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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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COLIN FULTON

-v-

SUNDAY NEWSPAPERS LIMITED

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Before: Morgan LCJ, Weatherup LJ and Weir LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Deeny J on 9 December 2015 in which he rejected the appellant's claim for damages and injunctive relief under the Protection from Harassment (Northern Ireland) Order 1997 ("the 1997 Order"). Although Article 2 of the Convention was pleaded it was not pursued upon the appeal reflecting the findings of the trial judge. Mr Girvan appeared for the appellant and Mr Lockhart QC and Mr Coghlin for the respondent.

Background

[2] The appellant resides in an area of Belfast off the Donegall Road known as The Village. In his Statement of Claim he was described as "an active member of the Progressive Unionist Party ("the PUP") but ... otherwise unemployed". The respondent company publishes the Sunday World newspaper in Dublin and has a Northern Edition sold in Northern Ireland. The appellant complained before the lower court that the Northern edition of this newspaper published 28 articles about him between 26 August 2012 and 5 January 2014 making allegations "of a serious, inflammatory and highly controversial nature".

[3] The publications contained allegations that the appellant had UVF connections, was in the UVF, was defying the UVF leadership, was involved in acts of criminality linked to drugs, arms and explosive devices, and was involved in stirring up 'turf wars' and 'sectarian squabbles'. Notable among the allegations of criminality linked to the appellant were so-called punishment attacks on three

teenage boys, one of whom was said to have had a Taser gun used on his privates, and another incident involving violence against girls who had brought a Catholic to a Rangers Supporters Club near the Village.

[4] Photographs of the appellant were repeatedly published with the articles and these included pictures of him in a crowd of Loyalists following a band marching in breach of a Parades Commission ruling, in a crowd confronting police after the march and, on a later date, taking part in a city centre protest and being arrested and handcuffed.

[5] Another aspect of the articles was that when the appellant was referred to, it was typically in pejorative terms and with the name 'Meerkat', as for example in a photograph caption "UVF Thug Colin 'Meerkat' Fulton". He was also described as a "Stool Pigeon", though the meaning of the phrase was not elaborated upon and "Scaredy Cat". There was also an allegation that he organised a ceremony to unveil a mural in the Village area of the Donegall Road.

[6] There were then a series of articles around allegations that he took frequent holidays, one of which was to see his "mistress and lovechild". Linked with this were allegations that he had been involved in stirring up tensions in advance of the marching season but had then gone abroad to be away for the key period of tension. Articles also referred to him in the context of first a power struggle, and then acollaboration, between the UVF and a gang known as "the Russians" or a "Russian crime boss". He was also named among alleged paramilitary leaders said to be running shebeens and drug running operations in defiance of the Shankill Road section of the UVF.

The statutory framework

[7] Article 3 of the 1997 Order reads as follows:

> "3.—(1) A person shall not pursue a course of conduct—
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> (a) which amounts to harassment of another; and
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> (b) which he knows or ought to know amounts to harassment of the other.
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> (2) For the purposes of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Paragraph (1) does not apply to a course of conduct if the person who pursued it shows—

(a) that it was pursued for the purpose of preventing or detecting crime;

(b) that it was pursued under any statutory provision or rule of law or to comply with any condition or requirement imposed by any person under any statutory provision; or

(c) that in the particular circumstances the pursuit of the course of conduct was reasonable."

Article 4 of the 1997 Order creates an offence of harassment. Article 5 provides a civil remedy which the appellant sought. Article 5(2) states that on such a claim "damages may be awarded for (among other things) any anxiety caused by the harassment ...".

