Neutral Citation: [2017] NIQB 71 | *Ref:* **STE10273**

Judgment: approved by the Court for handing down | *Delivered:* **19/07/2017**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

____

QUEEN'S BENCH DIVISION

____

BETWEEN

**COLIN FRANCIS DUFFY, ALEX McCRORY
AND HENRY JOSEPH FITZSIMONS**

Plaintiffs:

and

**SUNDAY NEWSPAPERS LIMITED, JAMES McDOWELL, PAULA MACKIN,
THE CHIEF CONSTABLE OF THE POLICE SERVICE FOR
NORTHERN IRELAND, A PERSON OR PERSONS UNKNOWN
THE ATTORNEY GENERAL FOR NORTHERN IRELAND,
THE ADVOCATE GENERAL FOR NORTHERN IRELAND,
and THE ATTORNEY GENERAL FOR ENGLAND AND WALES**

Defendants:

____

STEPHENS J

Introduction

[1] The plaintiffs, Colin Francis Duffy, Alex McCrory and Henry Joseph Fitzsimons have each commenced separate proceedings against a number of defendants. The first three defendants ("the newspaper defendants") are Sunday Newspapers Limited, the publisher of the "The Sunday World," James McDowell, the editor of the Sunday World, and Paula Mackin, a journalist for that newspaper. The fourth defendant is the Chief Constable of the Police Service for Northern Ireland ("the Chief Constable"). The fifth defendant was described in each of the writs as "An officer or officers of the Police Service for Northern Ireland unknown". The plaintiffs sought to amend the name of the fifth defendant to "A person or persons unknown" and that amendment was granted on 24 October 2016. The fifth defendant is alleged to be the source or sources of Articles published in the

Sunday World on 8 February 2015 and on 8 November 2015 ("the Articles"). The Chief Constable is sued on the basis of his vicarious liability for the actions of the fifth defendant, it still being asserted that the fifth defendant is a police officer. The writs also named the sixth, seventh and eighth defendants, the Attorney General for Northern Ireland, the Advocate General for Northern Ireland and the Attorney General for England and Wales, though none of these have been served so that at present they are not parties to any of these actions.

[2] The plaintiffs allege that whilst criminal proceedings against them were active a source or sources disclosed to the newspaper defendants a transcript of covert audio recordings leading to the publication of the Articles about them based on those recordings asserting their criminal guilt.

[3] The newspaper defendants have given undertakings not to re-publish the content of the Articles. By these applications the plaintiffs seek:

(a) an interlocutory injunction to prohibit *the fifth defendant* from any further disclosure of the contents of covert audio recordings of conversations which are alleged to have been between the plaintiffs and which the prosecution in the criminal proceedings assert establish that the plaintiffs participated in a conspiracy to murder and are members of a proscribed terrorist organisation; and

(b) an order for interrogatories to compel the editor of, and a journalist for, the "Sunday World" to reveal the name or at least the status of the source or sources who disclosed to them the contents of the covert audio recordings; and/or

(c) a similar order to reveal the name or at least the status of the source or sources under the principles contained in *Norwich Pharmacal Co v Customs and Excise* [1973] 2 All ER 943.

[4] The fifth defendant is a person or persons unknown and has not been served with proceedings or the application for an injunction so that application against him or her is an *ex parte* application.

[5] The editor and journalist oppose the application to compel them to disclose their source or sources relying on Section 10 of the Contempt of Court Act 1981 and Article 10 ECHR.

[6] Mr Fitzgerald QC and Mr Girvan appeared for the plaintiff, Colin Francis Duffy. Mr Fitzgerald QC and Mr Fletcher appeared for the plaintiff, Alex McGrory. Mr Girvan appeared for the plaintiff, Henry Joseph Fitzsimmons. Mr Lockhart QC and Mr Coghlin appeared for the first three defendants, Sunday Newspapers Ltd, James McDowell and Paula Mackin. Mr Coll QC and Mr McGuinness appeared for the Chief Constable. The fifth defendant has not been served with these proceedings

and there has been no application by the plaintiffs for substituted service on the fifth defendant by way of service on the first defendant. There has been no appearance by the fifth defendant either in the action or to these applications. The sixth, seventh and eighth defendants, the Attorney General for Northern Ireland, the Advocate General for Northern Ireland and the Attorney General for England and Wales have not been served with proceedings and therefore are not presently parties to these actions. Mr Coll and Mr McGuinness informed the court that they held a watching brief for the Advocate General for Northern Ireland and the Attorney General for England and Wales though they were not making any submissions on their behalf.

Potential stay of these civil proceedings and a reporting restriction order

[7] These civil proceedings are connected to ongoing criminal proceedings so I directed that enquiries be made of the Public Prosecution Service as to whether in their view the civil proceedings should be stayed pending the outcome of the criminal trial. Those enquiries were made both in the summer of 2016 and also in October 2016. The Public Prosecution Service decided not to bring any application to stay these civil proceedings. The absence of a requirement to stay the proceedings does not necessarily mean that these civil proceedings should be heard and determined prior to the criminal proceedings. I will hear the parties in relation to the question as to whether the court has a general jurisdiction to adjourn any trial of these proceedings until after the conclusion of the criminal proceedings, taking into account factors such as whether the issues in the criminal proceedings, and the determination of those issues, will assist the determination of these proceedings in the context of what the plaintiffs have achieved to date in these proceedings which has been to secure them from repetition of any unlawful conduct.

[8] On 8 April 2016 I imposed a reporting restriction order under Section 4(2) of the Contempt of Court Act 1981. 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."

[9] I was concerned that this court did not have a proper opportunity to give consideration to the question as to whether a fair and accurate report of the present proceedings might create a substantial risk of prejudice to the administration of justice in the criminal proceedings. In such circumstances I imposed a reporting restriction order. I have indicated to the parties that I will hear further submissions in relation to that reporting restriction order after I deliver this judgment.

