the plaintiff could not establish that the BBC published Spotlight One on YouTube whilst criminal proceedings were active.

[88] A question arose during these proceedings as to whether, even if the Spotlight team did not broadcast anything whilst the criminal proceedings were active, others in the BBC did do so. If the BBC did publish material during the period 31 May 2016 to 27 July 2016 and if the plaintiff contends that such material created a substantial risk that the course of justice in criminal proceedings against him will be seriously impeded or prejudiced, then the plaintiff should bring the particular broadcast to the attention of the Attorney General so that a decision can be taken by him as to whether contempt proceedings should be instituted.

[89] If it was anticipated that Spotlight One, Two or Three would be broadcast when criminal proceedings were active then an injunction would issue. The nature of the programmes would be such that they would clearly fall within the protection of section 2(2). However, in view of the fact that the BBC positively decided not to publish Spotlight Two when criminal proceedings were active, I consider that the plaintiff cannot establish any apprehended future contempt of court under the strict liability rule. If the criminal proceedings again become active then the BBC have demonstrated that they will not publish any future material.

[90] Furthermore, in advance of any Spotlight programme the BBC sends the plaintiff a right of reply letter and they have indicated that in advance of the broadcast of any new Spotlight programme they will send such a letter to the plaintiff. They should also send such a letter to the plaintiff if they intend to rebroadcast Spotlight One or Spotlight Two given that circumstances may have changed. The right of reply letters will afford the plaintiff a window of opportunity to bring injunctive proceedings against the BBC if they intend to broadcast whilst criminal proceedings are active.

[91] On these grounds and in relation to the plaintiff's application for an interlocutory injunction based on an anticipated contempt of court under the 1981 Act I refuse the application.

The application of common law contempt to the facts of this case

[92] The issue is whether the plaintiffs will probably succeed at trial in establishing a specific intent on the part of the defendants to impede or prejudice the administration of justice. The views expressed to the BBC by the NCA provides some evidential material but given Mr Simpson's analysis of that evidence and the clear public interest in publication I do not consider it more likely than not that a

specific intent will be established. I decline to grant an injunction under common law contempt.

Article 6 ECHR

[93] Article 6 of the ECHR at paragraphs 6.1 and 6.2 provides that:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[94] Mr O'Donoghue contended that if the BBC is a public authority then the court could issue an injunction relying on sections 6(1) and 7(1) of the Human Rights Act 1998, Article 6 of the Convention together with section 91 of the Judicature (Northern Ireland) Act 1979. Section 6(1) provides that it "is unlawful for a public authority to act in a way which is incompatible with a Convention right". Section 6(3) provides that "Public authority" includes:

> "(a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature …"

Section 7(1) provides that:

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by Section 6(1) may –
>
> (a) bring proceedings against the authority under this act in the appropriate court or tribunal; or

(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."

[95] The first question is whether the BBC is a public authority in relation to its journalism and editorial decisions. As I have indicated for the purposes of this interlocutory application the plaintiff has not satisfied the court that he will probably ("more likely than not") succeed at the trial in establishing that the BBC is a public authority in relation to its journalism and editorial decisions.

[96] Mr O'Donoghue also submitted that even if the BBC was not a public authority, so that no claim could be brought under section 7(1) of the Human Rights Act 1998 against it for breach of the Article 6 Convention right to a fair trial that this court still had jurisdiction to grant an injunction. He contended that the court was a public authority and that this court should not act in a way which was incompatible with a Convention right by refusing to grant an injunction. In support of this contention he relied on the decision of the Court of Appeal in *King v Sunday Newspapers Limited* [2011] NICA 8 at paragraph [8]. In that case, at first instance, Weatherup J had granted an injunction against Sunday Newspapers Limited relying on Article 2 of the Convention. Mr O'Donoghue contended that this was an example of a court granting an injunction for an anticipated breach of a Convention right, despite the claim not being against a public authority and that the Court of Appeal had also analysed that aspect of the plaintiff's claim on the same basis. However, Mr Scherbel-Ball contended that, properly analysed, the information which was the subject of an injunction in that case was private information, being the plaintiff's address. That Article 2 of the Convention gave rise to a reasonable expectation of privacy in that information in the context of a threat to the life of the plaintiff. Accordingly, that the injunction granted in *King v Sunday Newspapers Ltd* was based on the tort of misuse of private information. I agree with that analysis.

[97] I note that in *Ali v United Kingdom* [2016] EMLR 5 there was no suggestion by the ECtHR of a free standing article 6 right which required protection different from the 1981 Act or common law contempt.