The conclusion of the trial judge

[8] The learned trial judge set out the evidence given by the appellant, the retired Northern editor of the respondent newspaper, Mr McDowell, and the deputy editor of the Northern edition, Mr Sullivan. He concluded that the series of articles constituted a course of conduct towards the appellant. They were such that the respondent would have known or ought to have known that they would cause distress and anxiety to the appellant. They did have that effect and to that extent they were prima facie oppressive. However, the respondent satisfied the court pursuant to Article 3(3)(c) of the 1997 Order that its conduct in publishing the articles was reasonable. Among the reasons for reaching that conclusion were:

(i) the journalists were acting in good faith in publishing the articles. Their sources were known to them and were cross-checked by them. Their motivation was not vindictive; rather it was to expose criminal conduct and wrongdoing;

(ii) the appellant was not convincing in his denials of many allegations. Many of his answers were inconsistent and contradictory and he had caused his solicitors to make false statements in correspondence. When pressed by counsel for the respondent he resorted to a brazen assertion that the allegations were "all lies" and, under pressure, he reached for explanations that had never been previously given; and

(iii) while there were some inaccuracies in the articles, some matters not in dispute shored up and sustained a finding that the respondent's conduct was reasonable in making allegations of the nature it did against the appellant. He was a member of the PUP which he admitted had links with the UVF. He attended at least five marches attended by and sometimes organised by UVF members. He knew and associated with a considerable number of people alleged to be members of the UVF who had never sued to deny such allegations. He was a close friend of one man with a serious conviction in the past for a grave sectarian attack whom he admitted had a more recent conviction warranting a further period of imprisonment. He flew the only UVF flag in his street.

[9] The learned judge said he took into account the strongest point argued on his behalf, namely that he had never been arrested or questioned by police about these serious allegations. He noted that various possibilities existed to explain police inaction, including a difficulty with witnesses. The fact that they had not interviewed him did not deter the court from reaching conclusions in the case. He also noted that the appellant had not opted for the obvious remedy of suing for defamation. The explanation advanced on his behalf was that there was no legal aid for defamation. However, the 1997 Order was not enacted to circumvent that position.

[10] The appellant was not entitled to the civil remedy of damages as the statutory tort of harassment was not proved. One could have reached that finding on less material than the respondent was able to adduce in the case. Applying the test formulated by Lord Phillips in Thomas v News Group Newspapers Ltd and Another [2001] EWCA Civ 1233, the series of articles, although likely to cause distress to an individual, did not in fact constitute an abuse of the freedom of the press which the pressing social needs of a democratic society require. Rather they were to be seen as a robust expression of press freedom which the courts had a duty to protect.

[11] The learned judge also rejected the complaint based on Article 2 of the Convention. He had received the first threat warning before there was any reference to him by the respondent. He had continued to be prominent in the role as a representative of Loyalism in the Village area and at demonstrations and in his associations and activities. It was those facts which had led to the threats, more than the reporting of facts or allegations made in good faith by experienced journalists.

The issues in the appeal

The application for fresh evidence

[12] On 5 August 2016 shortly before the date fixed for the hearing of this appeal the appellant applied to introduce fresh evidence consisting of a number of articles

published by the respondent between 13 December 2015 and 13 March 2016. The articles continued the themes of the appellant's alleged involvement in the UVF, the unsatisfactory nature of his evidence before Deeny J and his funding of his lifestyle and that of his partner.

[13] The proceedings as originally issued included claims for damages for personal injury, loss, damage, injury to feelings and inconvenience sustained by him by reason of the anticipated future breach of his right to life and breach of his right to private and family life pursuant to the Human Rights Act and sought an injunction restraining the respondent from publishing in any of its newspapers allegations that he was associated in any way with the Ulster Volunteer Force. That Writ of Summons was then amended so as to seek an injunction and damages restraining the respondent from harassing the appellant by publishing repeatedly an allegation in its newspapers between September 2012 and January 2014 that he was a member or associated with or leader of the Ulster Volunteer Force contrary to the 1997 Order together with the claim based on Article 2 of the Convention.

[14] The proposed amendment related to periods substantially outside the timeframe within which the original pleadings were set and to some extent heralded what was effectively a claim influenced by if not based upon misuse of personal information in relation to members of the appellant's family. We concluded that if any cause of action was to be based upon those materials it should in the ordinary way be the subject of first instance proceedings, especially since the basis of the claim advanced was now expressly related to issues around misuse of private information. Accordingly we declined to admit the fresh material.

