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Ref: **MOR9103**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **19/12/2013**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

TERENCE EWING

Appellant;

-and-

TIMES NEWSPAPERS LTD

Respondent.

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Before: Morgan LCJ, Higgins LJ and Stephens J

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MORGAN LCJ (delivering the judgment of the court)

[1] The applicant applies for leave to appeal against a decision of Coghlin LJ, sitting in the Queen's Bench Division, whereby he granted the respondent's application under Order 18 Rule 19 RCJ for the summary dismissal of the appellant's claim for breach of privacy. There is also a related appeal against a decision of Gillen J, sitting in the Queen's Bench Division, whereby he granted the respondent's application under Order 18 Rule 19(1)(b) RCJ for the summary dismissal of the appellant's claim for defamation on the grounds that the claim was vexatious and also that a continuation of the proceedings would be an abuse of the court process. The appellant was granted leave to appeal by Gillen J. We are indebted to both judges for their helpful analysis of the background facts.

Background

[2] The appellant's claim in these proceedings arises out of an article published by the respondent 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 appellant 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 appellant of having received payments from developers to pull out of intended judicial review challenges. The article recorded that the appellant had emphatically denied ever having been offered or taking payments from developers. An article in the same terms had been published on the same day in the editions of the respondent's newspaper published in England, Wales and Scotland.

[3] The appellant 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 s42 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 appellant 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 appellant is prohibited from instituting any civil proceedings in England and Wales without the leave of the High Court.

[4] On 19 June 2008 the appellant, as he was required to do, brought an application for leave pursuant to s42(3) of the Supreme Court Act 1981 to institute civil proceedings against the respondent 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 and 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 appellant's case Coulson J recorded that he found as a fact that the appellant 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, the claims in defamation 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. The appellant has spent some time in his submissions seeking in effect to re-litigate the conclusions reached by Coulson J. We obtained no assistance from those submissions.

[5] In June 2008 the appellant issued further proceedings in Scotland for libel, breach of confidence and/or privacy and/or breach of s 13 of the Data Protection Act 1998 and/or harassment contrary to s8(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 for defamation. The respondent 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 appellant 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 appellant 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 respondent. Lord Brodie took into account the impecuniosity of the appellant 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 appellant's rights under Art 6 of the European Convention on 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 SLT 451, Lord Justice Clerk Wheatley at 453."

Lord Brodie then proceeded to review the essential merits of the appellant'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 appellant within four weeks of the order. A further application by the appellant to Lord Brodie to reconsider his decision was refused.

[6] The respondent subsequently brought an application for a decree of absolvitor in the Scottish proceedings (an application to strike out the appellant's claim) on the basis of the appellant's failure to provide the security of £15,000 ordered by Lord Brodie. The appellant objected and again sought to argue that ordering security was in breach of his Art 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 appellant 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 respondent'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 appellant'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. In an affidavit the appellant denied making such a remark but the transcript of the hearing confirms that he did so. In the circumstances, a decree of absolvitor was granted to the respondent and the appellant's claim in Scotland was struck out.

[7] By letter dated 10 February 2009 the appellant served two writs upon the respondent in this jurisdiction. The first writ, No. 15921 of 2008 was issued in February 2008 and claimed damages, inter alia, for libel allegedly contained in the same article in the Northern Ireland edition of the Sunday Times dated 11 February 2007 and published on the Times Online website. The second writ, No. 14508 of 2009, was 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.

[8] This appellant has no connection whatsoever with the Northern Ireland jurisdiction. No evidence has been produced that anyone in Northern Ireland who knew the appellant 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 appellant at any material time. The only reference by the appellant to publication to a person other than himself arose from a visit that he and his friend James Brettle made. 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 in order to obtain a print out. They also visited Dublin to confirm the circulation of hardcopy in that jurisdiction.

