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Judgment: approved by the Court for handing down | *Delivered:* **22/01/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

TERENCE PATRICK EWING

Plaintiff;

-and-

TIMES NEWSPAPERS LIMITED

Defendant.

_____

COGHLIN LJ

[1] This is an application on behalf of the defendant, Times Newspapers Limited, for an order pursuant to Order 18 Rule 19 of the Rules of the Supreme Court (Northern Ireland) 1980 ("the Rules") and the inherent jurisdiction of the court to strike out the statement of claim served herein by the plaintiff, Terence Patrick Ewing, dismiss his action and enter judgment on behalf of the defendant upon the grounds that the plaintiff's claim discloses no reasonable cause of action, is scandalous, frivolous and/or vexatious or otherwise constitutes an abuse of the process of the court and/or is likely to prejudice, embarrass or delay the fair trial of this action. In the alternative, the defendant seeks an order staying the plaintiff's actions on the grounds of forum non conveniens. The summons also seeks orders compelling the plaintiff to give security for the defendant's costs in accordance with Order 23 Rule 1 of the Rules and an order pursuant to Order 3 Rule 5 of the Rules extending the period during which the defendant is required to serve a defence to such time as the court may think fit after the determination of this application. At present, the defendant is not actively pursuing an order for security for costs but reserves its right to do so subject to the outcome of the remainder of this application.

[2] The defendant was represented by Mr Ringland QC and Mr MacMahon while Mr Ewing appeared on his own behalf as a personal litigant. I am grateful to both parties for the assistance that I derived from their helpful submissions.

Background facts

[3] The plaintiff resides in London and during the course of the hearing no evidence was produced to indicate that he has or ever has had any connection of any sort with the Northern Ireland jurisdiction. The plaintiff's claim in these proceedings arises out of an article published by the defendant on 11 February 2007 both in the Northern Ireland edition of the Sunday Times newspaper and on the "The Times On-line" website entitled "Heritage Fakers Hold Builders to Ransom". In the course of this article it was alleged, inter alia, that, despite claiming to campaign to protect Britain's architectural heritage, a non-profit group known as the Euston Trust had accepted a secret payment to drop objections to a development in a seaside town in England. This group was said to be suspected of taking money in similar circumstances from other builders in return for withdrawing objections to proposed developments. The Trust was described in the Article as being run by the plaintiff who was said to have studied planning law while serving a prison sentence for theft and forgery in the 1980s. The article contained a reference to another individual named Mr Hammerton who had been the secretary of the Euston Trust and who had apparently said that he suspected the plaintiff of having received payments from developers "to pull out of intended judicial review challenges". The article recorded that the plaintiff had emphatically denied ever having been offered or taking payments from developers.

[4] The plaintiff has a long history of involvement in litigation stretching back over many years and in a judgment dated 21 December 1989 he was made the subject of a Civil Proceedings Order, on the application of the Attorney General, and declared a vexatious litigant in accordance with the provisions of Section 42 of the Supreme Court Act 1981. In the course of delivering the judgment of the court Rose J referred to a number of quotations from and correspondence written by the plaintiff in relation to the issue of litigation costs. These included:

> "I will not in any event comply with any order for payment or taxation order … I shall knowingly and wilfully be defaulting on all debts owed to your trash wetback clients and the trash Law Society."
>
> "I shall of course be deliberately seeking to pursue vexatious objections, simply for the purpose of building up a further legal bill in respect of which you and the Law Society will be billed."

> "It is my policy on taxation to make the proceedings deliberately as expensive and convoluted for the opposition as I can possibly make them with every conceivable objection and point being taken, no matter how minor … I can also assure you that I intend to make the proceedings in the Westminster County Court as embarrassing as I possibly can for your client and your department."

As a consequence of the order made on 21 December 1989 the plaintiff is prohibited from instituting any civil proceedings in England and Wales without the leave of the High Court.

[5] On 19 June 2008 the plaintiff, as he was required to do, brought an application for leave pursuant to Section 42(3) of the Supreme Court Act 1981 to institute civil proceedings against the defendant in England and Wales for libel, breach of confidence and/or breach of privacy and/or breach of the Data Protection Act 1998 in respect of precisely the same article referred to above published in England and Wales on 11 February 2007. The matter came before Coulson J on 19 June 2008 and he gave judgment on 22 July 2008. In the course of a careful and detailed consideration of all aspects of the plaintiff's case Coulson J recorded that he found as a fact that the plaintiff was a serial litigator who was obsessed with civil litigation and whose stated policy was not to pay the costs of those who successfully defeated his claims. Ultimately, he refused the application on the basis that, in relation to the hard copy articles, those claims were statute barred. Even if such claims were not statute barred, Coulson J considered that they had no real prospect of success and/or constituted an abuse of the process of the court. He dismissed the claims in relation to the internet posting for the same reasons together with the additional reason that there was no evidence of publication.

[6] In June of 2008 the plaintiff issued further proceedings in Scotland for libel, breach of confidence and/or privacy and/or breach of Section 13 of the Data Protection Act 1998 and/or harassment contrary to Section 8(2) and (5)(*a*) of the Protection from Harassment Act 1997 in respect of the same article contained in the Sunday Times Scotland Edition on 11 February 2007. He appears to have told Coulson J that one of his reasons for doing so was to avoid being subject to a one year limitation period. The defendant then applied to the Court of Session for a caution (security for costs) in the sum of £50,000 or such other sum as a court might consider appropriate as a condition of the continuation of such proceedings. In the course of giving judgment on this application Lord Brodie referred to the observation of Coulson J that the plaintiff was a serial litigator who did not pay the costs of opponents and noted that such an opinion was consistent with the fact that the plaintiff had failed to pay any part of the sum of £22,500 ordered by

Coulson J at the conclusion of his judgment by way of interim payment of costs to the defendant. Lord Brodie took into account the impecuniosity of the plaintiff and his submission that to impose a significant sum in respect of security might very well impair the essence of his right of access to the courts. Nevertheless, having done so, Lord Brodie expressed the opinion that the imposition of a reasonable sum by way of security would not contravene the plaintiff's rights under Article 6 of the European Convention of Human Rights ("ECHR") provided that doing so was proportionate and consistent with the legitimate aim of protecting parties against recoverable costs incurred in defending dubious claims and providing the courts with the means of controlling unreasonable conduct. He made the following observation:

> "However, while making an order for caution on a party who is manifestly not in a financial position to provide it may appear to be draconian, justice has to be even handed, and, on the other side of the coin, it would be grossly unfair to oblige the defenders to carry on defending an obviously irrelevant action without any hope of recovering expenses if successful, particularly against an adversary who has shown that he is prone to table all kinds of procedural motions which have no merit and no justification: *Rush v Fife Regional Council* 1985 S.L.T. 451, Lord Justice Clerk Wheatley at 453."