[98] The power to grant an interlocutory injunction is embodied in section 91 of the Judicature (Northern Ireland) Act 1979. The wording of the section is extremely wide, but the power to grant interlocutory injunctions is circumscribed by authority, see *South Carolina Co v Assurantie NV* [1987] AC 24 at 40. Generally, such an injunction can only be granted where a party to an action has invaded or threatens to invade a legal or equitable right of the other party, which can be enforced by the court, and when one party has behaved or threatens to behave in an unconscionable manner, see *Chief Constable of Kent v V* [1983] 1 QB 34 at 45. I do not consider that there is a legal right under Article 6 in circumstances where, as here, the dispute does not involve a public authority. On that ground I refuse to grant an interlocutory injunction under Article 6.

[99] If I am incorrect in that analysis then the next question is whether the plaintiff is subject to a criminal charge within Article 6(1) ECHR. The issue is not straightforward. The plaintiff is and remains a suspect. He has been arrested and detained. The criminal investigation has not concluded and will not conclude for

some time. On the basis of the qualified evidence of Mr Rice I am not persuaded that the plaintiff has been officially alerted to the likelihood of criminal proceedings against him but I am persuaded that there has been an official notification to the plaintiff by the competent authority, the NCA, of an allegation that he has committed a criminal offence. Approaching the matter substantively I consider that the position of the plaintiff has been substantially affected and that he has been charged within the meaning of Article 6.

[100] However, even if the plaintiff has been charged the next question would be whether an injunction would issue in circumstances where the court had declined to make an order under the 1981 Act or under the common law. I consider that if the court declines to grant an injunction under the 1981 Act or under the common law then that it would not grant an injunction under Article 6 of the Convention. At paragraph 32 of the judgment of the Court of Appeal in *Attorney General v MGN Limited and Another* [2012] 1 WLR 2408 Lord Judge CJ stated:

> "The right to a fair trial is of course encapsulated in Article 6 of the Convention which declares the entitlement to a fair hearing. The 1981 Act represents a system provided in this jurisdiction to ensure that the right to a fair trial is protected. In the present context any interference with the Article 10 rights of the defendants depends on proof to the criminal standard that the publications in question have created a substantial risk of serious impediment or prejudice to the course of justice. This falls comfortably within the limitations acknowledged in the Convention itself."

I consider that this is authority for the proposition that the protection under Article 6 in respect of pre-trial publicity is defined in the same way as the 1981 Act, which provides protection in relation to a substantial risk that the course of justice will be seriously impeded or prejudiced. On that ground also I decline to grant an injunction under Article 6.

The application of section 4(2) of the Contempt of Court Act 1981 to the facts of this case

[101] Criminal proceedings against the plaintiff are not pending. In its ordinary sense they are not imminent given that the NCA investigation has not and will not conclude until June 2017 at the earliest and depending on the outcome of that investigation a file might be referred to the public prosecution service so that a decision could be taken as to whether or not to prosecute. Furthermore, I do not consider that within any extended meaning of the word that criminal proceeding against the plaintiff is imminent. Accordingly, I do not have jurisdiction to grant an order restraining reporting of these proceedings under section 4(2). I remove the reporting restriction order but will maintain it in place for a short period of time to enable the plaintiff to consider an appeal.

Misuse of private information

[102] In respect of misuse of private information and relying on, for instance, *Mosley v Newsgroup Newspapers Ltd* [2008] EWHC 1777 and *JR 38* [2016] AC 1131 the propositions of law can be summarised as follows:

(a) **The Human Rights Act**. The Human Rights Act 1998 requires the values enshrined in the European Convention on Human Rights be taken into account. The foundation of the jurisdiction to restrain publicity is now derived from Convention rights under the European Convention on Human Rights see *In Re S (A Child)* [2005] 1 AC 593 at paragraph [23]. The relevant values in relation to this action are expressed in Article 6, 8 and 10 of the Convention. The Convention "values are as much applicable in disputes between individuals or between an individual and a non-Government body such as a newspaper, as they are in disputes between individuals and a public authority," see paragraph [9] of *Mosley v Newsgroup Newspapers Ltd*.

(b) **A claim in tort when not against a public authority**. A claim between individuals, as opposed to a dispute between an individual and a public authority, for the misuse of private information is a tortious claim see *King v Sunday Newspapers Limited* [2011] NICA 8 at paragraph [18].

(c) **Expectation of privacy**. "The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence," see paragraph [7] of *Mosley v Newsgroup Newspapers Ltd*. The question as to whether there is a reasonable expectation of privacy is an objective question and a question of fact. The reasonable expectation is that of the person who is affected by the publicity. The question was defined by Lord Hope in *Campbell v MGN* [2004] UKHL at paragraph [99] as follows:-

> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity".