Potential consolidation of the three actions

[10] During the hearing of these interlocutory applications the court enquired as to why the plaintiffs had commenced 3 separate sets of proceedings with 3 separate sets of documents with the costs of the 3 proceedings either being paid by the Legal Aid fund or, if the plaintiffs were successful, with the potential for 3 sets of costs against a defendant. That concern was expressed in the context that in these interlocutory applications the parties only referred to the pleadings and the papers in relation to the action in which Mr Duffy was the plaintiff. The other two sets of proceedings are for all practical purposes identical. Mr Fitzgerald accepted that consolidation of the proceedings in some form should occur and that his instructing solicitors were to liaise with the Legal Services Commission. There has been no application by the defendants to consolidate the 3 actions. Pending some form of consolidation I give this judgment in all 3 actions.

Factual background

[11] On 5 December 2013 a police landrover and two other PSNI vehicles came under gun attack as they travelled on the Crumlin Road, Belfast, towards Twaddell Avenue. Two AK47 rifles and 14 spent rounds of ammunition were later recovered along with a hijacked and burnt out taxi.

[12] It is alleged that on 6 December 2013 three men met in Lurgan and that covert listening devices recorded their conversation. On the basis that these men were the perpetrators they were all arrested on 15 December 2013 and interviewed under caution. The plaintiffs remained silent during the interviews and did not speak. The plaintiffs did not deny during interview that their voices were present on the recording. The plaintiffs have not offered any alibi evidence to suggest that they were elsewhere when the recordings were made. The defence statements in the criminal proceedings have not raised any alibi defence. On 17 December 2013 they were each charged with serious criminal offences linked to the gun attack on 5 December 2013, including attempted murder, possession of firearms and ammunition with intent, preparation of terrorist acts, directing a terrorist organisation and belonging to, or professing to belong to, a proscribed organisation.

The evidence relied on by the prosecution to support these criminal charges is the covert audio recordings of the conversations on 6 December 2013, taken in conjunction with expert speech recognition evidence which the prosecution asserts identifies each of the plaintiffs as having participated in the conversations. The audio recordings are crucial to the prosecution's case.

[13] In relation to each of the plaintiffs criminal proceedings have been active within the meaning of Section 2 and Schedule 1 of the Contempt of Court Act 1981 since their arrest on 15 December 2013 and each of them have been subject to a criminal charge so as to engage Article 6 ECHR by at the latest 17 December 2013.

[14] The plaintiffs were remanded in custody and made applications for bail. One such bail application, which was heard in open court, was reported by the BBC on its website on 18 July 2014 under the heading "Dissident republican suspects: Bail refused in Belfast case." The report stated that the High Court had heard that three alleged dissident republicans were recorded talking about security force targets with a chance of "getting a kill". It was reported that prosecutors claimed that the men also discussed weaponry and explosives and losing two assault rifles in an attack on police in north Belfast. The report names the plaintiffs and states that a barrister informed the court that the men were arrested on the basis of a secretly-recorded meeting in Lurgan the day after the Twaddell Avenue attack and that this "was clearly a leadership or command discussion regarding the IRA, focusing on the attack against police and the loss of two assault rifles." That bail application is but one example of the numerous court hearings in which details of the case have been brought to the attention of the court in a public forum.

[15] On 12 December 2014 committal papers were served on all three plaintiffs. These committal papers included a transcript of a covertly recorded conversation. On 26 January 2015 copies of the covert audio recording on disc were served upon the respective legal representatives of the plaintiffs. So by the date of publication of the two Articles the covert audio recordings, and documents relating to the recordings and the interviews of the plaintiffs, would not only have been in the possession of the Chief Constable but were also in the possession of employees of the Public Prosecution Service, employees of the Court Service, the plaintiffs and their solicitors and anyone to whom the plaintiffs may have made the materials and information available.

[16] On 8 February 2015 an Article was published in the Sunday World under the heading "Sold out by own words. The dissidents' desperate dash to cover their tracks." A second Article was published on 8 November 2015 under the heading "Down to the wire talks shootings and bombings were recorded spooks bugged baby's buggy to nab OnH suspect." Both Articles named the plaintiffs. The first Article purported to quote from the covert audio recordings. The second Article asserted that highly sensitive security documents seen by the Sunday World proved "a trio of alleged terrorists were bugged" and that the Sunday World had obtained a

15 page disclosure document produced during interviews (of the plaintiffs) by the police.

[17] The committal proceedings commenced in Belfast Magistrates' Court in January 2016 and on 21 March 2016 all three plaintiffs were returned for trial in the Crown Court.

[18] Inspector Lowans states that during the committal proceedings and on 4 and 5 February 2016 the prosecution's speech recognition expert witness gave evidence as did a Detective Constable. He also states that the primary matters focused upon during the committal proceedings were in relation to the deployment of devices and security service personnel who interacted with Colin Duffy in Spain together with the methodology of the prosecution's speech recognition expert witness. The committal proceedings were in open court. The only reporting restrictions were in relation to reporting of bail conditions and in relation to an application made to Mr Justice Treacy on 22 June 2016. To the best of Inspector Lowans' knowledge there has been no other reporting restriction placed upon the Crown Court proceedings. Inspector Lowans also referred to press Articles including, for instance, an Article in the Belfast Telegraph dated 21 March 2016 which states that "the prosecution alleges that security services recorded the three men in conversation at a meeting a day after the gun attack."

[19] Inspector Lowans states that during the course of the committal proceedings, (which proceedings occurred after the two Articles were published) a journalist may have been provided with a copy of the provisional deposition of the prosecution's expert witness in relation to speech recognition. Inspector Lowans also states that this matter was referred to the Attorney General for Northern Ireland by the Public Prosecution Service but that he does not believe the provision of the provisional deposition to the journalist was made by an officer of the PSNI. He further states that the police, the Court Service, PPS legal representatives and the plaintiffs' legal representatives would have all had access to the provisional deposition. Furthermore, Inspector Lowans refers to differences between the provisional deposition of the expert witness and the contents of one of the Articles published by the newspaper defendants, stating not only that the particular expert witness did not refer to this information in his provisional deposition but also that there are no voice expert reports in this case containing that information. From this it can be seen that the Chief Constable will be relying on an inference that the information did not come from the PSNI, though it may be possible that it did but was distorted in its repetition or that there was journalistic inaccuracy.