The privacy case

[9] The article was written by Daniel Foggo and Robert Booth who were journalists with the respondent. The appellant also identified in the hard copies of the article distributed in Northern Ireland and elsewhere a small photograph of himself taken allegedly surreptitiously and appearing beside a photograph of Mr Hammerton. The appellant's claim on 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, Houndditch, London took place subject to a pre-existing confidential relationship between the journalist and himself as a source of information. The statement of claim pleads that this relationship commenced when the appellant 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 appellant 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 appellant 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."

[10] The appellant also exhibited the transcript of a telephone conversation between himself and Mr Foggo on Saturday afternoon 10 February 2007, the day before publication of the offending article. On the basis of that transcript the learned trial judge reached the following conclusions:

(i) Mr Foggo appears to accept that he invited the appellant 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 appellant's activities in connection with the Euston Trust. He also seems to accept that the appellant 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 appellant 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 appellant's Euston Trust activities.

(iii) On the other hand the appellant 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 appellant 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 the appellant could not see to be of any great interest, contained in a friendly chat that was off the cuff.

In a letter to the editor of the Sunday Times on the same date, 10 February 2007, the appellant, 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."

[11] The learned trial judge rejected the appellant's characterisation of the discussion as a friendly chat on matters of no great interest. He noted that the discussion included an allegation by the appellant that Mr Hammerton had received

£10,000 from a developer to drop a planning objection and that he had also received other payments in similar circumstances. The learned trial judge also rejected the appellant's evidence on affidavit that he had expressly agreed with Mr Foggo that the discussion at the meeting would be confidential although he could not remember the words used. The judge noted that no such case had been made to Coulson J or Lord Brodie. No such suggestion was made to Mr Foggo in the conversation which the appellant himself had recorded on 10 February 2007 nor was it asserted in the correspondence with the respondent on 10 February 2007. The judge considered that if there had been any such agreement it would have been mentioned in each of these instances and that it was only raised in these proceedings because the appellant recognised the lack of substance in his claim to confidentiality. He concluded that the appellant's affidavit evidence on this point was untruthful. In an affidavit filed in support of his appeal the appellant stated that an express indication of confidentiality was not required. That does not, however, answer the point that the earlier affidavit made a case which was so at variance with the other available material that the judge concluded that it was untruthful.

[12] After delivery of the statement of claim but before lodging its defence the respondent issued a summons seeking an Order pursuant to Order 18 Rule 19(1)(b) RCJ and the inherent jurisdiction of the court striking out the statement of claim, dismissing the action and entering judgment for the defendant on the grounds that the appellants claim was frivolous and/or vexatious or was otherwise an abuse of the process of the court. At that time there was an issue about the validity of the defamation writ and it had been struck out. It was subsequently re-instated.

[13] The learned trial judge noted at paragraph 38 of his judgment that the appellant conceded that his cause 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. The judge noted that the appellant's credibility was likely to be an important factor in the litigation. Having rejected the appellant's affidavit evidence that there was an express agreement on confidentiality the learned trial judge noted that his conclusion accorded with the view of Coulson J who in the course of his judgment made a specific finding that the appellant was prepared to lie to the court when he thought that it might benefit his case. The appellant himself had described the exchange as a friendly chat and taking all those circumstances into account the learned trial judge concluded that the appellant did not have any realistic prospect effect of establishing that he enjoyed a reasonable expectation of privacy in respect of the information imparted to Mr Foggo.

[14] If wrong on that point the learned trial judge then looked to the question of the public interest in disclosure. He noted that the material related to wrongdoing including an assertion by the appellant that he suspected Mr Hammerton of taking bribes behind his back. Lord Brodie noted that he agreed that had used the phrase "target King's Cross" but stated that it had been taken out of context. The appellant

asserted that he did not tell Mr Foggo that he intended to target that development. He denied any suggestion that he took bribes and played down his relationship with Mr Hammerton. The learned trial judge took the view that even if the appellant were able to establish that some of the material infringed his right to privacy to some degree the respondent's right to publish guaranteed by Article 10 ECHR took precedence.