The criticisms of the trial judge

[15] The appellant submitted that the statutory tort of harassment was intended to protect intrusion into a person's private and family life. That was also protected by the tort of misuse of private information. There were particular features of the course of conduct in this case which the appellant submitted were objectionable. The first was the use of the pejorative nickname "Meerkat" which amounted to abusive name-calling. The second was the reference to the appellant being a "stool pigeon". Although the appellant submitted that this was a reference to him being an informer the context indicates that it was in fact a suggestion that he was a decoy for other criminals. Thirdly, the learned trial judge noted that the allegations about the punishment beating and tasering of a teenager were incorrect in some details. Fourthly, the publication had included reference to his conduct of an affair and there was also complaint about the subsequent publication that his partner had had cosmetic surgery for which he paid, the inference being that he had no visible means of funding such a lifestyle. The respondent provided an undertaking not to further publish private information about his children or partner. The last of the items relevant to this particular submission was the publication of images of the appellant being arrested and handcuffed alongside allegations that he was guilty of the offence

of rioting at a time when the criminal proceedings were active and publication of the same image after his acquittal without identification of the fact that he had been acquitted.

[16] The difficulty with these submissions is that they are not consistent with the case made in the statement of claim which grounded the action heard by the learned trial judge. Paragraph 3 of the statement of claim alleged that between 26 August 2012 and 5 January 2014 the respondent published articles about the appellant along with photographs and the appellant's name making allegations of a serious, inflammatory and highly controversial nature alleging that the appellant was: –

(a) A "UVF heavy" believed to be close to Winston Irvine and tipped to take over the South Belfast UVF;

(b) A UVF Commanding Officer who was likely to start a bloody UVF "Turf War" and who was trying to steal from occupied houses on named streets;

(c) Part of the UVF sectarian march during the course of which the anti-Catholic "Famine Song" was played outside St Patrick's Church, Donegall Street, Belfast;

(d) A UVF gangster agitating against the South Belfast UVF, a South Belfast UVF thug who was prominent among city centre flag protesters;

(e) A "UVF Sex Torture Boss" and UVF godfather who ordered a teenager to be tortured by being tasered on his private parts and a person who was the focus of a police investigation into the incident and therefore facing child sex charges;

(f) A "stool pigeon" who had been removed from the position of second in command for the UVF in the Village area of Belfast;

(g) Part of a sinister "arms race" to obtain more weapons and develop a mortar type device to carry out attacks on Republican targets;

(h) Involved in stockpiling weapons used to launch attacks on Republican targets and believed to be deeply involved in the supplying of contaminated Ecstasy type tablets which had led to the death of a number of young people and that he was behind the newly opened "shebeen" and drugs den from which the UVF was selling cocaine and mephedrone;

(i) Part of the UVF mob who "beat up girls in the Rangers Club".

[17] The particulars of the breach of the 1997 Order alleged were: –

(a) Repeatedly publishing material identifying the appellant and containing material of an inflammatory and politically controversial nature;

(b) Identifying the appellant as a leading member of the South Belfast UVF;

(c) Continuing to publish and republishing material constituted harassment;

(d) Causing or omitting to prevent consequent anxiety of the appellant;

(e) Continuing to publish material after being put on notice of the risk of harm presented to the appellant.

[18] The nature of the case pursued at first instance is also clear from the opening of senior counsel on behalf of the appellant in those proceedings which is contained within the papers. The opening begins as follows:

> "The Plaintiff brings a claim in damages claiming that the Defendant, by its conduct, materially contributed to a real and immediate risk to his life by the publication of a series of sensationalist articles alleging that the Plaintiff was variously a leader and/or a member of the UVF and that he was responsible for overseeing serious paramilitary criminality. Further, he claims that to allege that he is a leader or member of the UVF constitutes harassment by the Defendant of him."

[19] After referring to various articles referring to UVF connections in the course of an interlocutory application for an injunction based upon Article 2 of the Convention the nub of the case presented at trial is set out at paragraphs [15]–[18]:

> "15. The Plaintiff's case is that by publishing repeatedly that (*sic*) the Plaintiff words to the effect that he is a UVF thug, member or leader, the Plaintiff is suffering alarm and distress. He is a person whose life was and is under threat and the material cause of

that threat is the repeated publication within the Sunday World of this accusation.