Lord Brodie then proceeded to review the essential merits of the plaintiff's various claims and, having done so, considered it to be in the interests of justice to impose security of £15,000. That sum was to be lodged by the plaintiff within four weeks of the order. A further application by the plaintiff to Lord Brodie to reconsider his decision was refused.

[7] The defendant subsequently brought an application for a decree of absolvitor in the Scottish proceedings (an application to strike out the plaintiff's claim) on the basis of the plaintiff's failure to provide the security of £15,000 ordered by Lord Brodie. The plaintiff objected and again sought to argue that ordering security was in breach of his Article 6 ECHR rights and that Lord Brodie had been wrong to hold that his privacy claims were not lawfully actionable. The application came on for hearing before temporary Judge Morag Wise QC on 15 January 2009. She referred to the detailed arguments and submissions that had been advanced before and considered by Lord Brodie in the course of his judgment on 11 December 2008. The plaintiff accepted that the temporary judge had no power to review the findings of Lord Brodie's decision and subsequent review and conceded that his opposition to the defendant's application was essentially formal. He maintained that he was anxious to avoid any future argument that he had

consented to or acquiesced in the granting of the motion. It is to be noted that during the course of the plaintiff's submissions he told the temporary judge that he could not and would not come up with the sum of £15,000 ordered by way of security. At paragraphs 193 to 195 of his affidavit the plaintiff denied making such a remark but the transcript of the hearing with which I was supplied confirms that he did so. In the circumstances, a decree of absolvitor was granted to the defendant and the plaintiff's claim in Scotland was struck out.

[8] By letter dated 10 February 2009 the plaintiff purported to serve two writs upon the defendant in this jurisdiction. In the course of this correspondence the plaintiff said:

> "I serve on you two Writs from the High Court in Northern Ireland. The first one is an amended Writ and I am serving this on the presumption that it is still valid.
>
> There is a dispute with the Court Office as to whether it was issued, and I considered that it was so I am serving it within the twelve months duration. Any arguments relating to its legal validity no doubt will be addressed during proceedings relating to the later Writ."

The first writ, No. 15921 of 2008 purported to have been issued on an unspecified day in February 2008 and claimed damages, inter alia, for libel allegedly contained in the same article in the Ulster edition of the Sunday Times dated 11 February 2007 and published on the Times Online website. The second writ, No. 14508 of 2009, purported to have been issued on 9 February 2009 and claimed damages for alleged breach of confidence and/or privacy and/or breach of the "data protection principles" of the Data Protection Act 1998 and/or harassment in relation to the same article.

[9] On 19 February 2009 the defendant's Northern Ireland solicitors wrote to the plaintiff enclosing an appearance in relation to the second writ and informing the plaintiff that they had been advised by the Court Office that the first writ was not valid. By way of reply on 23 February 2009 the plaintiff wrote as follows:

> "Regarding Action No. 15921, it is my intention that this matter is to be proceeded with, and Service of that Writ was within time on 9 February 2009 on your client's legal department at their London offices.

> It will be a matter for the court in due course to rule on whether the writ was issued and whether it is still valid. I have prepared an affidavit that deals with the circumstances relating to it, which will be relied on at any hearing later.
>
> I consider that the Writ was issued, and although I afterwards sought to withdraw it, one of the reasons being that I didn't know if the article had been published in hard copy in Northern Ireland, this now appears not to be valid.
>
> My understanding now is that a Writ once issued can only be withdrawn by notice to the Defendant under RSC (Northern Ireland) 1980 Order 21 Rule 2(1) and/or 3(1). In addition a non-suit isn't possible to the Plaintiff.
>
> The hard copy of the article only came to my attention whilst attending your client's offices in Dublin when I was supplied with a copy by the News Manager in April last year and accordingly I wish to proceed with the Writ previously issued.
>
> I would therefore inform you that I am not accepting the court's view relating to this matter and it is a matter for a Judge to rule on judicially at a later date.
>
> Alternatively, I may apply to amend Writ No. 2009 No. 14508 to allege libel and disallow the limitation period under Article 51(1) of the Limitation (Northern Ireland) Order 1989.
>
> It is open to your clients to consent to such an amendment, to avoid possibly lengthy hearings relating to the validity of the Writ in Action No. 15921.
>
> I felt it was right that I should draw your attention to these matters in any event."

In fact it appears that no court fee was paid in relation to writ No. 2008 15921 and the Court Service has confirmed that no valid writ was issued under that reference number. The plaintiff did make an ex parte application to Master Bell on 29 July 2008 for an order to "restore" that writ. That order was refused by the Master on 29 July 2008. In the circumstances the proceedings

before me were limited to the plaintiff's claims as set out in Section 14508 of 2009. Pursuant to an order made by Gillen J on 21 June 2009 the plaintiff served an amended statement of claim purporting to have deleted therefrom allegations directed towards establishing a case of defamation.

[10] During the vacation, without applying for leave to do so or notifying the respondent, the plaintiff submitted a further amended statement of claim together with a bundle containing more than 40 authorities and some 37 pages of further submissions. He seems to have followed a similar course of action in relation to the proceedings before Coulson J, despite being specifically requested not to do so, and I note from paragraph [20] of Lord Brodie's judgment that the plaintiff adopted the same approach in Scotland when, after the conclusion of the hearing, he continued to forward further material to Lord Brodie's clerk. The plaintiff was notified that, since the hearing had been concluded, it would be necessary for him to apply to the court for leave to further amend the statement of claim and submit further submissions and materials. On the 19 August 2009 the plaintiff wrote a letter to the court, a copy of which he sent to the defendant's solicitors. In that letter the plaintiff pointed out that the purpose of the additional submissions was to draw the court's attention to the fact that he had stated in the statement of claim currently before the court that the alleged comments were made in the context of a meeting with Mr Foggo. He said that he was notifying the court that he had set out those details in the amended statement of claim filed with the court on the last occasion. He also informed the court that he thought it would be helpful to set out in writing the relevant passages relating to the definitions of privacy in the authorities. Once again the reference was to authorities many of which were already before the court. I held a further hearing on 23 September 2009 at which I gave the plaintiff leave to submit the additional submissions and authorities and afforded the defendant an opportunity to make any further written or oral submissions by way of response. Since the plaintiff had clearly drawn the attention of the court to the relevant pleading in the amended statement of claim previously filed with the court during the original hearing, when he had also firmly advanced his submission that the material of which he complained had been divulged in the course of what he alleged to have been a private/confidential meeting with Mr Foggo, I declined to allow further amendment of the statement of claim pending the outcome of the defendant's application. The defendant made some further written submissions but, unfortunately, due to a breakdown in communication these were not drawn to my attention prior to delivering this judgment. After delivery of this judgment I offered the defendant an opportunity to draw to my attention any additional matters in relation to these submissions in response but Mr Ringland QC indicated that it was not necessary to do so in the circumstances.