[15] Turning to the issue of abuse of process the learned trial judge relied on the observation of Buxton J in McKennitt v Ash [2007] 3 WLR 194 that where the nub of the case was a complaint of the falsity of the allegations and the claim in breach of confidence was brought to avoid the rules of the tort of defamation then objections could be raised in terms of abuse of process. The judge noted the various portions of the grounding affidavit which referred to the alleged falsity of the allegations and described the appellant's attitude as encapsulated in paragraph 117 of that affidavit:

> "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 learned trial judge concluded that the appellant's real target was the allegation attributed in the article to Mr Hammerton that the appellant had taken a payoff rather than any infringement of his right to privacy. He considered that the prolonged history of vexatious litigation coupled with the appellant's determination to exploit the issue of litigation costs to his own advantage served to confirm his conclusion that the proceedings constituted an abuse of the process of the court. The learned trial judge rejected a further submission by the respondent based on forum non conveniens.

The issues on the application for leave

[16] The first issue raised by the appellant concerned the jurisdiction of Coghlin LJ. By virtue of section 6 (1) of the Judicature (Northern Ireland) Act 1978 ("the 1978 Act") a Lord Justice of Appeal may at any time at the request of the Lord Chief Justice sit and act as a judge of the High Court. By virtue of section 8 (1) of the 1978 Act a person may sit by virtue of section 6 as a judge of the court for the purpose of the particular case or cases or during a specified period and whether or not all the judges of that court are sitting or are available to sit. Because of the limited number of judges available in this jurisdiction it has for many years been the practice to request members of the Court of Appeal to make themselves available for first instance work where that is consistent with their commitments to the Court of

Appeal. The Lord Justice is, of course, perfectly entitled to decline the request and need not give reasons for that. Coghlin LJ was acting in accordance with that practice and was, therefore, entitled to sit as a judge of the High Court. In any event even if he had not been formally requested he would have been an officer or judge de facto (see Coppard v Customs and Excise Commissioners [2003] 2 WLR 618).

[17] This court has held in McNamee and McDonnell's Application (leave stage) [2011] NICA 40 that the test for leave is generally whether the applicant has an arguable case with a reasonable prospect of success. We accept that there may be cases where there is some compelling reason to give permission to appeal despite the fact that this test is not met. We accept the appellant's submission that the test is no different from that set out in Smith v Cosworth Casting Processes Ltd (Practice Note) [1997] 1 WLR 1538 by Lord Woolf.

> "1. The court will only refuse leave if satisfied that the applicant has no realistic prospect of succeeding on the appeal. This test is not meant to be any different from that which is sometimes used, which is that the applicant has no arguable case. Why however this court has decided to adopt the former phrase is because the use of the word 'realistic' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient.
>
> 2. The court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the court is not satisfied that the appeal has any prospect of success. For example, the issue may be one which the court considers should in the public interest be examined by this court or, to be more specific, this court may take the view that the case raises an issue where the law requires clarifying."

[18] The appellant submitted that there were various aspects of the conduct of the trial by the learned trial judge which demonstrated that his decision was infected by bias. It was common case that the appropriate test to be applied was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased (see Porter v Magill [2002] 2 AC 357). In his skeleton argument the appellant contended that Coghlin LJ had displayed hostility towards him throughout the hearing and allegedly said that he "had been at it for 25 years" as well as enquiring whether anyone had made him bankrupt.

[19] No transcript was provided by the appellant to sustain any of these assertions. As set out in paragraph 2 above he was the subject of a Civil Proceedings Order in 1989 and his approach to the question of costs incurred in litigation is not disputed. The appellant asserts that bankruptcy would not prevent the maintenance of an action on privacy but the issue for us was, assuming the comments were made, what was the context within which they were made and would that context indicate to the fair minded and informed observer that there was a real possibility that the judge was biased. The appellant introduced no material to assist on this point.

[20] The learned trial judge was clearly alert to the need to ensure that the appellant's previous history of litigation did not disadvantage him in this case in a passage which he set out at paragraph 21 of his judgment.

> "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."

