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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

KEVIN WINTERS
NIALL MURPHY
JOSEPH McVEIGH
GERARD McNAMARA
MICHAEL CRAWFORD
PAUL PIERCE
KRW LAW LLP

Plaintiffs

v

NEWS GROUP NEWSPAPERS LIMITED

Defendant

Mr F O'Donoghue KC with Mr P Girvan (instructed by KRW Law Solicitors) for the Plaintiffs
Dr T McGleenan CBE KC with Mr J Scherbel-Ball (instructed by A & L Goodbody Solicitors) for the Defendant

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McFARLAND J

Introduction

[1] This judgment sets out my ruling in respect of applications in two summonses issued by the plaintiffs on 24 February 2023 and 15 March 2023 for leave to amend their statement of claim, for a variety of orders relating to discovery and production of specified documents, and the issue of a subpoena duces tecum.

Background

[2] By writ of summons issued on 16 December 2016 the plaintiffs and two other plaintiffs claimed damages for harassment, defamation, breach of privacy and data

protection, and breach of copyright. The claim arises out of the publication by the defendant in its newspaper *The Sun* and the on-line version of that newspaper of articles on 7 December 2016, 8 December 2016 and 10 December 2016.

[3] The two other plaintiffs (one a former member of the KRW Law LLP practice and the other a former employee) have now discontinued their involvement in the proceedings and the proceedings are being continued by the seven plaintiffs, the first six being members of the seventh plaintiff.

[4] I have set out below the dates of the pleadings and two judgments relevant to this application:

(a) Writ of summons dated 16 December 2016

(b) Statement of claim served 6 February 2017

(c) Defence served 9 March 2017

(d) Reply to defence served 21 April 2017

(e) Amended statement of claim served 15 June 2017

(f) Judgment of Stephens LJ dated 6 November 2017 ([2017] NIQB 100) ("the meanings judgment")

(g) Second amended statement of claim served 30 November 2017

(h) Amended defence served 21 December 2017

(i) Judgment of McFarland J dated 19 April 2023 [2023] NIKB 45

[5] The court has been assisted by the written and oral arguments presented by counsel for the defendant and the plaintiffs.

The first summons

[6] The plaintiffs issued this summons on 21 February 2023 seeking the following orders (which I have summarised for the purpose of brevity):

(a) Leave to further amend their statement of claim and reply to defence in terms specified in schedules to the summons;

(b) Discovery by the defendant and its journalist Thomas Zoltan Newton ("TZN") in respect of documents relating to –

(i) Pre-publication communications between TZN and John L Mercer MP as referenced in an email 2 December 2016;

(ii) Pre-publication communications between TZN and Ian RK Paisley Jnr MP as referenced in an email 2 December 2016;

(iii) Dashboard data, analytics, date and meta-data of circulation figures of the first and third online articles and the attribution of PVs to Northern Ireland;

(iv) Circulation figures for the newspaper containing the second print article (8 December 2016);

(v) Publication of the articles on the defendant's social media page;

(vi) Emails and letters of instruction from the defendant's solicitors to ASM accountants which led to a report of 21 February 2023.

(c) Leave to administer interrogatories upon the Steven Kennedy, the news editor of the Sun in relation to a 'Memo' attributed to a journalist Ben Lazarus ("the Lazarus Memo"):

(i) By which person was it authored;

(ii) When did it come into existence;

(iii) Was it an edited version of journalistic materials taken from pre-publication emails of 20 October 2016, 2 December 2016 and/or 5 December 2016;

(iv) If so, which person or persons edited the email or emails to create it.

(d) Inspection of the original affidavit of 3 January 2017 sworn by Steven Kennedy and the original document described as 'Memo' exhibited to that affidavit;

(e) Striking out of three particulars of fact set out in the amended defence.

[7] It was agreed by the plaintiffs that orders were no longer required in relation to the matters in paragraphs [6] (b) (iv) and (vi), (c), (d) and (e), but orders were sought in respect of the amendment to the pleadings and discovery. It was acknowledged that any amendment to the reply to defence would have to await any amendment to the defence, which in turn would have to await decisions in relation to the statement of claim.

The second summons

[8] The plaintiffs issued this summons on 15 March 2023 seeking the following orders (which again I have summarised for the purposes of brevity):

(a) Leave to further amend their statement of claim in terms specified in the schedule to the summons;

(b) Discovery by the defendant in respect of documents relating to computer data primarily relating to circulation data for the on-line publications. These are set out in detail in three sub paragraphs, one of which includes five further sub-paragraphs.

(c) Discovery by the defendant in respect of documents relating to:

  (i) The original version of the Lazarus Memo;

  (ii) The email and the electronic version of the memorandum exhibited to the affidavit of Steven Kennedy.