The submissions of the parties

[11] Essentially, the case made by the plaintiff seems to be that the defendant acted in breach of his right to privacy/confidentiality by publishing a number of items of personal information. These were:

(*i*) The plaintiff's name, age, the locality of his home and the fact that he was in receipt of state benefits.

(*ii*) Reference to the contents of a confidential letter before claim written by the plaintiff to North Somerset Council in September 2005 with regard to a potential judicial review application. This seems to be a reference to a section of the impugned article which reads as follows:

> "In 2005 Ewing became aware of the Severn Croft redevelopment in Western Supermare. Period buildings had to be demolished or partially demolished to make way for new flats and a respite centre for veterans of the Armed Services. Ewing and Hammerton applied for a judicial review to stop the project but their application was rejected in April 2005 by Mr Justice Ouseley as 'untenable' and 'unarguably wrong'.
>
> The Royal British Legion, one of the three developers of the site, was awarded legal costs of £6,400. To date Ewing and Hammerton have failed to pay the charity.
>
> The Trust kept up the pressure on the developers, however. Ewing informed North Somerset Council that despite the court's decision he intended to bring further legal challenges."

(*iii*) A reference to previous convictions of the plaintiff in 1981 said to be in breach of the "sensitive personal data" provisions of the Data Protection Act 1998.

(*iv*) An alleged but unexplained misquotation to the effect that the plaintiff had told the Sunday Times that he intended to target the two billion pound redevelopment of derelict rail yards at King's Cross, London together with a number of other unspecified misquotations and/or distortions.

(*v*) The publication of a photograph of the plaintiff in O'Neill's Bar, 31-36 Houndsditch, London which was apparently the location of the plaintiff's conversation with the journalist that seems to have at least partially stimulated the impugned article.

[12] The plaintiff maintains that he enjoyed a confidential relationship with the journalist responsible for the publication of the article, Mr Daniel Foggo, for whom he claims to have acted as a source of confidential information over a period of time.

[13] It appears that, some years earlier, the plaintiff had previously given material relating to a particular individual and a certain body to Mr Foggo, at a time when the latter was employed by a different newspaper,. In the course of his affidavit sworn on 20 April 2009 the plaintiff, referring to this earlier meeting said, at paragraph 219:

> "As with any source in these circumstances it is understood that such material is provided in complete confidence."

[14] The plaintiff's claim in these proceedings is based on the assertion that the subsequent meeting with Mr Foggo that took place at O'Neill's public house in London on 1 February 2007, more than three years later, was also subject to a duty of confidentiality. The plaintiff asserts that, when arranging this meeting, Mr Foggo explained that it would be for the purpose of discussing further aspects of the material relating to the individual and body previously discussed. The plaintiff accepts that such material was discussed but claims that Mr Foggo, by means of "subterfuge," also used the meeting to obtain information for the purpose of writing the impugned article. In support of his claim that the meeting took place in confidence the plaintiff has exhibited a transcript of a telephone conversation that he had with Mr Foggo on Saturday 10 February 2007. This conversation clearly took place after the meeting at O'Neill's public house at a time when the plaintiff apprehended that the defendant intended to publish the article. Inter alia, the transcript records the following exchanges:

(*a*) "Ewing: Ahhm, as I say err, I can't understand why you said to me uhhm that uhhm, the, the, the meeting was for, uhhm – to discuss Mr …… – uhhm.

Foggo: Well I did want to discuss Mr …… but I also uhhm wanted to talk about these issues, and err you seemed happy to talk about it but I –

Ewing: Well it was off the cuff, you know.

Foggo: Errm.

Ewing: I don't think I went into great detail in, in them because it was a sort of friendly chat wasn't it? Oh, I thought, I thought it was very amicable, didn't you or? –

Foggo: Yeah, yeah! yeah, yeah!

Ewing: And you bought me drinks and things. I thought that was, you know, all part of – I thought it was in, in confidence.

Foggo: Errm well. I mean, I mean at the time if, if you want to treat any of that in, in confidence, that's one thing I'm not actually – you know, it doesn't make any odds to me one way or the other actually, errm -."

(*b*) "Foggo: Where, where is this leading Terry?

Ewing: Well no I cannot understand why you got me down there err, err to talk about Mr……., and, and why you didn't mention that you were doing this story to me on errm – when was it last Thursday?

Foggo: Well, I'll tell you it is quite, quite easy to explain that. Err, I did that because I thought you weren't going to be up front about having uhhm, err received money from developers, and you're still not being totally up front with me about, about that, because we both know you have, so –

Ewing: uhhm, no, I haven't."

(*c*) "Ewing: Well, are you aware? You are aware that when you speak to a, a source it is customary journalistic practice to treat people as, in confidence? Are you aware, I mean you must be aware of that?

Foggo: Err, I know the way you are quoting to me about journalistic ethics as if I'm, as if you're the expert, yes –

Ewing: Well, I am not an expert, I am not an expert on anything Mr Foggo I am just an ordinary guy.

Foggo: Yeah, there's no, there's no customary thing about anything you ask me to treat what you said about uhhm …… in confidence then I will.

Ewing: Well, I, I, I, I, think you should treat everything in, in confidence. Is it your, it is your, I mean do, do you interview people as possible sources and then, then go and write stories about them as a matter of habit?

Foggo: Uhhm, I think this is a really futile conversation."

(*d*) Foggo: Is it the fact that you spoke to me as you put in confidence about …… means that you were therefore uhhm – immune from ever being written about any other stories in any other activities you have partaken or been involved in.

Ewing: No I wouldn't no, no, no, no, but I mean, uhhm –

Foggo: Oh, well, there you are.