[20] The deposition of the prosecution's expert witness (3/174-344/26 of 171) refers to two different copies of a transcript of a covert audio recording. They are the same transcripts but one has the additional words "solicitor's copy" above the words "interview copy" but otherwise they appear identical.

[21] "No Bill" applications were made by all three plaintiffs in relation to all the counts on the indictment under Section 2(c) of the Grand Jury Abolition Act (Northern Ireland) 1969. Those applications were refused on 23 January 2017 (COL10138).

[22] It is envisaged that the contents of the covert audio recordings of conversations which are alleged to have been between the plaintiffs will be in the public domain during the course of the criminal trial together with the allegation in the criminal proceedings that those recordings establish that the plaintiffs committed a number of criminal offences including participating in a conspiracy to murder and membership of a proscribed terrorist organisation.

The plaintiffs' causes of action and the defence of the newspaper defendants and the defence of the Chief Constable

[23] In these civil proceedings the plaintiffs allege that the covert audio recordings, which are referred to and quoted in the Articles, are sensitive personal data within the Data Protection Act 1998 and that all five of the defendants, who are parties to this action, were data controllers. That the first three defendants and the fifth defendant processed the data by disclosing it or making it available and the fourth defendant (if the fifth defendant was his servant or agent) also processed the data. That in order to process the data each of the defendants had a duty to comply with the data protection principles including the first data protection principle which is that personal data *shall be processed fairly and lawfully*. As the Data Protection Act 1998 is within the scope of EU Law, the question as to whether personal data is processed fairly and lawfully has to be assessed by reference to the EU Charter of Fundamental Rights and Freedoms. Furthermore, as the covert recordings must have been authorised under the Regulation of Investigatory Powers Act 2000 ("RIPA"), any processing which does not comply with the provisions of that legislation could not be lawful processing. The plaintiffs also referred to, and rely on, a number of other data protection principles. The second principle in Schedule 1, Part I, paragraph 2 states that:

> "Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes."

The plaintiffs assert that covert recordings could only have been obtained for the specified purpose of a criminal investigation and that to disclose the recordings to the newspaper defendants and for them to disclose the recordings to the public was to process it in a manner incompatible with that purpose.

Schedule 1, Part I, paragraph 4 states that:

> "Personal data shall be accurate and, where necessary, kept up to date."

Schedule 1, Part I, paragraph 7 states that:

> "Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data."

The plaintiffs assert that the Chief Constable was in breach of this obligation to take measures against unauthorised or unlawful processing of personal data.

[24] In relation to the first data protection principle that personal data is to be processed *fairly and lawfully* it is provided that data be treated as obtained fairly if they consist of information obtained from a person who:

> "(a) is authorised by or under any enactment to supply it, …"

The plaintiffs assert that the individual from whom the first three defendants obtained the personal data could not be a person authorised by or under any enactment to supply it.

[25] The plaintiffs also assert that on the facts of this case in order to disclose sensitive personal data the data subject has to consent (Schedule 3, paragraph 1) and that there was no such consent, though it may be possible for the newspaper defendants to rely on the defence in Section 32 of the 1998 Act.

[26] The plaintiffs also rely on a number of other causes of action. For instance, they assert that prior to any criminal trial they have a reasonable expectation of privacy in relation to the covert audio recordings and that the newspaper defendants are liable in the tort of misuse of private information. On the same basis that there is liability on the fifth defendant and on the Chief Constable on the basis of his vicarious liability if the fifth defendant is his servant or agent. They also assert that the Chief Constable is a public authority and is vicariously liable for the breach by the fifth defendant of Article 6 ECHR. Furthermore, that the plaintiffs are entitled to an injunction to prevent the defendants and each of them processing their personal data unlawfully or from committing a contempt of court, either under the strict liability rule in the Contempt of Court Act 1981 or under common law contempt of court. The plaintiffs claim both compensatory, aggravated and exemplary damages.

[27] The newspaper defendants in their defence admit that they know the identity of the source or sources of the information contained in the Articles, they assert amongst other matters that they are exempt from the data protection principles, except the seventh principle, on the basis that the data was processed only for the

purposes of journalism, they deny that there was any expectation of privacy in relation to any of the information published in the Articles, they assert that publication of the information in the Articles was in the public interest and they deny all liability to the plaintiffs.

[28] The Chief Constable in his defence asserts, amongst other matters, that the plaintiffs have failed to plead with specificity the "documents, materials and discovery" arising from the prosecution to which a duty of confidentiality is owed, that there are a number of persons and classes of persons other than police officers who would have had access to the materials in respect of the criminal charges, that he did not unlawfully provide and/or leak the categories of documents set out in the statement of claim, that he requires the plaintiffs to prove that the disclosure to the newspaper defendants was by a police officer, that personal data processed for the purposes of the prevention or detection of crime or the apprehension or prosecution of offenders is exempt from the first data protection principle (except to the extent to which it requires compliance with the conditions in Schedules 2 and 3 of the 1998 Act) and that he denies all liability to the plaintiffs.

[29] The stance of the newspaper defendants protecting the source or sources from disclosure in effect precludes them, if found liable, from seeking a contribution from the Chief Constable on the basis that the source was a police officer. The Chief Constable is not so precluded and in such circumstances could seek a contribution from the newspaper defendants.

Legal principles in relation to an interlocutory injunction

[30] The guidelines in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504 for the grant of an interlocutory injunction were considered in *Cream Holdings Limited and others v. Banerjee and others* [2004] UKHL 44 in the context of Article 10 ECHR and Section 12 of the Human Rights Act 1998. In *American Cyanamid* Lord Diplock said, at pages 407- 408, that the court must be satisfied the claim 'is not frivolous or vexatious; in other words, that there is a serious question to be tried.' In *Cream Holdings* Lord Nicholls at paragraph [22] said that:

> "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 s12(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 s12(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 Art 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).

In *Callaghan v Independent News and Media Limited* [2008] NIQB 15 I applied that degree of flexibility, stating that "the more serious the consequences the less cogent the evidence needs to be to satisfy that test." There can be a similar degree of flexibility depending on the seriousness of the consequences in other areas of the law; see for instance *Jordan's Applications* [2014] NIQB 11, at paragraph [118].