(d) Production to the court by the defendant of documents relating to the preparation of the affidavit of Steven Kennedy of 3 January 2017, including:

  (i) An email and electronic version referred to in a later affidavit of Steven Kennedy;

  (ii) An email from Steven Kennedy of 18 December. [No year is provided but this is assumed to be 2016];

  (iii) Emails and correspondence between the defendant and its solicitors Simons Muirhead & Burton, London.

(e) Leave to issue a subpoena duces tecum out of the jurisdiction upon TZN requiring him to attend on a date prior to the trial with documents, including:

  (i) Records of communication between TZN, and John L Mercer MP;

  (ii) Records of communication between TZN and Ian RK Paisley Jnr MP;

  (iii) Twitter analytics for the re-publication of articles by TZN;

  (iv) A 'retweet' on or around 7 or 8 December 2016 in which TZN 'retweeted' the Sky News twitter account

Proposed amendments of the statement of claim

[9] The proposed amendments to the statement of claim have followed an interesting route with the plaintiffs providing six sets of proposed amendments.

[10] The first set was issued on 15 February 2023 in advance of the first summons. The first summons then issued on 24 February 2023 incorporating the first set of amendments and containing further proposed amendments. There then followed four further sets of amendments delivered to the defendant on 9 March 2023, 10 March 2023, 14 March 2023 and then finally on 17 March 2023 with the second summons. With the second summons now incorporating what were the six proposed amendments (on top of the two earlier amendments in 2017) to the statement of claim, the whole process has revealed a method of conducting litigation, bordering on the shambolic. The plaintiffs have attempted to amend their pleaded case six times over a period of five weeks, six and a quarter years after they issued the writ.

Amendment to pleadings generally

[11] The purpose of pleadings is "to define the issues upon which the court at first instance is asked to adjudicate, they inform the process of discovery and provide the basis for the determination of the issue of the relevance of evidence adduced by the parties" (Humphreys J in *Holchem Laboratories v Henry* [2021] NICA 35 at [7]).

[12] The Rules of the Court of Judicature ("the Rules") permit the amendment to a statement of claim on one occasion before the pleadings are closed (*i.e.* 21 days after the service of the defence). Thereafter, the leave of the court for any amendment is required.

[13] Gillen J in *Loughran v Century Newspapers* [2014] NIQB 26 set out the principles involved at [35]:

> "A pleading may be amended by leave at any time. The guiding principle is that it will generally be allowed in order to raise or clarify the real issues in the case or to correct a defect or error, provided that it is bona fide and there is no injustice to the other party which cannot be compensated in costs … However, as a general rule, the later the application to amend, the more it is likely to be enquired into and the greater risk is that it will be refused."

[14] The reference to the lateness of the application echoes the case-law from England. The English CPR at Part 17 has introduced a more codified procedure, and this has been coupled with what appears to be a much stricter approach to

enforcement by the judiciary. In Northern Ireland there still remains a perception, and on occasions a reality, that compliance with the Rules, Practice Directions and judicial case management decisions is aspirational as opposed to obligatory. An example of the English approach can be found in *Swain-Mason v Mills* [2011] EWCA Civ 14 in the judgment of Lloyd LJ at [72]:

> "… the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on the party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

and in the observations of Vos LJ in *Nesbitt Law v Acasta European Insurance* [2018] EWCA Civ 268 at [41]:

> "In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted.
>
> There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it."

[15] The delay in this case has been significant. After the meanings judgment was delivered on 6 November 2017, a further amended statement of claim was served on 30 November 2017 with the amended defence served on 21 December 2017. The case, as pleaded to take account of the meanings judgment, was therefore in essence ready for hearing from early 2018. The plaintiffs brought their applications to amend five years later. To put the applications into context, the case had been eventually fixed for hearing on 27 February 2023. The plaintiffs had filed a skeleton argument in preparation for the hearing on 6 February 2023. At a review hearing before Colton J on 21 February 2023 it was submitted, by counsel on behalf of the plaintiffs, that the case was ready for trial. At that stage a proposed amended statement of claim had been issued on 15 February 2023. That document necessitated the hearing of a leave application, and it was clear that the lateness of this proposed application for leave was going to compromise the hearing date, which was then vacated. The summons to amend the statement of claim was issued on 24 February 2023 (incorporating what had been the proposed amendments of 15 February and new amendments of 24 February). This was three days after the assertion that the case was ready for hearing and three days before what would have been the scheduled hearing. These fresh proposed amendments now included within what had been a relatively brief particularisation of general and aggravated

damages, new, and highly controversial, amendments to paragraph 21, including a new particularisation of a claim for exemplary damages.