[21] The appellant criticised this passage on the basis that the issues raised within it were irrelevant and prejudicial. We do not agree. The history of the earlier litigation in respect of the publication of this article was a relevant part of the background in considering the underlying purpose of the privacy proceedings. Coghlin LJ concluded that the purpose of the proceedings was to evade what the appellant then feared was the impediment to the conduct of his defamation proceedings which had been struck out. What the learned trial judge was seeking to do was to reassure the appellant that those matters relevant to the purpose of the privacy proceedings would not be taken into account so as to prejudice him on other issues.

[22] The appellant also maintained that bias was demonstrated by the failure of Coghlin LJ to give reasons for his decision awarding costs against the appellant. We consider this point entirely without merit. By virtue of section 59(1) of the 1978 Act costs are in the discretion of the judge. Order 62 RCJ deals with the principles on

which that discretion should be exercised and by virtue of Order 62 Rule 3(3) when costs are awarded the court should order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. The detailed rules on the calculation of costs introduced under the Civil Procedure Rules in England and Wales do not apply in this jurisdiction. The costs were awarded against the appellant because they followed the event. The fact that the judge had found in the appellant's favour on forum non conveniens did not alter the outcome and ought not to have altered the costs order. The reason for the order was obvious. There was no requirement to expressly set out the grounds for the order (see Reimbold v Ambic Equipment Ltd [2002] 1 WLR 2409). We reject the appellant's case on bias as unsustainable.

[23] The central issue in this appeal was whether the appellant could demonstrate any sustainable case on privacy. There is no dispute that a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected (see Lord Hope in Campbell v MGN [2004] 2 AC 457 at 480D). There must be some interest of a private nature which the claimant wishes to protect. Privacy has a wide scope (see Browne v Associated Newspapers [2008] 1 QB 103 at 113). That is consistent with the approach taken under Article 8 ECHR (see Perry v UK [2004] 39 EHRR 3). Photographs can be particularly intrusive and the courts have showed a high degree of willingness to prevent their publication (see Theakston v MGN [2022] EMLR 398). The widespread publication of a photograph of someone which reveals them to be in a situation of humiliation or severe embarrassment, even if taken in a public place, maybe an infringement of the privacy of personal information. The mere fact of covert photography, however, is not sufficient to make the information contained in the photograph confidential (see Baroness Hale in Campbell v MGN [2004] 2 AC 457 at 501).

[24] None of this is controversial. The issue in this appeal concerns the application of these principles by the learned trial judge. The appellant relies on the fact that he had a previous relationship with Mr Foggo as a source. That concerned the exposure of a person for alleged fraudulent activity concerning cheques. We have already set out at paragraph 9 above the terms of the email sent by the appellant on 28 December 2003.

[25] The request for confidentiality in this e-mail is express. That is as one would expect. Where someone imparts information to a person known to be an investigative journalist the starting point is that the information and the person who supplied it will be disclosed unless there is an agreement that the information or some of it is confidential or there is some other indication from the circumstances that a duty of confidentiality arises. Secondly, the duty of confidence arising from the terms of the email relates only to information which was supplied about this particular individual. We consider that the learned trial judge was right, therefore, to conclude that any reasonable expectation of privacy applied only to the issue being

discussed between Mr Foggo and the appellant in 2003/2004. The publication of material about the Euston Trust as a result of the "friendly chat" on 1 February 2008 at O'Neill's Bar, Hounditch, London was not subject to a duty of confidentiality as a result of the earlier arrangements.

[26] At paragraph 225 of his grounding affidavit sworn on 20 April 2009 the appellant asserted that he was contacted by Mr Foggo in early February 2007 and he recalled that he agreed with Mr Foggo at the time that the meeting would be confidential although he could not recall the words used. On any view an express agreement that the meeting would be confidential is considerable evidence of a reasonable expectation of privacy. This appellant is an experienced litigator and has considerable command of the relevant case law. The assertion that there was an express agreement that the meeting should be confidential was not made in either the English proceedings or the Scottish proceedings. Even more surprisingly it was not made to Mr Foggo when the appellant contacted him for the purpose of seeking to extract from him by way of a recorded telephone call a basis for the conclusion that the meeting was confidential nor is it mentioned in the correspondence to the respondent on 10 February 2008. It is also of note that the appellant's amended statement of claim asserts at paragraph 13 that the appellant met with Mr Foggo to discuss the earlier activities in confidence but makes no such claim in respect of the issues concerning the Euston Trust.