[31] An interlocutory injunction looks to the future between the date of the application and the date of trial. Its purpose is to restrain threatened breaches of the plaintiff's rights pending trial. Normally, in the context of an interlocutory application which engages Article 10 ECHR when a plaintiff has established that he will probably ('more likely than not') succeed at the trial in establishing that the defendant has infringed his rights or, if appropriate, the plaintiff has established a lesser degree of likelihood of infringement, and provided that damages are not an adequate remedy and after considering the balance of convenience, the court will assume that the infringement is not a one-off activity and will grant an interlocutory injunction to stop repetition. However, this course is not inevitable so that if, on the balance of probabilities, no future threat exists, an interlocutory injunction will be refused, particularly where there are limited potential adverse consequences of any future infringement. Lord Dunedin in *A-G for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd* [1919] AC 999 stated at 1005: '… no one can obtain a quia timet order by merely saying "Timeo"; he must aver and prove that what is going on is calculated to infringe his rights.' Similar guidelines were applied in relation to permanent injunctions in *Proctor v Bayley* (1889) 42 Ch D 390, (1889) 6 RPC 538, *Coflexip SA and another v Stolt Comex Seaway MS Ltd and others* [2000] EWCA Civ 242, *Raleigh Cycle Co Ltd v H Miller & Co Ltd* (1949) 66 RPC 23 ,at 43 and by

Tugendhat J in relation to an interlocutory injunction in *Citation plc v Ellis Whittam Ltd* [2012] EWHC 549 (QB).

The application for an interlocutory injunction against the source

(a) Whether the plaintiffs will more likely than not succeed at trial against the source or whether the plaintiffs have established a lesser degree of likelihood

[32] Whether the plaintiffs will more likely than not succeed at trial against the source depends on the status of the source.

[33] If the source was a police officer or a public official, then the plaintiffs will probably (more likely than not) succeed at trial in establishing that the source acted unlawfully on a number of alternative or cumulative grounds, including breach of confidence, misuse of private information and breach of the Data Protection Act 1998.

[34] Even if the source was not a police officer or a public official, then if the document was not kept securely in an office environment and the source was someone who (whether legitimately or not) had access to that office, then again the plaintiffs will probably (more likely than not) succeed at trial against the source on a basis of breach of confidence.

[35] The pool of potential sources is wide given, for instance, that the 15 page disclosure document was in the possession of police officers but was made available to the plaintiffs' solicitors with the potential for onward transmission to any of the plaintiffs and by them to others. Further instances as to why the pool of potential sources is wide is that any person engaged by the plaintiffs' solicitors to defend the criminal proceedings may have been provided with a copy of the document and also given a similar level of potential dissemination by the PSNI placing the document into a number of different office environments.

[36] At this interlocutory stage it is not possible to analyse all the potential ways in which the information may have been provided to the newspaper defendants, though it is difficult to envisage a source except, for instance, the plaintiffs or someone acting on their behalf who would not be acting unlawfully.

[37] Despite the exact size of the pool of potential sources not being known, despite the fact that at this stage one cannot envisage all the methods by which the information might have become available to the newspaper defendants and despite the fact that whether disclosure by the source to the newspaper was unlawful may depend on the status of the source, I am prepared to hold, purely for the purposes of this interlocutory application, that the plaintiffs have established that they will probably (more likely than not) succeed at trial in establishing that the source acted unlawfully.

(b) Whether a future threat of further infringement exists

[38] There are a number of factors relevant to the question as to whether a future threat exists.

[39] I am prepared to hold, purely for the purposes of this interlocutory application, that the source acted unlawfully on two separate occasions, that is prior to 8 February 2015, the date of the first Article, and prior to 8 November 2015, the date of the second Article. On that basis this was not just one unlawful act but two separated by some 9 months. A single unlawful act gives rise to the assumption that it will be repeated and that assumption is strengthened by the fact that, for the purposes of this interlocutory application, there were two unlawful acts by the source. This factor supports the proposition that the plaintiffs have established that a future threat exists.

[40] Against that, the lack of any further reports over a substantial period of time supports the proposition that no future threat exists. On 24 November 2015 and 27 November 2015 the newspaper defendants gave undertakings not to re-publish. There has been no re-publication either by the newspaper defendants or by anyone else over the period of some 1 year and 8 months since 8 November 2015. Mr Fitzgerald suggested that the source could "hawk" the story around other media outlets which could lead to further publications but he recognised that there was no evidence that the source had approached any other media outlet, either before or after the Articles were published.

[41] Another factor which supports the proposition that no future threat exists is that the source or sources are not anonymous, given that in their defence the newspaper defendants admit that they know "the identity of the source or sources of the information contained in the Articles …". The newspaper defendants have stated that they will immediately inform the source or sources that they should anticipate that any further disclosure by them of the covert audio recordings, of the contents of any of the prosecution expert evidence in relation to speech recognition, of anything which is likely to prejudice a terrorist investigation, or of anything which is a contempt of court, will result in their prosecution and conviction for serious criminal offences with consequences, if the source is a public official or an employee acting in breach of confidence, for their employment. The criminal offences which may have been committed by the source include, for instance, an offence under Section 55 of the Data Protection Act 1998. That Section makes it an offence for a person to knowingly or recklessly, without the consent of the data controller, obtain or disclose personal data or the information contained in personal data. The source may also have committed a number of other offences including the common law offence of misconduct in public office which is committed, *inter alia*, when a public officer acting as such wilfully misconducts himself to such a degree as to amount to an abuse of the public's trust in the office holder without reasonable

excuse or justification. If the source is a public officer, the unauthorised leaking of sensitive information could mean that he has committed that offence.
[42] I consider that knowledge by the source or sources of the heavy sanction of prosecution is another highly relevant factor to be taken into consideration when determining whether the plaintiff has established that a future threat exists of further unlawful acts by the source or sources.

[43] Taking all of those factors into account, I conclude that the plaintiffs have no arguable case that there is now, or will at trial be found to be, a real risk that the fifth defendant will repeat the alleged unlawful acts. On that basis I refuse to grant an interlocutory injunction against the fifth defendant.