The question whether there is a reasonable expectation of privacy "is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher" see *Murray v Express Newspapers* [2008] EWCA Civ 446 at paragraph [36]. In both the tort of misuse of private information or in a claim against a public

authority under section 7(1) of the Human Rights Act 1998 for breach of an Article 8 Convention right, the plaintiff has to establish a reasonable expectation of privacy in relation to the subject matter of his complaint, see *In Re JR38* [2016] AC 1131.

(d) **Balancing exercise**. "If the first hurdle can be overcome, by demonstrating a reasonable expectation of privacy, it is now clear that the court is required to carry out the next step of weighing the competing Convention rights in the light of an "intense focus upon the individual facts of each case"" see paragraph [10] of *Mosley v Newsgroup Newspapers Ltd* and see also *Murray v Big Pictures (UK) Ltd* [2008] EWCA 446 at paragraphs [35]-[40]. The balancing exercise is essentially a question of fact with the weight to be attached to the various considerations being of degree and essentially a matter for the trial judge. In carrying out the balancing exercise of weighing the competing Convention rights no one Convention right takes automatic precedence over another. "In order to determine which should take precedence, in the particular circumstances, it is necessary to examine the facts closely as revealed in the evidence at the trial and to decide whether (assuming a reasonable expectation of privacy to have been established) some countervailing consideration of public interest may be said to justify any intrusion which has taken place," see paragraphs [10] and [11] of *Mosley v Newsgroup Newspapers Ltd*. In carrying out the balancing exercise the justifications for interfering or restricting rights under Articles 8 and 10 must be taken into account. Finally proportionality must be applied to each which is called the ultimate balancing test. The judge will have to ask whether the intrusion, or perhaps the degree of intrusion, into the plaintiff's privacy was proportionate to the public interest supposedly being served by it , see paragraph [14] of *Mosley v Newsgroup Newspapers Ltd* and paragraph [17] of *Re S* [2005] 1 AC at 595. In weighing up the relative worth of one person's rights against those of another the use to which a person has put or intends to put his or her rights is to be taken into account, see paragraph [15] of *Mosley v Newsgroup Newspapers Ltd*.

(e) **Section 12 of the Human Rights Act 1998.** Earlier in this judgment I have set out the provisions of section 12. Section 12(4) requires the court to pay particular regard to the rights of others in accordance with Article 10(2) including the rights under Articles 6 and 8. However, one does not start with the balance tilted in favour of Article 10, see paragraph [82] of *Douglas & Ors v Hello! Ltd & Ors (No 3)* [2005] EWCA Civ 595.

[103] In this case the plaintiff has defined the subject matter of his complaint in relation to which he had a reasonable expectation of privacy as "his enduring reputation as a man of good character, honour and integrity". Mr O'Donoghue expressly stated and repeated on a number of occasions that the information in relation to which the plaintiff had a reasonable expectation of privacy was not that

he had committed or that he was suspected of having committed criminal offences. There can be circumstances in which an individual might have an expectation of privacy in relation to a spent criminal conviction or past acquittals see *A v B* [2005] EMLR 36, 851 at paragraph 32. The interaction between the law of contempt of court and the law of misuse of private information might also lead to an expectation of privacy in relation to some information that a person has committed or is suspected of having committed a criminal offence when for instance criminal proceedings are "active" within the meaning of the Contempt of Court Act 1981. However, this was expressly not the case made on behalf of the plaintiff.

[104] I do not consider that there was a reasonable expectation of privacy in the information which the plaintiff by his senior counsel has identified. The tort of defamation protects good character, honour and integrity. In the tort of misuse of private information it is not sufficient to just identify what is protected in the tort of defamation. In the absence of an occasion of privacy that part of the claim is not sustainable and is an abuse of court's process, see *Ewing v Times Newspapers Limited* [2013] NICA 74 at paragraph [31]. I decline to grant an interlocutory injunction in favour of the plaintiff based on misuse of private information. I strike out that part of the plaintiff's claim which is based on misuse of private information.

[105] It could have been suggested that the "nub" of the plaintiff's claim was to protect against an anticipated contempt of court. However, that was not the way that the claim for misuse of private information was articulated which I consider was that the "nub" of his claim was for the protection of reputation. In such circumstances the plaintiff cannot avoid the restrictions set out in *Bonnard v Perryman* by formulating the claim in misuse of private information. I also decline to grant an interlocutory injunction on that alternative ground.