Ewing: But I mean Err to then have, to get somebody to, on the pretext of discussing errm about one story and, in my view in, in confidence and then turn around as you phoned me yesterday, and then turned around and say 'by the way I didn't really get you down there for that purpose, I've got another story that I'm publishing'. Errm, do you think that's fair?

Foggo: Errm, well I think it is ahh, uhhm, I think it's justified in the, in the context of what I am looking at, yes.

Ewing: Why, why do you say that. Why was it considered?

Foggo: Because I think it is an issue of public interest and I errm and I don't think you were going to be straight with me and I think it is the only way I could have gone about it.

Ewing: Well I, I, I, I, I, I.

Foggo: If I could have gone about it another way I would have done.

Ewing: I, I see, no I, I, I, I, think that errm – Err, if you had asked me straight out, I am quite certain that I would have answered any of your questions.

Foggo: Well is it that –

Ewing: But I don't think –

Foggo: Alright, let me ask you this then. Is there anything that you said to me about this issue that you wouldn't have said to me if I had, if I had, ….. to you straight out.

Ewing: Errm, err no I've,

Foggo: Well, then what are you complaining about?

Ewing: But no – ahh, ahh, ahh, ahh, but ahh, ahh, ahh, ahh, I think but errm you know, it is highly unethical then to use somebody as a, subterfuge to come along err on the pretext of discussing one case as a possible source and turn around and then decide to well I am going to publish stuff about you - - material about you which I can't see is of any, of very great interest."

[15] The defendant's primary case is that the plaintiff's litigation in Northern Ireland has no realistic prospect of success and is an abuse of process. The defendant maintains that, having been prevented from bringing proceedings for defamation in England and Wales and Scotland and, latterly, in this jurisdiction, as a consequence of the passage of time, the plaintiff is using these proceedings for a collateral purpose, namely, compelling the defendant to become involved in tedious and time consuming litigation, with no prospect of recovering its costs in the event that it is successful. In terms, the defendant says that he is ostensibly founding his claim upon his right to

privacy but, in reality, seeking to achieve the same end with regard to the truth of the allegations that he is unable to achieve by way of an action for defamation. The defendant relies upon the plaintiff's history as a vexatious litigant and his public confirmations that he cannot and will not comply with any order for costs. The defendant further submits that, in any event, the plaintiff has no reasonable prospect of establishing that the information and/or materials about which he complains were the subject of a right to privacy/confidentiality either at common law or in accordance with Article 8 of the ECHR. Even if the plaintiff does enjoy such a prospect in relation to any of the information or materials the defendant relies upon the freedom of expression enjoyed by newspapers in accordance with Article 10 of the ECHR and submits that it is inconceivable that the application of the balancing exercise could come down in favour of the plaintiff. Insofar as it may be necessary to do so the defendant further relies upon the maxim 'forum non conveniens.'

Discussion

[16] It is fundamental to the plaintiff's claim that he should have a reasonable prospect of establishing that the material about the publication of which he complains was imparted in a private/confidential context. This is an area of law which has been the subject of substantial and rapid development over recent years as was no doubt foreseen by Keene LJ when he said in Douglas v Hello [2001] QB 967 at paragraph 165:

> "Breach of confidence is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice."

[17] Perhaps two of the most significant developments that have taken place have been the confirmation by the courts that a prior relationship is not essential in order to establish a duty of confidentiality and the incorporation of Articles 8 and 10 of the ECHR into domestic law. In Campbell v MGN Limited [2004] 2 AC 457 Lord Nicholls referring to the original common law said:

> "13. The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when a cause of action was based on improper use of information disclosed by one person to another in confidence. To

> attract protection the information had to be of a confidential nature. But the gist of the cause of the action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed: see the classic exposition by Megarry J in Coco v A N Clark (Engineers) Limited [1969] RPC 41, 47-48. The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.
>
> 14. This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in Attorney General v Guardian Newspapers Limited (No. 2)[1990] 1 AC 109 at 281. Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."

In the same case Baroness Hale of Richmond noted that the Human Rights Act of 1998 had not created any new cause of action between private persons but went on to ask at paragraph 134:

> "How does the scope of the action for breach of confidence accommodate the Article 8 rights of individuals? As Randerson J summed it up in Hosking v Runting [2003] 3 NZLR 385 at 403 para. 83:
>
> > '[The English courts] have chosen to develop the claim for breach of confidence on a case by case basis. In doing so, it has been recognised that no pre-existing relationship is required in order to establish a cause of action and

> that an obligation of confidence may arise from the nature of the material or may be inferred from the circumstances in which it has been obtained.'
>
> The position we have reached is that the exercise of balancing Article 8 and Article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential."

Baroness Hale also emphasised that the reasonable expectation test was objective and served as a threshold which brought the balancing exercise into play. She pointed out that once the information has been identified as "private" the court must then go on to balance the claimant's interest in keeping the information private against the countervailing interests of the recipient in publishing it and that, very often, it can be expected that the countervailing rights of the recipient will prevail.

[18] Two years after the House of Lords delivered judgment in the Campbell case Buxton LJ giving judgment in McKennitt and Others v Ash and Another [2007] 3 WLR 194 reviewed the development of the law of privacy and confidence and said, at paragraph 11:

> "11. The effect of this guidance is, therefore, that in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of Articles 8 and 10. Those articles are now not merely of persuasive or parallel affect but, as Lord Woolf CJ says, are the very content of the domestic tort that the English court has to enforce. Accordingly, in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by Article 8? If 'no', that is the end of the case. If, 'yes', the second question arises: in all the circumstances, must the interests of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10?"

[19] In Murray v Express Newspapers Plc and Another [2008] 3 WLR 1360, after setting out the relevant principles, Sir Anthony Clarke MR referred to the House of Lords decision in Campbell and said at paragraphs [35] and [36]:

> "35. In these circumstances, so far as the relevant principles to be derived from Campbell v MGN Limited [2004] 2 AC 457 are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in Campbell v MGN Limited. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said, at paragraph 99:
>
> > '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.'
>
> We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.
>
> 36 As we see it, 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."

The learned Master of the Rolls went on to observe that the question as to whether the plaintiff had established a reasonable expectation of privacy was essentially one of fact to be decided by the trial judge who, if satisfied, would then proceed to determine the balancing exercise. I respectfully accept that this will be appropriate in most cases.

[20] In Napier v Pressdram [2009] EWCA Civ 443 Toulson LJ commented, at paragraph [42]:

> "…For a duty of confidentiality to be owed (other than under a contract or a statute), the information in

> question must be of a nature and obtained in circumstances such that any reasonable person in the position of the recipient ought to recognise that it should be treated as confidential. As Cross J observed in Printers and Finishers Limited v Holloway [1965] RPC 239, 256, the law would defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary person. Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the wider society (the democratic principle), and it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential."