[27] The appellant submitted that the learned trial judge was not entitled to reach a conclusion on the truthfulness of the appellant's evidence at the interlocutory stage. He submitted that the respondent was obliged to adduce direct evidence seeking to contradict the appellant's account and only then could the court decide whether to accept the appellant's account. We do not accept that submission. The object of the strike out provisions is to protect integrity of the system of the administration of justice by dismissing claims without substance at an early stage. A similar approach was taken by Tugendhat J in <u>Lonzim plc v Sprague</u> [2009] EWHC 2838 (QB) who dismissed a slander claim at an early stage being satisfied that all relevant information was available to him.

[28] We also consider that in light of the material available the learned trial judge was driven to the conclusion that the allegation that the meeting was confidential was untrue. There may have been some basis for the contention that what the appellant said about the earlier matter was still subject to the earlier agreement but that arrangement did not give rise to any expectation of privacy in relation to this separate matter. If there had been any agreement of confidentiality for the meeting as a whole it is incomprehensible that it was not referred to in the earlier proceedings or in the telephone call which the appellant recorded with a view to establishing that the meeting was confidential.

[29] The appellant claimed confidentiality for the photograph published with the article. As indicated above the courts have been alert to the intrusive nature of

photographs and have shown a high degree of willingness to prevent their publication. Photographs can demonstrate embarrassment or distress and may exacerbate either. This, however, was a small photograph of the appellant sitting and the criticism made by the appellant was that the grainy quality of the photograph and its proximity to a photograph of Mr Hammerton reflected in some way on him. The learned trial judge did not specifically deal with the claim in respect of the photograph in his judgment but did note the passage from Baroness Hale in Campbell where she noted that the taking and publication of a covert photograph did not by itself amount to a breach of privacy.

[30] The appellant maintained that the failure to allow him to further amend his statement of claim to include the omission within the article of the appellant's subsequent disassociation from Mr Hammerton in some way constituted a breach of his Article 8 rights. That claim has to be seen in the context of an assertion by the appellant to Mr Foggo that when he and Mr Hammerton were both involved in the Euston Trust Mr Hammerton had abused his position by demanding money to withdraw planning objections. In that context the photograph did not have any private character. We do not consider, therefore, that the publication of the photograph gave any substance to the privacy claim.

[31] The learned trial judge went on to find that if he was wrong on the privacy issue he would in any event have dismissed the action as vexatious because the public interest in publication would have outweighed any privacy interest of the appellant and as an abuse of process because the proceedings were an improper attempt to evade the strictures on libel proceedings. We have concluded that the appellant had no sustainable argument for advancing a case that the meeting on 1 February 2008 was an occasion on which there was a reasonable expectation of privacy in respect of the published material. If we were wrong on that it would be necessary to take into account the circumstances giving rise to the privacy claim before balancing that against the public interest in publication. Since we have not accepted that there were circumstances in which there was a reasonable expectation of privacy we cannot carry out that balancing exercise. Similarly, if we had found some basis for a privacy claim, that would have impacted on the evaluation of whether the proceedings were an abuse of process. Since we have not found such a basis we consider that we cannot reach a conclusion on the basis that there was a reasonable expectation of privacy. In the absence of such an occasion of privacy the claim was clearly an abuse of the court's process. Accordingly we reach our finding on the basis that there was no sustainable case that which there was a reasonable expectation of privacy in respect of the published material.

[32] For the reasons given we reject the arguments advanced in support of the privacy case and dismiss the appeal

The defamation claim

[33] In the defamation claim the appellant's case was that the words in their natural and ordinary meaning meant that the appellant:

(i) had corruptly been involved with and/or had facilitated and/or condoned the payment of £10,000 or bribe a developer in order to drop objections to the developer's planning application and scheme.