(c) The gravity of the consequences if the risk materialises

[44] The question as to whether the plaintiffs have established a risk of further infringement which should be prevented by the grant of an interlocutory injunction also requires consideration of the gravity of the consequences if the risk materialises.

[45] The first potential consequence would be to the criminal proceedings. Those proceedings are to be heard by a judge alone and it was not suggested that there would be any risk to the impartiality of the criminal trial by the contents of either of the Articles. No question arises as to the impartiality of the judge being affected by any further publication.

[46] Mr Fitzgerald accepted that the issues in the criminal trial related to the identification of the plaintiffs and if so as to what was said by each of them. Mr Fitzgerald, whilst emphasising that he was not instructed in the criminal proceedings, initially suggested that in theory there could be inappropriate pressure on a defence expert witness or theoretically on an alibi witness. However, there was no evidence supporting either of these theories and, given that the application for an interlocutory injunction was on an *ex parte* basis. Mr Fitzgerald stated that he could not advance either of those grounds as adversely impacting on a criminal trial.

[47] The remaining potential adverse consequence was on the plaintiffs' rights under Article 6 ECHR that they "shall be presumed innocent until proved guilty according to law." The presumption of innocence may be infringed not only by a judge or court but also by other public authorities; see the decision of the ECtHR in *Allenet de Ribemont v France* (Application No 15175/89) at paragraph 36. Article 6(2) governs criminal proceedings in their entirety irrespective of the outcome of those proceedings and guarantees that no one will be described, or treated, as guilty of an offence before his guilt has been established by a court,; see the decision of the European Court of Justice in *Yves Franchet v Byk* (8 July 2008) at paragraph 209. So if the source was a public official then the plaintiffs' fundamental right contained in Article 6(2) ECHR and Article 48(1) of the Charter will have been breached and they will be entitled to a declaration and potentially they will be entitled to damages. In *Ribemont* the ECtHR awarded the applicant damages of 2M French Francs for

breaches of the reasonable time requirement in Article 6(1) and for breach of the presumption of innocence in Article 6(2): see paragraphs [59]-[62]. An award of damages for breach of Article 6 was considered by the House of Lords in *R (on the application of Greenfield) v The Secretary of State for the Home Department* [2005] 2 All ER 240 which considered, amongst others, the head of general or non-pecuniary damage for "physical and mental suffering." There is a distinction between anxiety involved in the criminal proceedings and anxiety as a result of the breach of the right to the presumption of innocence. In some situations it is reasonable to assume that the applicant must have suffered anxiety as a result of a breach of Article 6(2). To gain an award of damages under this head it is not necessary for the plaintiffs to show that but for the violation the outcome of the criminal proceedings would or would probably or even might have been different. The ECtHR has been very sparing in making awards and when it does the sums awarded have been noteworthy for their modesty: see paragraphs [16], [17] of *Greenfield*.

[48] If there is a future breach of the plaintiffs' presumption of innocence by or at the instigation of a public authority, then, if appropriate, the plaintiffs can be compensated by an award of damages irrespective of the outcome of the criminal proceedings. For the purposes of this application for an interlocutory injunction I consider that a declaration or a declaration and an award of damages would be an adequate remedy.

[49] In arriving at the decision not to grant an interlocutory injunction against the fifth defendant I have also taken into account my conclusion as to the gravity of the consequences if the risks materialise.

(d) Exercise of discretion as to the grant of an interlocutory injunction

[50] In case I am incorrect in relation to those grounds for refusing to grant an interlocutory injunction I will also address the question as to whether an interlocutory injunction should be refused in the exercise of discretion.

[51] The exercise of discretion to grant an interlocutory injunction where the identity of the fifth defendant is unknown has to take into account how the order of the court will be served or brought to the notice of the source and how it could be enforced.

[52] The newspaper defendants have not agreed to serve any injunction on the fifth defendant.

[53] There has been no application for substituted service of the proceedings on the fifth defendant, or of these applications, or of any order granting an interlocutory injunction by way of service on the newspaper defendants. Even if an application for substituted service on the source by service on the newspaper defendants was made, which it has not been, it would be a difficult application given the chilling effect on sources amounting to an interference with the Article 10 right to freedom of

expression of the newspaper defendants; see *X v Persons Unknown* [2006] EWHC 2783, at paragraphs [74]-[77].

[54] As the plaintiffs have not applied for or obtained an order for substituted service of any interlocutory injunction, then a potential method of bringing the order to the source's attention would be to bring publicity to these proceedings. However, it would not be possible to know whether this method was effective and furthermore these proceedings are presently subject to a reporting restriction order under Section 4(2) of the Contempt of Court Act 1981.

[55] Even if the order was not served on or brought to the attention of the fifth defendant, the plaintiffs can still rely on the *Spycatcher* doctrine under which third parties should not knowingly frustrate orders of the court whether made *inter parties* or *contra mundum*. That would involve serving the injunction on other media outlets with a confidential schedule identifying the "hotspots" so as to avoid any coverage if the source tried to sell or provide information to those outlets. That would provide a potential remedy for contempt of court for the plaintiffs against those media outlets if they published any information about those "hotspots" but would only provide a remedy for contempt of court against the source if it was proved to the criminal standard that he was the same person or persons as the source or sources of the Articles published by the newspaper defendants.

[56] I consider that all these difficulties would lead in the exercise of discretion to the court declining to grant an interlocutory injunction against the fifth defendant.

The application for disclosure of the name or status of the source

[57] The plaintiffs seek to obtain the name or in the alternative the status of the source either by way of interrogatories or under the jurisdiction established by the decision of the House of Lords in *Norwich Pharmacal Co v Customs & Excise Commissioners* [1973] 2 All ER 943.