Conclusions

[21] I commence my consideration of the defendant's application by reminding myself of some general principles. It is clear that there are a number of aspects of the plaintiff's history and character that are unattractive and indicative of a lack of personal integrity and honesty. However, it is important to bear in mind that access to justice should not be and is not restricted to those fortunate enough to have an unimpeachable moral character. That does not mean that, in appropriate circumstances, the court can or should leave out of account relevant aspects of an individual applicant's history including those relating to credibility. I also have regard to the plaintiff's status as a personal litigant and not as an experienced professional lawyer although he obviously has long experience of involvement in litigation.

The information sought to be protected

[22] One factor to be taken into account is that some aspects of the information detailed by the plaintiff in the amended statement of claim appear, prima facie, to be relatively trivial including the plaintiff's name, his age, the statement that his only income is state benefits and the reference to the location of his address as "a north London council flat". In fact, it is interesting to note that the offending article refers to the "north London council flat" as being the address from which the plaintiff runs the Euston Trust rather than the address at which the plaintiff resides. Correspondence to which I was referred during the course of the proceedings indicates that letters have been written on behalf of the Euston Trust from various addresses including 9c Lawn Road, London NW3 2XS. The same documents also contain the plaintiff's correspondence to various businesses, including

solicitors, from the same address. In such circumstances I am satisfied that the fact that Euston Trust is run from a north London council flat by the plaintiff is information that has long been in the public domain. The plaintiff's age, quoted in the article as 54, is, in itself, a trivial piece of information which would not otherwise attract objection. I note that Coulson J found that the plaintiff's age, name and locality of his home were all facts within the public domain and that any claim in respect of privacy relating to that information was doomed to fail. His convictions are a matter of record and he has been described as a convicted fraudster in the public judgments of Coulson J and Lord Brodie. The plaintiff accepts that, in itself, the fact that a photograph was taken covertly does not make publication objectionable unless the activity or situation photographed was confidential – see also Murray's case and paragraph 154 of the judgment of Baroness Hale in Campbell v MGN Ltd [2004] 2 A.C. 457. Finally, some of the information is vague and lacking in any specific content or particularity. That includes the reference to a letter before a claim for judicial review alleged to have been written by the plaintiff to North Somerset Council in September 2005 and said to be in some unspecified way "confidential". There is no specific reference to such a letter or its contents in the offending article which does refer to a judicial review, rejected in April 2005 by Ouseley J as "untenable" and "unarguably wrong," and notes that, subsequently, the plaintiff "informed" North Somerset Council that despite the court's decision he intended to bring further legal challenges. The statement of claim also refers to alleged inaccurate, misquoted or distorted quotations alleged to have been made by the plaintiff without any further detail whatever.

The application to strike out

[23] As pleaded, the plaintiff's claim to enjoy a legitimate expectation of confidentiality and/or privacy is based primarily upon his allegation that the interview with Mr Foggo on 1 February 2008 at O'Neill's Bar, Hounditch, London took place subject to a pre-existing confidential relationship between journalist and source of information. The statement of claim pleads that this relationship commenced when the plaintiff supplied confidential information to Mr Foggo in 2003/2004 about another topic altogether at a time when Mr Foggo was employed by a different newspaper. In support of this allegation the plaintiff has exhibited a series of e-mails between himself and Mr Foggo in 2003/2004 in one of which, after furnishing Mr Foggo with certain information, the plaintiff wrote:

> "I would however be most grateful if you would keep confidential the source of this information and not mention myself as having given it to you. Obviously you have the excuse of journalist sources etc.

> Meanwhile I shan't mention the fact of your ongoing enquiry to anyone as you request, and look forward to the article when published."

[24] The plaintiff has also exhibited the transcript of the telephone conversation between himself and Mr Foggo on Saturday afternoon 10 February 2007, the date before publication of the offending article. I have referred earlier in this judgment to some quotations from this transcript from which is not particularly easy to draw any clear inferences but it seems to me that any fair reading of the document leads to the following conclusions:

(*i*) Mr Foggo appears to accept that he invited the plaintiff to attend the meeting for the purpose of discussing/disclosing further information about the activities of Mr …….. with the intention of also using the occasion to seek material relating to the plaintiff's activities in connection with the Euston Trust. He also seems to accept that the plaintiff would have been unlikely to attend had he been notified of this secondary intention - "If I could have gone about it in another way I would have done."

(*ii*) The plaintiff clearly made arrangements to record the call and appears to have used the telephone conversation for the purpose of inducing Mr Foggo to concede that any relationship of confidence relating to the materials discussed previously also extended to information relating to the plaintiff's Euston Trust activities.

(*iii*) On the other hand the plaintiff also appears to have accepted, somewhat inconsistently in the context of the alleged extension of the confidential relationship, that, had he been asked "straight out," he would have answered any of Mr Foggo's questions. That he was willing to do so is neatly illustrated by the exchange quoted above:

> "Foggo: All right, let me ask you this then. Is there anything that you said to me about this issue that you wouldn't have said to me if I had, if I had come to you straight out?
>
> Ewing: Errm, err no I,"

(iv) The plaintiff then proceeded to complain that the use of subterfuge to persuade him to attend the meeting was unethical when coupled with the decision to publish material which he (the plaintiff) could not see to be of any "great interest," contained in a "friendly chat" that was "off the cuff". The nature of the material itself, although not determinative of privacy, is of significance since, while it would be important even if some type of confidential relationship could be established, that, in itself, would not confer upon every piece of information imparted protection on the ground of privacy. In the course of delivering the judgment of the Court of Appeal in

Browne v Associated Newspapers [2007] EWCA Civ 295 Sir Anthony Clarke gave the example of a husband telling his wife that Oxford or Cambridge had won the boat race in a particular year and in McKennitt v Ash Buxton LJ observed

> "Of course, even within a domestic environment or relationship, there may be circumstances where the public interest genuinely requires the confidence to be overridden (e.g. in order to reveal significant wrongdoing or perhaps to protect the public from being seriously misled.)".

Apart from the plaintiff's own assessment that it was not of "any great interest", I note that none of the material complained of was of an intimate nature or related to the plaintiff's personal, emotional or sexual life. In a letter to the editor of the Sunday Times on the same date, 10 February 2007, the plaintiff, referring to the interview with Mr Foggo, said:

> "We also briefly discussed planning matters that I had been involved in, but I understand that this was purely on a social level and not connected with the purpose of the interview, which was regarding Mr Sainsbury and the POW Trust."