(ii) had corruptly been involved with and/or had fabricated the acceptance of many other bribes from other developers systematically and serially in order to drop objections to other developers' planning applications and schemes and/or judicial review applications in connection with them.

(iii) had corruptly made planning applications for the purpose of extorting demands of the payment of money from developers and/or accepting corrupt payments of money and bribes from them systematically and serially.

(iv) was not genuinely interested or concerned about heritage and planning issues but had been using these issues along with others as a front for corrupt payments from developers in return for dropping planning objections and judicial reviews.

[34] As appears from paragraph 8 above the appellant has no connection with Northern Ireland. He came to Northern Ireland for the purpose of downloading a copy of the article in the City Library which was published to the friend that he brought with him. There is nothing to suggest that anyone in Northern Ireland who read the article knew the appellant. In short the argument is that he has no reputation in Northern Ireland and that any damage that may have been done to him occurred as a result of the publication in Great Britain, where he resides.

[35] The learned trial judge, Gillen J, granted the respondent's application under Order 18 Rule 19(1)(b) RCJ for the summary dismissal of the appellant's claim for defamation on the grounds that the claim was vexatious and also on the ground that a continuation of the proceedings would be an abuse of process of the Court.

[36] The basis for that application was the decision in Jameel v Dow Jones & Co [2005] EWCA Civ 75. The claimant was a wealthy Saudi businessman who was named in an article in a publication in the USA which implied he was a member of a syndicate which financed Al Qaeda terrorists. This article was published on the internet and was accessible by subscribers in the UK. The publisher was able to identify that only 5 subscribers within the UK had accessed the article and, therefore, claimed the claimant had in fact suffered no or minimal damage to his reputation.

The judge at first instance refused the publishers application for summary dismissal of the claim. Reversing that decision, the Court of Appeal found that prior to the Human Rights Act 1998 the presumption that a defamatory publication caused some damage to its victim was, in practice, irrebuttable. Since the Human Rights Act, however, an action for defamation where no or minimal damage to reputation has been caused may constitute an interference with freedom of expression under Article 10 ECHR. In such a case, if the claimant were to succeed in the action, it could be said that he will have achieved vindication for the damage done to his reputation in the UK, but both the damage and vindication will be minimal and the cost of the exercise will have been out of all proportion to what has been achieved. As Lord Philips put it, "The game will not merely not have been worth the candle, it will not have been worth the wick". His Lordship concluded:

> "[70] If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake. Normally where a small claim is brought, it will be dealt with by a proportionate small claims procedure. Such a course is not available in an action for defamation where, although the claim is small, the issues are complex and subject to special procedure under the CPR.
>
> [71] Mr Price submitted that to dismiss this claim as an abuse of process would infringe art 6 of the Convention. We do not consider that this Article requires the provision of a fair and public hearing in relation to an alleged infringement of rights when the alleged infringement is shown not to be real or substantial. Subject to the final issue, to which we now turn, and on the premise that there have only been the five individual publications within this jurisdiction, we would dismiss this action as an abuse of process."

[37] We accept the appellant's submission that it is not necessary to demonstrate that the reader knew an identified individual referred to in a publication before an action in libel can be maintained. Damage is presumed and Jameel supports the view that such a presumption does not offend Article 10 ECHR. The corollary, however, for which Jameel is also support is that the court is acting in accordance with Article 6 ECHR where the reputation which the claimant seeks to uphold is minimal and the use of the court process is disproportionate having regard to the complexity of the proceedings.

[38] The learned trial judge concluded that in this case there was no real and substantial tort. He was aware of the publications in the other jurisdictions including publication where the appellant lived and where the Euston Trust operated. He noted the absence of any connection of the appellant to Northern Ireland. He was entitled to take into account the circumstances in which proceedings were issued here at the very end of the limitation period as an indication that these proceedings were a device to get round the failure of his proceedings elsewhere.

[39] In our view this was a clear case for the application of the Jameel principle. For those reasons the defamation appeal is also dismissed.