Harassment

[106] Article 1 of the Protection from Harassment (Northern Ireland) Order 1997 prohibits harassment. Thus a "person must not pursue a course of conduct:- (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other." Article 3 provides a civil remedy. Article 7 which applies, inter alia, to the interpretation of Article 1, provides that:

> "…
>
> (2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A 'course of conduct' must involve conduct on at least two occasions.
>
> (4) 'Conduct' includes speech."

[107] A series of publications in a newspaper can amount to harassment see paragraph [15] of *Thomas v Newsgroup Newspapers Ltd & Anor* [2001] EWCA Civ 1233.

[108] The nature of harassment and the nature of reasonable conduct were considered by Lord Phillips MR at paragraphs [29] to [37] of *Thomas v Newsgroup Newspapers Ltd & Anor* [2001] EWCA Civ. Reasonable conduct will not constitute harassment. "Whether conduct is reasonable will depend upon the circumstances of the particular case. When considering whether the conduct of the press in publishing articles is reasonable for the purposes of 1997 Act, the answer does not turn upon whether opinions expressed in the article are reasonably held. The question must be answered by reference to the right of the press to freedom of expression which has been so emphatically recognised by the jurisprudence both of Strasbourg and this country." "In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. A pleading, which does no more than allege that the defendant newspaper has published a series of articles that have foreseeably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment." Lord Phillips went on to state that: "It is common ground between the parties to this appeal, and properly so, that before press publications are capable of constituting harassment, they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare."

[109] I consider that if Spotlight One and Two had been broadcast when criminal proceedings were active then the defendants' conduct would not have been reasonable.

[110] In this case another aspect of alleged harassment of the plaintiff is that he was covertly recorded by the BBC. A course of conduct which involves having a person watched is capable of amounting to harassment. Eady J stated at paragraph 23 in *Howlett v Holding* [2006] EWHC 41 at paragraph [23]:

> "To keep someone on tenterhooks, knowing that she is likely to be watched as she goes about her daily life, seems to me remarkably cruel. Just because she does not know, in any given instance, that surveillance is taking place, it does not make it any the less distressing for her. What causes the distress is the awareness that secret surveillance is taking place, or is likely to take place at any moment. I see no reason why that form of besetting should fall outside either the spirit or the letter of the Act."

In the sphere of surveillance by the State there are strict controls provided by the provisions of the Regulation of Investigatory Powers Act 2000. This is an area worthy of substantial safeguards and the safeguards which the BBC impose are contained in their Editorial Guidelines which at section 7.4.10 set out that the BBC

will use secret recordings in limited circumstances and that in order to do so there is a requirement for approval by a senior editorial figure as stipulated at sections 7.3.6 and 7.4.11 (1/143 et seq).

[111] The plaintiff seeks to establish that the covert taking of visual and audio recordings of the meeting in the Malmaison hotel, the surveillance which was involved in that process and the use of covert audio recordings of the meetings between the plaintiff and Mr Miskelly when combined with the content of Spotlight One and Spotlight Two amounts to harassment. The plaintiff further contends that these matters were all calculated to incite hatred of and animosity and hostility towards him and are therefore capable of amounting to harassment under the 1997 Order.

[112] The plaintiff seeks an interlocutory injunction to prevent anticipated acts of harassment. In *Fulton v Sunday Newspapers Limited* [2015] NIQB 100 Deeny J stated that:

> "For the avoidance of doubt, in applying the test formulated by Lord Phillips, I do not consider that this series of articles, although likely to cause distress to an individual, do in fact constitute an abuse of the freedom of press which the pressing social needs of a democratic society require. Rather they are to be seen as a robust expression of press freedom which the courts have a duty to protect."

The defendants contend that such a conclusion will be reached at trial in this case. I do not consider that the plaintiff's prospects of success are "sufficiently favourable" and therefore I decline to grant an interlocutory injunction relying on the Protection from Harassment (Northern Ireland) Order 1997.

[113] In view of the covert surveillance of the plaintiff by the BBC I do not consider that there is sufficient ground to strike out this part of the plaintiff's claim. I refuse that part of the defendants' application.

Data Protection Act 1998

[114] The initial articulation of plaintiff's reliance on the Data Protection Act 1998 was that the Defendants had used audio and/or video recordings of or relating to the Plaintiff "obtained by the Defendant's source John Miskelly unlawfully and in breach of section sections 18, 19 and 61 of the Data Protection Act 1998". The basis of this complaint appeared to be a belief that neither Mr Miskelly nor any of his companies were registered as data controllers at the date of the recordings, so that it was unlawful for Mr Miskelly to process, or for the BBC to receive from Mr Miskelly, personal data relating to the plaintiff (2/735a/44). The response on behalf of the BBC was that any issue relating to Mr Miskelly's registration was a matter for him, not the BBC. That the BBC was and remains registered as a data controller; see

(1/194/101). Furthermore, the suggestion that the BBC could only receive information from a registered data controller was without authority and in any event, even if Mr Miskelly were not a registered data controller, that would not give rise to any civil claim on the part of the Plaintiff even as against him – see *Murray v Express Newspapers* [2007] EWHC 1908 (Ch) at [84] – [85].