[25] Far from relating to the plaintiff's personal life the information referred primarily to the plaintiff's public activities and, in particular, to his activities in connection with the Euston Trust. It also dealt with the conduct of Mr Hammerton, the one time secretary of the Trust. The impugned article referred to an alleged agreement between a developer and Mr Hammerton that the latter would accept a payment of £10,000.00 in return for dropping objections to a development and recorded that the plaintiff suspected Mr Hammerton of taking payments from developers. The article also recorded Mr Hammerton's belief that the plaintiff had received payments from developers and the plaintiff's suspicion that Mr Hammerton had received £10,000.00 together with his emphatic denial that he himself had ever received any such payments. In essence, this might be seen as mutual allegations of dishonesty in public life between two individuals each of whom has a criminal record.

[26] The credibility of the plaintiff is likely to be an important factor in this litigation. At paragraph 225 of the affidavit that he swore in the course of these proceedings on 20 April 2009 the plaintiff, referring to the meeting with Mr Foggo, said:

> "I assumed that the meeting would be confidential as is usual with all newspaper sources and as I recall this

> was agreed with Mr Foggo at the time although I cannot recall the exact words used."

During the hearing before this court, when questioned, the plaintiff firmly maintained that there had been a prior oral agreement between himself and Mr Foggo that the meeting would be held in confidence. When asked why, if that was so, there had been absolutely no reference to any such specific agreement, oral or otherwise, in any of his pleadings the plaintiff stated:

> "My reason for not pleading that was because it was a matter of evidence."

[27] If such an agreement had been concluded, given the fundamental significance that it would have had for the existence and extent of the confidentiality alleged by the plaintiff to have applied to the meeting with Mr Foggo, I consider the absence of any reference to it whatsoever in the original or the amended statement of claim to be quite extraordinary. Furthermore it does not appear to have been a matter that the plaintiff referred to Coulson J who recorded at paragraph 114 of his judgment that the duty of confidence alleged in relation to the pub conversation on 1 February 2007 … "Appears to be based on the suggestion that the claimant thought he had previously spoken in confidence to the same journalist on a different subject." Nor does the plaintiff appear to have drawn this alleged agreement to the attention of Lord Brodie who noted at page 10 of his judgment the plaintiff's submission that:

> "A jury might wish to infer from his dealings with Mr Foggo that a duty of confidentiality arose."

Even if one was to accept the reason for these apparent omissions put forward in this court by the plaintiff, namely, that he believed that it was a matter of evidence, there remains the problem of the transcript of the telephone conversation with Mr Foggo that he has exhibited. It is quite simply beyond belief that the plaintiff would have gone to the lengths that he obviously did in the course of that conversation to induce Mr Foggo to concede that everything said at the meeting was subject to a duty of confidentiality without referring to a specific oral agreement which, according to the plaintiff, formed the basis upon which the meeting had been agreed. In the circumstances, I am bound to conclude that the plaintiff's evidence on oath relating to this oral agreement was untrue and that his proffered reason for failing to refer to it was simply disingenuous. I also infer that the most likely reason for him to have included this untrue evidence in his affidavit and before this court was the severe reservations that he himself entertains about his ability to establish that the material which he provided to Mr Foggo was in fact subject to a duty of confidentiality. I note that Coulson J in the course of the judgment referred to earlier also made a specific finding

that the plaintiff was prepared to lie to the court when he thought that it might benefit his case – see paragraphs 90 and 91.

[28] At this stage of the proceedings, the test is whether the plaintiff enjoys a reasonable prospect of success. Objectively, most of the information of which he complains appears relatively trivial or vague. Subjectively, he himself has described it as of "no great interest" and contained in a discussion that was "off the cuff," on a "social level," a "friendly chat," etc. I bear in mind the view expressed by Sir Anthony Clarke MR in Browne v Associated Newspapers Ltd [2007] EWCA Civ 295 that the cases support the conclusion that the relationship between the relevant persons or parties is of considerable importance together with the nature of the relationship itself and the circumstances in which the information was imparted or obtained and that each case should be decided upon its own facts. In the circumstances, taking into account his willingness to mislead the court, despite the "subterfuge" on the part of the journalist, I am not persuaded that the plaintiff has any realistic prospect of establishing that he enjoyed a reasonable expectation of privacy in respect of any information relevant to these proceedings that was imparted during his meeting with the journalist.

Public Interest.

[29] In the event that I may be wrong about the ability of the plaintiff to establish a reasonable expectation of privacy, it becomes necessary to consider the defendant's submission that no reasonable tribunal could reach any other conclusion but that the relevant material was in the public interest and that in carrying out the balancing exercise preference would inevitably be given to the defendant's Article 10 rights over the plaintiff's Article 8 rights. At paragraph [17] of his judgment in In re S (a child) [2005] AC 593 Lord Steyn described the process in the following terms:

> "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

[30] The extent to which the allegations may be proved to be accurate might be relevant to this second stage of the inquiry: see McKennitt v Ash at {78] – [80] and [87]. In accordance with practice in this jurisdiction I have not had access to any witness statements and, generally speaking, a plaintiff might expect to be able to persuade a court that this part of the exercise should

proceed to trial provided that the relevant threshold had been reached. Apart from asserting in his affidavit that he did not tell Mr Foggo that he intended to target the development at King's Cross (he seems to have told Lord Brodie that he did use the phrase "target King's Cross" but the it had been "taken out of context"), denying any suggestion that he took bribes and playing down the extent of his relationship with Mr Hammerton, the plaintiff has failed to identify any other specific respects in which he claims that the published material was false. The article recorded that he, himself, suspected Mr Hammerton of taking bribes "behind my back." I have earlier noted the importance of the nature of the material in this case and, in particular, that it relates to wrongdoing and not to the more intimate or personal aspects of life which is much more often encountered in this type of case. While that might not be conclusive, a court would take that into account, together with the phraseology used by the plaintiff to describe the information imparted and the obvious efforts of the plaintiff to retrospectively create a pre-existing confidential relationship as illustrated by the transcript of the telephone conversation with Mr Foggo. In addition there is the clear evidence of the plaintiff's own willingness to lie to the court in order to strengthen his case to which I have referred above. In such circumstances I have reached the conclusion that, even if the plaintiff was to establish that publication of some part of the material of which he complains infringed his right to privacy to some degree, no reasonable court approaching the balancing exercise in a proportionate manner could do other than to give precedence to the defendant's Article 10 rights.