16. It is the Plaintiff's case that these publications are targeted at the Plaintiff. They accuse him personally of being involved in paramilitarism, knowing that these accusations will be read by a wide circulation in Northern Ireland and the articles read cumulatively are not only capable of but are intended to incite feelings of revulsion about the Plaintiff among its readership.

17. It is the Plaintiff's case that the Defendant knows that its continued publication of these articles amounts to harassment of the plaintiff. If it doesn't know, it ought to know. The court is invited to conclude that any reasonable person in possession of the same information would consider that this course of conduct amounted to harassment of the Plaintiff.

18. Finally, it is the Plaintiff's case that the Defendant cannot avail of any of the statutory defences set out in Article 3(3). The Defendant is not the Police Service of Northern Ireland or a law enforcement agency. Though it can pursue legitimately, of course, a robust line in investigative journalism, it is not its role to start to make accusations of a serious and sustained nature about an individual in circumstances where there is, frankly, no evidence to support it."

That was the case which the respondent met at trial and the case upon which the learned trial judge gave judgment. It is not open to the appellant to completely alter the basis of his case by way of a skeleton argument delivered eight months after the judgment.

[20] The appellant contrasted the defence of reasonableness in Article 3(3)(c) of the 1997 Order with the nature of the defence in the Data Protection Act 1998 for journalism under section 32 of that Act. It was submitted that whereas there was specific reference to the public interest in section 32 of the 1998 Act that was no such reference in the 1997 Order. It was further submitted that a test of "reasonable belief" was a standard below the wholly objective standard of reasonableness. The appellant contended that the test of responsible journalism set out in Reynolds v Times Newspapers Ltd [2001] 2 AC 127 by Lord Nicholls was less stringent than a test of reasonableness.

[21] The appellant criticised the approach which the learned trial judge took to the question of reasonableness. In particular it was submitted that Hayes v Willoughby [2013] UKSC 17 demonstrated that reasonableness could not be established simply by establishing that the publisher had acted rationally and that the reasoning of the learned trial judge was based on the latter test. In its defence the defendant had joined issue with the appellant on the truth or falsity of all of the allegations comprising the course of conduct and, it was submitted, had failed to discharge the burden of proving any justification defence.

[22] By way of development of these submissions it was suggested that the more serious the allegation the heavier the burden upon the publisher to prove the publication was justified. Where the tone of the publication was sensationalist it was less likely to be judged reasonable. In a case of this nature there must be real public concern about the issue the subject of the report and the respondent was not entitled to call additional matters not known at the time of publication to support the defence of reasonableness.

[23] The appellant complained, therefore, that the trial judge took into account evidence that a UVF flag flew outside the appellant's house whereas this was not apparently known to the respondent at the time of publication. Similarly there was complaint about reliance upon the comments of Assistant Chief Constable Drew Harris to the Northern Ireland Affairs Committee of the House of Commons on 29 November 2013 where he indicated that police saw sizeable chunks of the UVF, including in South Belfast, involved in serious crime, robbery, extortion and drug dealing. This plainly would not have been known in relation to all of the articles preceding that comment.

[24] The appellant submitted that the articles were published in bad faith and were motivated by hatred that the journalists held for the appellant and that there had been inadequate demonstration that the sources relied upon by the respondent were reliable. The learned trial judge had the opportunity to view and hear the witnesses and he clearly rejected both of these submissions. We see no reason to interfere with that decision. Although it was contended that the learned trial judge should not have taken into account the absence of any defamation proceedings issued by the appellant it is clear that this issue did not play any significant part in the learned trial judge's conclusion.

[25] Finally, the appellant argued that he had not been given a right of reply. At paragraph [57] of the judgment the learned trial judge noted that Mr Sullivan said that offering a right of reply had not borne fruit in the past with people of this kind who dismissed the allegations and would make no comment. In that context it is of some significance that there was no attempt to engage with the respondent in respect of the 28 articles which formed the subject matter of this claim until an email of 2 November 2013 leading to the launch of these proceedings in January 2014. At the very least this provides some support for Mr Sullivan's approach.