[115] In light of this response on behalf of the BBC the plaintiff chose not to rely on the case as initially articulated but rather to articulate the case being made on a different basis.

[116] "Personal data" as defined by section 1 of the 1998 Act means:

> "Data which relate to a living individual who can be identified … and includes any expression of opinion about the individual …."

"Sensitive personal data" as defined by section 2 means:

> "Personal data consisting of information as to … (g) the commission or alleged commission by (the data subject) of any offence, …."

The plaintiff contends, and for the purposes of this application I agree, that the data held by the BBC is both personal data and sensitive personal data. This means that under section 4(4) the BBC has to comply with the Data Protection principles unless it can rely on section 32 which, in relation to "the special purposes" of journalism, literature and art, provides that:

> "Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—
>
> (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
>
> (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
>
> (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes."

[117] In this case the BBC contends that it had a reasonable belief as to the public interest. It also states that the data protection principle compliance with which it reasonably believes is incompatible with the special purpose of journalism is that the data subject consents to the publication.

[118] The Data Protection Act 1998 falls "within the scope" of EU law so that this court has to respect the rights, observe the principles and promote the application of the Charter of Fundamental Rights of the European Union ("the Charter"). Article 52(3) provides that:

> "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

So when this court interprets the Charter it is required to consider the case law of the ECtHR. The provisions of the Charter upon which the plaintiff relied, were Article 7 (Respect for private and family life), Article 8 (Protection of personal data), Article 47 (Right to an effective remedy and to a fair trial) and Article 48 (Presumption of innocence and right of defence). The plaintiff contends that the BBC can only rely on section 32 of the 1998 Act if it complies with the provisions of, in particular, Articles 47 and 48 of the Charter and in that respect Mr Girvan relied on paragraphs [26] to [32] of the judgment of Lord Kerr in delivering the judgment of the Supreme Court in *Rugby Football Union v Consolidated Information Services Ltd (formerly Viagogo Ltd) (in liquidation)* [2012] UKSC 55.

[119] The Data Protection Act 1998 protects not only privacy but also, by the application of the Charter, other fundamental rights including the presumption of innocence and the right to a fair trial. So it is suggested by Mr Girvan that in considering a section 32 defence that the BBC reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and that the BBC reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes, the BBC cannot leave out of account the public interest in the administration of justice. For the purposes of this application I accept that legal submission. I also accept that if there is an anticipated contempt of court the BBC could not have reasonably believed that the publication was in the public interest.

[120] There was clear evidence from the defendant that prior to broadcast of both Spotlight programmes they had carefully considered the public interest and also considered with input from the NCA the plaintiff's fair trial rights. The evidence was that they believed that the publication was in the public interest and that they reasonably believed that, in all the circumstances, obtaining the plaintiff's consent was incompatible with the special purposes. At the hearing before me there was no detailed analysis on behalf of the plaintiff as to why those beliefs were unreasonable. The context is that it appears to have been a belief formed not only by the BBC but also by a number of other editors who have published information about the

plaintiff. Given that criminal proceedings were not active and the provisional view that I have formed as to the engagement of Article 6 of the Convention I do not consider that the prospects of success at the trial on the basis of the Data Protection Act 1998 are sufficiently favourable to justify an interlocutory injunction being made in the particular circumstances of this case. Even if this is a case where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite I do not consider that the plaintiff has established such a lesser degree of likelihood.

[121] I refuse to grant an injunction under the Data Protection Act 1998. In view of the interaction between data protection, the law of contempt of court and the exacting standards in relation to covert recordings, I do not strike out this part of the plaintiff's claim.

Conclusion

[122] I decline to grant an interlocutory injunction.

[123] I strike out those parts of the plaintiff's claim that relate to any contempt of court which is alleged to have been committed. I also strike out the plaintiff's claim based on misuse of private information. I refuse to strike out the rest of the plaintiff's claim.

[124] Subject to continuing the reporting restriction order for a period to allow the plaintiff to consider an appeal, I will discharge that order.

[125] I direct that a copy of this judgment be sent by the court office to the Attorney General.