Abuse of process

[31] In the circumstances of this particular case, I am also persuaded that the real essence of the plaintiff's claim relates to the alleged falsity of the allegations contained in the offending article and that he is now relying upon the claims in respect of the breach of confidence/privacy as a consequence of his failure to comply with the defamation rules and in order to bring pressure to bear on the defendant. I bear in mind the words of Buxton LJ who observed at paragraph [79] of his judgment in McKennitt:

> "If it could be shown that the claim in breach of confidence was brought when the nub of the case was a complaint of the falsity of the allegations, and that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process."

In addition, I note in passing that the plaintiff told Coulson J that he had issued proceedings in Belfast because the order making him a vexatious litigant was only in force in England and Wales. In writ number 15921 the

plaintiff sought to claim damages for both libel and breach of confidence/privacy. While the writ of summons in these proceedings was restricted to claims in respect of breach of confidence and/or privacy together with data protection and harassment allegations, the plaintiff's original statement of claim, in particular at paragraphs 8-13, was clearly directed towards the alleged falsity of the allegations. In addition, even the amended statement of claim contains, as particulars of information provided in breach of the plaintiff's right to confidentiality, references to statements alleged to be inaccurate, misquoted and/or distorted, the particulars of alleged harassment include references to defamatory and abusive statements and the claim for damages compensatory, aggravated and exemplary includes references to the plaintiff being held up to "hatred ridicule and contempt" so as to be shunned by the general public.

[32] Paragraph 1 of the plaintiff's first affidavit in these proceedings commences in the following terms:

> "1. The subject matter of the present article relates to the publication on 11 February 2007 of a defamatory article referring to me being published on page 7 of the Sunday Times London edition entitled 'Fake Nimbys Hold Builders to Ransom' written by Daniel Foggo and Robert Booth in England and Wales and simultaneously published on page 7 of the Sunday Times Ulster edition by the same journalists and published exclusively in the jurisdiction of Northern Ireland."

[33] In the plaintiff's skeleton argument under the heading "Merits of Plaintiff's Causes of Action" the plaintiff purports to deal with the "substantive" action for breach of confidentiality and/or privacy in the following terms:

> "80. In this case, this relates to the central theme of the article that defendant alleged that the plaintiff had either demanded or received bribes from developers in return for dropping planning objections or withdrawing Judicial Review applications.
>
> 81. In addition court would have to determine whether the plaintiff did in fact receive a cut of the £10,000 that has been alleged that Mr Hammerton received.
>
> 82. These allegations totally denied by plaintiff …..

> 83. Therefore, if defendants were able to prove before a court that their insinuations against plaintiff were true, then this action fails at first hurdle.
>
> 84. On other hand, if defendants fail to prove this, then plaintiff's action would succeed, subject to application of remaining tests.
>
> 85. As previously stated, defendant has filed no evidence seeking to justify reasons for referring to plaintiff in article, or seeking to justify insinuations against plaintiff at all."

The skeleton argument proceeds to refer to the remainder of the claims in respect of breach of confidentiality and/or privacy as "ancillary". At paragraph 107 of the affidavit that he swore in these proceedings on 22 May 2009 the plaintiff specifically stated that:

> "107. My aim in bringing the present action is to obtain a determination of my 'civil rights and obligations' as guaranteed by Article 6(1) of the Human Rights Act 1998 and to obtain redress for the publication of malicious lies and innuendos made in connection with the disgraceful assertions made by the defendant."

[34] At paragraph 112 of the same document the plaintiff set out his view that the case of Mosely v News Group [2008] EWHC 1777 (QB) demonstrated that this type of action may be brought as an *alternative* (my emphasis) to defamation claims, asserting that, in that case, the defendant had been required to prove the truth of the relevant allegations. However it is important to bear in mind that, in that case, Eady J was concerned with a public interest defence based on the accuracy of the interpretation or inference that the newspaper claimed should be drawn from material that otherwise clearly fell into the personal/sexual area of the plaintiff's life. One of the most fundamental distinctions between the tort of defamation and the right to privacy is the relevance of the accuracy of the published material. The former protects and vindicates the reputation of plaintiffs about whom untrue allegations have been made whilst the latter prevents the publication of material that infringes the right to privacy irrespective of its accuracy. It may not be without significance that the plaintiff did not apply for an interim injunction, despite his considerable experience of litigation and being aware that the material was about to be published at least as early as the 9th of February. The plaintiff explained that the 9th was a Friday and maintained that he was disadvantaged by his status as a vexatious personal litigant.

However I note from the transcript of the telephone conversation that his initial reaction appears to have been to ask Mr Foggo for a further meeting at which he (the plaintiff) would produce additional documentation.

[35] Again, at paragraph 117 of the skeleton the plaintiff described his present attitude in the following terms:

> "117. I am however quite content to pursue the current action as a privacy and/or breach of confidentiality action in its own as the issue of the truth of the innuendos so far as I am concerned will be the central issue in the claim as would be the case in a defamation claim subject to the difference as a defence of qualified privilege would be able to be claimed by the defendant."

The plaintiff's submissions before this court were consistent with such an attitude. Whilst he was anxious to persuade the court that his primary concern was breach of his right to confidentiality and/or privacy, he also made clear that, should he succeed in establishing such a breach, he believed that a burden would pass to the defendant to establish the truth of the allegations in order to rely on the "public interest" defence. All of this serves to persuade me that the plaintiff's real target in these proceedings is the allegation attributed in the article to Mr Hammerton rather than any infringement of his right to privacy. In my view the plaintiff's prolonged history of vexatious litigation coupled with his determination to exploit the issue of litigation costs to his own advantage simply serve to confirm my conclusion that these proceedings constitute an abuse of the process of this court.

[36] This plaintiff has no connection whatsoever with the Northern Ireland jurisdiction. No evidence has been produced that anyone in Northern Ireland who knew the plaintiff or was aware of his existence read the article in the Northern Ireland edition of the Sunday Times or drew the same to the attention of the plaintiff at any material time. Indeed, the only reference by the plaintiff to publication to a person other than himself seems to have been the lengths to which he and his friend James Brettle were prepared to go to expose themselves to publication. They travelled to Belfast for the purpose of attending Belfast City Library, accessed an on-line version of the article and downloaded it on to a memory stick for the purpose of obtaining a print out. They also seem to have visited Dublin in order to confirm the circulation of hardcopy in this jurisdiction. In Mosely Eady J reviewed the law relating to exemplary damages and, having done so, ruled at paragraph [197] of his judgment that such damages were not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension and, indeed it would fail the tests of necessity and proportionality. I respectfully agree with his analysis. In such

circumstances it is difficult to see how the plaintiff enjoys the prospect of being awarded any substantial sum by way of damages even if he were to succeed.