Consideration

[26] We are satisfied that between paragraphs [69] and [89] of his judgment the learned trial judge properly set out the applicable law and in particular paid close attention to Thomas v News Group Newspapers Ltd and Another [2001] EWCA Civ 1233 and King v Sunday Newspapers Ltd both at first instance and on appeal in this jurisdiction. In light of his conclusion about the course of conduct amounting to harassment and causing anxiety the issue for the learned trial judge was whether the particular circumstances made the pursuit of the course of conduct reasonable.

[27] We accept that there is a difference between rationality and reasonableness. As Lord Sumption demonstrated at paragraph [14] of Hayes v Willoughby rationality applies a minimum objective standard to the relevant person's mental processes importing a requirement of good faith, some logical connection between the evidence and the reasons for the decision and an absence of arbitrariness.

[28] Reasonableness is a more demanding objective standard requiring the publisher to satisfy the court that the circumstances are such that publication would not constitute an abuse of the freedom of the press. It is not sufficient that the publisher suspects or believes on reasonable grounds that the allegations are true. The additional factor in this case as found by the trial judge was the public interest in exposing this alleged paramilitary influence in a loyalist area of Belfast which the investigations conducted by the newspaper uncovered. In making his judgment about the reasonableness of the conduct the learned trial judge took into account the seriousness of the allegation and, in the appellant's favour, the fact that he had not been arrested or questioned by the PSNI about these serious allegations. That was a point to which the learned trial judge paid particular attention at paragraph [95] of his judgment.

[29] In the passage set out at paragraph 19 above it was suggested that it was in some way inappropriate for a newspaper publisher to expose alleged criminal wrongdoing on the basis that this was a matter for the PSNI or other law enforcement agencies. The point was developed a little differently in the presentation of this appeal in that it was suggested that the exposure of such allegations did not constitute matters of public interest. We reject both of those submissions. In our view it is an entirely appropriate role for the press to draw to the attention of the public allegations of serious wrongdoing. Of course, in doing so, the press must act responsibly since otherwise such conduct is not likely to be found to be reasonable. It does not follow, however, that there is a burden upon the press in such a situation to demonstrate the truth of the allegations in order to resist a claim for harassment. That would be to import concepts from defamation law which do not apply.

[30] In considering reasonableness in the context of investigative journalism we accept that there is a public interest in examining allegations of criminal behaviour by paramilitaries linked to the UVF in the South Belfast area with a view to publication. The articles of which complaint was made identified a number of others as well as the appellant as being involved in those enterprises. The role of the press in exposing alleged wrongdoing is all the more important where the PSNI accepts that there is a problem of paramilitary criminality but is unable to take effective steps to stop it.

[31] The public interest on its own could not, however, be sufficient to establish the defence. The bona fides of the reporters and the nature of the investigation were also material. The learned trial judge was satisfied that the journalists involved had checked and rechecked their sources prior to publication and continued to publish material about what was alleged to be an ongoing criminal enterprise. The association of the appellant with other named alleged members of the UVF was consistent with the information provided by the sources. The fact that his house was the only house in his street from which a UVF flag hung was not known to the respondent but it supports the inference that the appellant publicly demonstrated his adherence to the UVF in a range of different ways. Although, as indicated, the appellant complained about the absence of a right of reply it is frankly astonishing that it took so long before any issue about the publication of these articles was taken with the respondent newspaper and it is of some note that the learned trial judge formed the view that the appellant relished his notoriety. The absence of any complaint at an early stage is a relevant fact in the respondent's favour on the issue of publication.

[32] We consider, therefore, that many of the elements of responsible journalism identified by Lord Nicholls in Reynolds were found to be satisfied by the learned trial judge in this case. We see no reason to disturb the finding of the learned trial judge that the respondent demonstrated that its approach was reasonable in the circumstances and that the publication should be seen as a robust expression of press freedom which the courts have a duty to protect.

Conclusion

[33] For the reasons given the appeal is dismissed.