[58] In relation to the plaintiffs' application for interrogatories it is noted that none of the parties have given discovery and it is sometimes reasonable to postpone the application where it is not yet plain what information will be obtained from discovery: see the *Supreme Court Practice 1999* at paragraph 26/4/3. In relation to discovery from the newspaper defendants it is probable that some of the documents, if provided on discovery, would establish the identity or status of the source but, if that were so, then it is clear that the newspaper defendants will refuse to provide discovery relying on Section 10 of the Contempt of Court Act 1981 and Article 10 ECHR. In such circumstances I do not consider it appropriate to postpone the plaintiffs' application for interrogatories until after discovery by the newspaper defendants. However, the Chief Constable has also not provided discovery and that discovery could well assist the court in relation to issues such as the size of the pool of potential sources within the PSNI and as to whether, if the court orders disclosure by the newspaper defendants of the status of the source, that would lead to a reasonable chance that the identity of the source would be revealed.

[59] The jurisdiction to grant leave to serve interrogatories is contained in Order 26 rule 1(2) of the Rules of the Court of Judicature (Northern Ireland) 1980. The plaintiffs seek leave to serve interrogatories which would require the newspaper defendants to identify the source by name. However, Mr Fitzgerald stated that if the court did not wish to make such an order that instead the newspaper defendants could be ordered to answer an interrogatory as to whether the source is a PSNI officer or servant of the state.

[60] The jurisdiction to require a person to assist by the delivery up of otherwise confidential information under *Norwich Pharmacal* arises where (a) without discovery of the information in the possession of the person against whom discovery is sought no action can be begun against the wrongdoer, and (b) the person against whom discovery is sought has himself, albeit through no fault of his own, been involved in the wrongful acts of another so as to facilitate the wrongdoing. Both jurisdictions to compel disclosure of the name or status of the source are subject to Section 10 of the Contempt of Court Act 1981 which provides that:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

It is recognised that the applications whether under Order 26, rule 1(2) or under *Norwich Pharmacal* turn on Section 10 of the 1981 Act.

[61] Section 10 contains a "negative right" not to be compelled to disclose "the source of information". That negative rights is to be read compatibly with Article 10 ECHR,; see paragraph [30] of the judgment of Sedley LJ in *Interbrew SA v Financial Times Ltd* [2002] EMLR 24. The negative right includes not only the right not to be compelled to identify the source by name but also not to be compelled to:

(a) provide information that would lead to a "reasonable chance" that the identity of the source would be revealed,; see *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, at page 349G;

(b) provide information that creates "a serious risk of compromising the identity of the journalist's sources…" see *Sanoma v Uitgevers BV v The Netherlands* [2011] EMLR 4 at paragraph 92;

(c) reveal the confidential material provided by the source,; see *Malik v Manchester Crown Court* [2008] EMLR 19, at paragraph [50];

(d) reveal information which is likely to be something that the source would be uncomfortable about having disclosed,; see paragraph [51] of *Sir Cliff Richard v The British Broadcasting Corporation and another* [2017] EWHC 1291 (Ch).

The negative right is not only not to disclose to the parties but also not to disclose to anyone. This means that the "reasonable chance" of identifying the source or the serious risk of compromising the identity of the journalist's sources is to be assessed by reference to the knowledge not only of the parties to the action but also by reference to the knowledge of others such as potential employers of the source.

[62] It can be seen from the terms of Section 10 that the plaintiffs in this case have to establish that disclosure is *necessary* in relation to one or more of the following gateways, namely:-

(a) in the interests of justice or

(b) in the interests of national security or

(c) for the prevention of disorder or crime.

All these gateways in Section 10 fall within one or more of the catalogue of legitimate aims in Article 10 ECHR.

[63] The plaintiffs did not seek to rely upon disclosure being necessary in the interests of national security but rather relied on the interests of justice and for the prevention of crime.

[64] The phrase "in the interests of justice" was considered in *Ashworth Hospital Authority v Mirror Group Newspapers Limited* [2001] 1 WLR 515 at paragraphs [79]-[84]. Lord Phillips of Worth Matravers MR stated that 'interests of justice' in Section 10 mean "interests that are justiciable" and stated that the interpretation of Lord Bridge in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, at 43 accorded more happily with the scheme of Article 10. Lord Bridge stated that:

> "It is, in my opinion, `in the interests of justice', in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives."

[65] The purpose of prevention of crime in Section 10 is much wider than simply preventing repetition of crime,; see *Interbrew SA v Financial Times Limited* [2002] EWCA Civ 274, at paragraph [39]. In *Re An Inquiry under The Company Securities (Insider Dealing) Act 1985* [1988] 1 AC 660 it was stated that "prevention of … crime"

was not restricted to particular crimes but was used in its broad general sense of deterrence and containment. Lord Griffiths stated:

> "The phrase "prevention of … crime" carries, to my mind, very different overtones from "prevention of *a* crime" or even "prevention of *crimes*." There are frequent articles and programmes in the media on the prevention of crime. The subject on these occasions is discussed from many points of view including the social background in which crime breeds, detection, deterrence, retribution, punishment, rehabilitation and so forth. The prevention of crime in this broad sense is a matter of public and vital interest to any civilised society." (emphasis added)

[66] The purpose of prevention of crime has a particular importance when considered in the context of covert surveillance authorised under RIPA. There is a public and vital interest that covert recordings are not unlawfully disclosed and that any culture of disclosure is deterred so that the risk of any further unlawful disclosure on the part of those entrusted to intrude into the lives of others is diminished.

[67] The requirement to establish that the disclosure is "necessary" involves "a single exercise in which the court considers not merely whether, on the facts of the particular case, disclosure of the source is necessary to achieve the legitimate aim but, more significantly, whether the achievement of the legitimate aim on the facts of the instant case is so important that it overrides the public interest in protecting journalistic sources in order to ensure free communication of information to and through the press" see *Ashworth Hospital Authority v Mirror Group Newspapers Limited* [2001] 1 WLR 515, [2001] E.M.L.R. 11, [2001] F.S.R. 33, at paragraph [90]. Furthermore, proportionality must also be considered by the court so that "the question … therefore becomes whether the claimant has shown that it is both necessary, in the sense of there being an overriding interest amounting to a pressing social need, and proportionate, for the court to order the journalist to disclose the name of his source" see *Ashworth,* at paragraph [61].