[37] As Lord Phillips, MR, noted in Jameel v Dow Jones and Company [2005] QB 946:

> "An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field then to referee any game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice"

To-day it is necessary to clearly bear in mind the overriding objective contained in Order 1 Rule 1A of the Rules which requires the court to take into account not just the interests of the parties before the court but also the interests of other litigants and the overall administration of justice including the potential for the costs, expense and time to escalate out of all proportion. In my view such an approach is consistent with the proportionate observation of the Article 6 rights of individuals.

[38] Taking an overall view of all the circumstances, I have reached the conclusion that the plaintiff' proceedings do not enjoy a reasonable prospect of success. In his skeleton argument and during the course of his oral submissions the plaintiff conceded that his additional causes of action under the Data Protection Act 1998 and the Protection of Harassment (Northern Ireland) Order 1997 depended entirely upon the success of his claims for breach of confidence/privacy.

Forum non conveniens

[39] Having regard to the conclusions that I have reached in relation to the other aspects of this application this issue becomes academic and I propose to deal with it on that basis. In his letter of 19 August the plaintiff drew to my attention the fact that the defendants had not amended their summons to include this ground in their application. However, since I heard submissions with regard to this issue and the plaintiff has provided me with copious written references I am prepared to grant the defendants any necessary leave to amend and express my views.

[40] As Higgins J stated in the course of his judgment in Treacy v O'Dowd and Others [NIHC January 2002]:

> "The principle governing the decision whether a court in exercising its discretion to stay an action on the ground of forum non conveniens, is that the court will

> choose that forum in which the case could be tried more suitably for the interests of all parties and the interests of justice. The burden of proof lies on a party seeking the stay … In exercising that discretion the court would look for that forum with which the action had the most real and substantial connection. Relevant factors would also include where the parties reside, the availability of the witnesses, the convenience to the parties and the witnesses of the forum already chosen and any other fora suggested or obvious as well comparative expenses for all parties involved."

Higgins J then proceeded to helpfully set out the principles identified by Lord Goff in Spiliada Maritime Corporation v Cansulex Limited The Spiliada [1987] AC 460.

[41] As I have indicated above, the plaintiff has no connection whatever with this jurisdiction nor, as far as I am aware, has he any previous experience of litigating in Northern Ireland. He resides in London which is also the location of the defendant newspaper's registered office. All of the material and activities about which the plaintiff complains in the offending article relate to England and Wales which is also likely to be the place of residence of most of the witnesses. It is clear that the plaintiff has only issued these proceedings in Northern Ireland and, indeed, in Scotland, as a "fall back" in the event of his being unable to pursue his action in England and Wales. To some extent the lack of relevance of this jurisdiction may be measured by the trouble to which the plaintiff and Mr Brettle had to go achieve publication of the offending article to themselves in Northern Ireland. Accordingly there is likely to be some substance in the defendant's submission that the plaintiff would be likely to encounter significant difficulty in establishing that he has suffered injury to his feelings, embarrassment or distress as a consequence of the publication of the article in Northern Ireland.

[42] The burden is on the defendant to persuade the court that another forum is available which is clearly or distinctly more appropriate than Northern Ireland. In my view, there is no doubt that the evidence establishes that England and Wales constitutes such a forum. By way of response, the plaintiff submits that England and Wales is no longer available as a forum as a consequence of the ruling by Coulson J in Ewing v News International Limited and Others. The defendant submits that the plaintiff cannot complain of the non-availability of England and Wales after a full and fair hearing by Coulson J of his application for leave in accordance with Section 42(3) of the Supreme Court Act 1981. Prima facie, that submission has considerable persuasive force but it does not seem to me to provide the final answer to this aspect of the application.

[43] In my view, it is important to keep in mind the fact that, despite his tenuous, if any, connections with Northern Ireland, at this stage, the plaintiff has made out a prima facie case of public disclosure of the material about which he complains in this jurisdiction. In practical terms, to accede to the defendant's application for a stay on the ground that the courts in England and Wales afford a more appropriate jurisdiction would, at this stage, effectively preclude the plaintiff from being able to obtain a hearing in respect of the wrong that he claims he has suffered within the independent jurisdiction of Northern Ireland.

[44] Inability to proceed in what might otherwise have been a more appropriate jurisdiction as a consequence of the legal process in that system received some consideration from Lord Goff in Spiliada Maritime Corporation v Cansulex Limited and Others [1987] AC 460 at page 483 when he said:

> "Again, take the example of cases concerned with time bars. Let me consider how the principle of forum non conveniens should be applied in a case in which the plaintiff has started proceedings in England where his claim is not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective write there; in cases such as these, I cannot see that court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. But, in my opinion, this is a case where practical justice should be done. Practical justice demands that, if the court considers that the plaintiff acted reasonably in

> commencing proceedings in this country, and that, although it appears that (putting on one side the time barred point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country."

[45] However, in my view that section of Lord Goff's classic judgment has to be considered within the context of the specific circumstances of this litigation. Despite the adverse conclusions that various judges have drawn in relation to the plaintiff's history and credibility, I do not think that it could be said that he had acted unreasonably in the course of seeking to exercise his rights in England and Wales. As a vexatious litigant he had no choice but to apply for leave to proceed in accordance with Section 42(3) of the Supreme Court Act 1981. The plaintiff is currently not under any such obligation in this jurisdiction in which he would be free to pursue his rights, such as they might be, without seeking initial leave to do so. If, contrary to the views that I have expressed earlier, the plaintiff's claim has a realistic prospect of success and does not constitute an abuse of process acceding to the defendant's application for a stay would inevitably result in the plaintiff being unable to exercise his rights in respect of disclosure of the offending material in this jurisdiction. Given the relative proximity of the two jurisdictions I do not consider that any inconvenience resulting from witnesses having to travel from England and Wales to Northern Ireland to be a factor of major significance. Having taken into account all the relevant circumstances, I would not have been prepared to exercise my discretion to grant the defendant's application for a stay on the ground of forum non conveniens.

[46] In the circumstances I propose to accede to the remainder of the defendant's application and strike out the plaintiff's proceedings in this jurisdiction.