[16] No real explanation has been offered to explain the five year delay and then the approach to the readiness for hearing as expressed to the court on 21 February 2023. In particular, no explanation was offered as to why experienced counsel indicated to the court that the case was ready for hearing, yet three days later it was considered necessary to attempt to particularise the claim for exemplary damages. The court had already vacated the hearing date but the reality was that the plaintiffs sought to amend substantially the basis of their claim on the Friday before what had been the scheduled hearing date the following Monday. The summons also sought within this time-frame discovery from a non-party to the proceedings and leave to administer interrogatories.

[17] Part of the submission before me raised an issue about what the plaintiffs argue has been a breach by the defendant in relation to its duty of candour to the court. This has some relevance to the issue of delay and also is the basis for some of the proposed amendments to the statement of claim.

Duty of candour

[18] The concept of the duty of candour developed in administrative law because of the absence, at common law, of a duty on public bodies to give reasons for their decisions. It was first developed in *Huddleston* [1986] 2 All ER 941. Donaldson LJ at 945c explained the reason for this in the following terms:

> "The wider remedy of judicial review and the evolution of what is, in effect, a specialist administrative or public law court is a post-war development. This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership ..."

He then continued at 945e:

> "The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should public authorities."

and at 945g:

> "It is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands."

[19] More recently the concept of all cards facing upwards has been described in *Al-Sweedy* [2009] EWHC 2387 at [20] as being a very high duty to assist the court with full and accurate explanations of all the facts relevant to the issues the court must decide. This reflected the different approach to discovery of documents in administrative law proceedings.

[20] Although the duty of candour primarily applies to the respondent public authorities in judicial review proceedings, it also applies to applicants (see *Khan* [2016] EWCA Civ 416 at [42]–[47]) given the limited scope of discovery in judicial reviews proceedings. As Edis LJ stated in *HM* [2022] EWHC 2729 at [15]:

> "The duty of candour in judicial review proceedings is very important. It enables the court to adjudicate on issues involving the state without deciding facts or engaging in disclosure processes. That is because the court assumes that it will be supplied with all the information necessary to determine a case accurately. That assumption is made because the law imposes upon the state a positive duty to ensure that this happens."

[21] Mr Girvan argued that the duty of candour, in reality, is extended to all civil litigation, including defamation cases. He relied on the judgment of Nicklin J in *ZXC v Blomberg* [2019] EWHC 970. This was a claim relating to the misuse of private information. In this judgment, Nicklin J dealt at length with an issue relating to the conduct of the defendant during an interim injunction application. At [71] he described this as

> "a serious failure of candour in the evidence the Defendant put before the Court at the injunction application and, thereafter, a prolonged failure to inform the Court (or the Claimant) subsequently that material statements of fact, upon which the Court had relied at the interim injunction stage, were not correct."

[22] Later at [102] Nicklin J referred to a further matter:

> "That leads to the second failure of candour at the interim injunction application: the failure to disclose the approach of UKLEB to publication of information from the LoR. Whatever the extent of the duty of a defendant in terms of its responsibility at an *inter partes* hearing to ensure that the Court is provided with evidence that has a potential bearing on the issues, one thing is quite clear; a party must not permit the Court to be misled."

[23] Mr Girvan offered no other authority to support his argument.

[24] Sir Rabinder Singh was quite clear in stating that the duty of candour did not extend to general civil litigation. In *Midcounties Co-operative* [2015] EWHC 1251 (sitting as a justice) at [149] he stated:

> "It is well established that judicial review litigation is not to be conducted in the same way as ordinary civil litigation. This is not only because there are specific provisions in [the rules] which govern judicial review. More fundamentally, it is because the relationship between a public authority defendant and the court is not the same as that between an ordinary litigant and the court. [The public authority] should conduct the litigation with its cards face upwards. This is based on the concept that it acts in the public interest, and not merely to protect a private, commercial interest."

and again, and with more emphasis, in *Hoareau* [2018] EWHC 1508 (then sitting as a lord justice) at [13]:

> "One of the reasons why the ordinary rules about disclosure do not apply to judicial review proceedings is that there is a quite separate but very important duty which is imposed on public authorities which is not imposed on other litigants. This is the duty of candour and co-operation with the court, particularly after permission to bring a claim for judicial review has been granted."

[25] I am not satisfied that a duty of candour is placed on parties when conducting what could be described as ordinary civil litigation. In certain circumstances, for example when a party is making a without notice, or *ex parte* application, there is a higher duty placed on that party (see the comments of Gibson LJ in *Brink's Mat v Elcombe* [2002] 1 WLR 1269 at 1356g–1357b). Such a duty also rests on prosecutors (public and private) when making *ex parte* applications in criminal proceedings (see *Kay* [2018] EWHC 1233). However *ex parte* applications are a special type of application and the absence of a party who could be adversely affected by a court order, does require the moving party to be completely open and frank with the court, alerting the court to all material facts, including points and facts in favour of the absent party.