(a) Whether in the interests of justice

[68] In relation to the proceedings against the Chief Constable and the question as to whether disclosure is in the interests of justice, Mr Fitzgerald stated that, whereas the plaintiffs did not require to know the name of the source, they did require to know the status of the source as a police officer in order to establish their claims against the Chief Constable. Absent that information and if they are unable to prove that he was on the balance of probabilities a police officer by other means, then their action against the Chief Constable will fail.

[69] In relation to the potential for proceedings to be served on the Attorney General for Northern Ireland, Mr Fitzgerald stated that, whereas the plaintiffs did not require to know the name of the source, they did require to know the status of the source as a public official. In such circumstances if the fifth defendant was not a police officer, but was rather a public official, then with knowledge of that status the plaintiffs would serve the proceedings on the Attorney General for Northern Ireland under the Crown Proceedings Act 1947 as the relevant body of last resort pursuing a claim against an unknown public authority based on breach of Article 6 ECHR.

[70] In relation to the proceedings against the newspaper defendants and the question as to whether disclosure is in the interests of justice, Mr Fitzgerald stated that, whereas the plaintiffs did not require to know the name of the source, they did require to know the status of the source as a police officer to establish a claim for misuse of private information and for breach of the 1998 Act.

[71] In addition Mr Fitzgerald stated that the status of the source and his motives are relevant to the assessment of damages.

[72] The newspaper defendants conceded that this case falls within the purpose of the interests of justice within Section 10 which purpose is a legitimate aim within Article 10 ECHR.

[73] I accept that some degree of disclosure would be in the interests of justice but the weight to be attached to that interest has to be assessed so that it can be taken into account in the balancing exercise. In relation to the newspaper defendants I do not consider that any significant weight should be attached *at this stage*. I envisage that at trial there will be the potential for adverse inferences being drawn against the newspaper defendants both in relation to data protection and in relation to misuse of private information. I am not persuaded, based on the present evidence and the potential for adverse inferences, that the status of the source is of any significant weight in relation to the newspaper defendants. It may transpire at trial that it is of significant weight and, if that is so, then the issue can be reviewed in the light of that assessment.

[74] It is clear that the status of the source is crucial to the case against the Chief Constable and to the potential proceedings against the Attorney General for Northern Ireland. However, if the plaintiffs achieved all or substantially all of their relief from the newspaper defendants, then the weight to be attached to this interest would be substantially reduced. As I have indicated for the purposes of the application for an interlocutory injunction, I consider that a declaration or a declaration and an award of damages would be an adequate remedy. I consider for the purposes of this interlocutory application only, and not otherwise, that it is likely that a judgment against the newspaper defendants would be the equivalent of a declaration and that it is likely that an award of damages against the newspaper defendants would be the same or substantially the same as an award of damages against the Chief Constable or against the Attorney General for Northern Ireland.

Again it may transpire at trial that greater weight should be attached and, if that is so, then the issue can be reviewed in the light of that assessment.

[75] In assessing the weight to be attached to the interests of justice I also take into account what the plaintiffs have achieved by this litigation to date in comparison with what remains to be achieved. The plaintiffs have secured undertakings from the newspaper defendants, they have ensured that the source is made aware of the very serious potential consequences if there is any repetition, they have prevented any further publications and in my assessment there is no real risk of the source repeating the alleged unlawful acts. There remain substantial issues to be determined but a concentration on those issues should not overshadow the interests of justice which have been achieved.

[76] My overall assessment at this interlocutory stage is that the weight to be attached to the interests of justice is to be kept strictly in proportion.

(b) Whether for the prevention of crime

[77] In relation to whether disclosure is for the prevention of crime, the plaintiffs state that disclosure of the source is for that purpose in a broad sense and is a legitimate aim within Article 10 ECHR regardless of whether the source was or was not a police officer. The plaintiffs state that criminal activity or a background in which crime breeds could exist in relation to both police officers and a number of others within the pool of potential sources in the area of covert recordings. The plaintiffs state that there is a strong vital public interest in ensuring that covert recordings are not misused.

[78] The newspaper defendants, whilst not formally conceding, did not seek to argue that the disclosure of the source was not for the purpose of prevention of crime.

[79] I accept that disclosure of the identity of the source would be for the prevention of crime, both on the basis of investigating whether a crime has been committed and on the basis of deterring a background in which crime breeds. I also accept that identifying the status of the source would indirectly deter the source and would deter a background in which crime breeds. However, the weight to be attached to that gateway has to be assessed so that it can be taken into account in the balancing exercise. On the one hand the area of covert surveillance under RIPA is a particularly sensitive area which attracts considerable weight. However, in relation to the source in this case he has now been made aware by the newspaper defendants of the very serious potential criminal and employment consequences. The deterrence of the source has taken place not only by these proceedings but also by the information which has been made available to him by the newspaper defendants. I have concluded that there is now no real risk that the fifth defendant will repeat the alleged unlawful acts. The newspaper defendants have been represented in court and are aware of the legal requirements. The Chief Constable

has a responsibility to enforce the law, to prevent unlawful disclosure and to investigate if appropriate.

[80] My overall assessment at this interlocutory stage is that the weight to be attached to the gateway of the prevention of crime is to be kept strictly in proportion.

(c) The submissions of the plaintiffs and of the newspaper defendants and of the Chief Constable as to whether disclosure is necessary

[81] The plaintiffs emphasised that the newspaper defendants had conceded that the gateways had been met in this case and that what was alleged in the proceedings was an abuse of power in relation to the right to a fair trial of the most serious criminal charges and an undermining of the fundamental right to the presumption of innocence. That the issues raised are profound so that at least disclosing the status of the source is an overriding public interest. The plaintiffs also asserted that there was no risk to the life of the source or any risk of the source's identification if the status of the source was disclosed.

[82] The newspaper defendants contended that it was not necessary to order the disclosure of the identity of the source or the status of the source.

[83] The Chief Constable contended that, unless the newspaper defendants were ordered to disclose the name of the source, then it was not necessary to order the disclosure of the status of the source.

[84] In relation to disclosing the name of the source, the newspaper defendants stated that this would have a particularly chilling effect on the role of a free press in the context of a society which in the past has been riven with terrorist violence and in which various dissident groups continue to pose a threat against members of the security forces and against members of their own communities whom they suspect of anti-social behaviour. That MI5 has assessed the threat related to terrorism in Northern Ireland as "severe" meaning an attack is highly likely. The newspaper defendants have been prepared to publish articles as to what is going on within various terrorist groups in Northern Ireland, including within dissident republican groups, and that such articles are of huge public interest but come at personal risk to the journalists. For instance, the third defendant in 2013 and 2014 received a police message warning that her personal security was under threat from dissident republicans and on both occasions these warnings followed a series of articles about the activities of dissident groups.

[85] The newspaper defendants also raised the question of a risk to the life of the source or sources if his or her identity were revealed. A risk assessment poses difficulties as, in order for the PSNI or MI5 to carry out such an assessment, the name of the source would have to be revealed which is the very thing to which the newspapers defendants are opposed. A generic risk assessment could be carried out by the PSNI and that could be done on the basis of number of alternative theoretical

grounds, including that the source was a police officer or, in the alternative, a public official.

[86] In relation to identifying the status of the source, the newspaper defendants state that at this interlocutory stage it is just not possible to identify the potential pool of sources so that the court could not form an assessment as to whether identifying the status of the source would lead to a reasonable chance that the identity of the source would be revealed for instance taking into account the dates of the articles and the ability to access telephone records. It is recognised that in some cases it is possible to form such an assessment at an interlocutory stage but it is asserted, given the complexities of this case and the analysis required of the articles and those who had access to information based on the articles, the court should not order disclosure of the status at this stage. The newspaper defendants also assert that the court has only seen limited evidence in respect of the extent of access to the various transcripts, which formed part of the evidence against the plaintiffs in the criminal trial. That this application is brought at an interlocutory stage and that Ward LJ and May LJ in *Ackroyd v Mersey Care NHS Trust* (2003) 73 B.M.L.R. 88 and [2003] EWCA Civ 663, at paragraph [70] stated that it would be "an exceptional case indeed if a journalist were ordered to disclose the identity of his source without the facts of his case being fully examined." The newspaper defendants assert that the same principle applies to the question of disclosure of the status of the source, particularly in light of the fact that the court has limited evidence as to the number of people who would have had access to the relevant information at the relevant times.

[87] The newspaper defendants also asserted that at trial the plaintiffs will have every opportunity to explore, by way of cross-examination of the journalist, the relevant circumstances which led to publication. That the court will be quite entitled to draw such inferences as may be apparent from the failure to disclose the source or information about the source. That at trial there is a full opportunity to assess any diminution of the plaintiffs' ability to establish privacy rights, misuse of private information or a direct claim under the Human Rights Act but that at this stage there cannot be an assessment of the appropriate balance between what the newspaper defendants contend is the slight impact on the plaintiffs' case against them as opposed to what they contend would be the catastrophic consequences to the life of the source that could follow from direct or indirect identification.

[88] The Chief Constable contended that ordering the newspaper defendants to reveal the status of the source would result in unfairness as between the Chief Constable and the other parties. It was asserted that if the status of the source was disclosed (whether either as or not as a police officer or as a state officer) and if his or her name was not disclosed, then this would place the Chief Constable in the position where he would be unable to challenge or examine the truth of the newspaper defendants' assertion. It was suggested that this would cede an unacceptable degree of control to the newspaper defendants, with the dangerous effect that neither the court nor the other parties could be independently assured that the correct answer had been given as to the question of status. There would be

no means for the court or for the parties to look behind the answer to verify whether it was correct. Furthermore, there would be no means to ensure the practical or realistic enforcement of sanctions for any provision of incorrect information. It was contended on behalf of the Chief Constable that this would result in an unsatisfactory state of affairs for all the parties to this litigation and should be a factor taken into account in deciding whether it is necessary to order the disclosure of the status of the source.

(d) Conclusions as to whether disclosure is necessary

[89] I do not consider that the disclosure of the name of the source is so important that it overrides the public interest in protecting journalistic sources in order to ensure free communication of information to and through the press. I arrive at that conclusion based on my assessment of the weight to be attached to the relevant gateways, to what has been achieved in this litigation to date and to what remains outstanding, to the chilling effect on journalistic sources particularly in the context of alleged terrorist activities, and the chilling effect of any actual or perceived threat to the life of or bodily integrity of a source. I repeat that this is an interlocutory decision and if at the trial the balance shifts then the matter can be reconsidered.

[90] The issue as to whether the status of the source should be disclosed is more finely balanced, though at this interlocutory stage I have arrived at a clear conclusion that disclosure is not necessary. In arriving at that conclusion I have taken into account that at this interlocutory stage it is not possible to analyse the pool of potential sources in order to determine whether disclosing the status of the source would lead to a reasonable chance of his or her identification. Whether there is a reasonable chance that the identity of the source would be revealed depends not only on the information presently available to the court but also on the information that is or could be available to the Chief Constable. I consider discovery from the Chief Constable and the trial process will bring greater definition to the size of the pool of potential sources. At present I cannot sufficiently determine the risk of identification. Furthermore, the trial process will throw greater light on whether the status of the source needs to be disclosed. In arriving at the conclusion that disclosure of the status is not necessary at this stage I have also taken into account my assessment of the weight to be attached to the relevant gateways, to what has been achieved in this litigation to date and to what remains outstanding, to the chilling effect on journalistic sources particularly in the context of alleged terrorist activities, and the chilling effect of any actual or perceived threat to the life of or bodily integrity of a source. I repeat that this is an interlocutory decision and if at the trial the balance shifts then the matter can be reconsidered.

Conclusions

[91] I dismiss the plaintiffs' application for an interlocutory injunction against the fifth named defendant.

[92] I decline to give leave to serve interrogatories on the newspaper defendants to obtain either the name of, or the status of, the source and I decline to make any order under the *Norwich Pharmacal* jurisdiction.

[93] I will hear counsel in relation to the following issues:

(a) whether the reporting restriction order should be continued;

(b) whether the trial of these civil proceedings should be adjourned until after the criminal trial;

(c) as to the costs of these applications; and

(d) as to consolidation of these three actions.