[26] Although there may not be a duty of candour as asserted by Mr Girvan, there is an obligation on all parties to conduct litigation in an appropriate fashion, which would clearly include a duty not to mislead the court or the other parties. This would include an obligation to correct the court should it fall into error. In my view

this is what Nicklin J was alluding to in *ZXC* when he referred to a lack of candour, as opposed to a breach of a duty of candour. A breach of such an obligation can be dealt with in the course of the litigation as a potential contempt and/or an abuse of process, and if it relates to the conduct of a lawyer representing a party, then by the court exercising authority over a solicitor as an officer of the court, or by reference to the Law Society or Bar Council.

[27] The conduct which gave rise to the plaintiff's assertion related to the approach by the defendant, and in particular the content of the affidavit sworn by Steven Kennedy on its behalf, in defence of an earlier application for an interim injunction made by the plaintiffs at the time of the commencement of the proceedings. This relates to the creation of the Lazarus Memo and how it was described in, and exhibited to, the affidavit.

[28] Irrespective of the type and form of any duty owed to the court and to the plaintiffs, I do not consider that the plaintiffs have provided any real evidence which suggests that Steven Kennedy, or his employer, the defendant, actually misled the court or the plaintiffs. The interim injunction application resolved without court order. The discovery process was complete a matter of months later and all the cards were on the table face up at that stage. The alleged conduct comes nowhere near the conduct identified by Nicklin J in *ZXC*.

[29] The relevance in relation to the delay is the assumption that the plaintiffs only became aware of the real issue in relation to the content of the affidavit in recent times, hence the delay in bringing the applications.

[30] I accept that the plaintiffs' knowledge and understanding relating to the Lazarus Memo, and that of those advising them, may very well have been recent, however the actual discovery process in relation to the Lazarus Memo issue took place in 2017. In May 2017 the defendant's list of discoverable documents was shared and in the usual way it invited inspection of the documents at the solicitor's office. In December 2017 copies of the documents on the list were physically delivered to the plaintiffs. The plaintiffs had therefore access to the material from May 2017, and had the actual material from December 2017.

[31] The first plaintiff swore a grounding affidavit in respect of the first summons on 24 February 2023. Paragraphs 44–47 set out the reasons why the plaintiffs decided to terminate the retainer of their then solicitors Mills Selig in or about April 2018. Mills Selig came off the court record formally on 1 May 2018. The reason stated was the demands of the discovery process and what the deponent said was the spiralling legal costs. The decision was then made to bring the conduct of this case in-house. Paragraph 48 is important as it states, "In any event, by mid-2019, so far as the Plaintiffs were concerned, pleadings had closed, discovery had been provided." I infer from this comment that as far as the plaintiffs were concerned, the provision of discovery applied both to the plaintiffs' and the defendant's documents.

[32] The plaintiffs were therefore aware of all documents relating to the provenance and accuracy of the Lazarus Memo by May 2017 and they were physically in their possession by December 2017. By mid-2019 they were satisfied that discovery had been provided, both by them and to them. That is a reasonable assumption, as at that stage the plaintiffs would have had notice of the documents for two years and had the actual documents in their possession for one and a half years.

[33] The issue before me is why this has become an issue now, some five years later, particularly when the plaintiffs set the case down for hearing in July 2019, and accepted an initial trial date in January 2020, and in more recent times advised the court that the case was ready for hearing in February 2023. These expressions of readiness for hearing were based on the state of the amended pleadings in November 2017. Certain amendments had been 'flagged up' on 15 February 2023, but leave to amend had not been sought.

[34] The grounding affidavits to both summonses do not address this delay, neither does the skeleton argument filed and no explanation for the delay was forthcoming to the court during the hearing. Gillen J in *Loughran* at [37], referred to what he described as a 'cautionary note' by Waller LJ in *Worldwide Corp Ltd v G P T Ltd*, [1998] EWCA Civ 1894 where it was stated:

> "Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants?"

I, too, have asked that rhetorical question. The plaintiffs have not provided an answer, and I, on reading the core documents provided to me, cannot find an answer either. The reality is that there is none, or none that could stand up to any scrutiny.

[35] In *Hague Plant v Hague* [2014] EWCA Civ 1609, Briggs LJ at [33] said that:

> "Lateness is not an absolute but a relative concept."

and then went on to explain that –

> "it all depends upon a careful review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of its consequences in terms of work wasted and consequential work to be done."

[36] The application by the plaintiffs to amend the statement of claim appears to have been a last minute exercise. It appears to have arisen as a result of a more thorough examination of the state of their case during a period sometime between 21 and 24 February 2023. There then followed four further amendments to the statement of claim on 9, 10, 14 and 17 March 2023. Stephens LJ in the meanings judgment at [17] stated that "pleadings require precision and this is particularly important in relation to proceedings for defamation which require meticulous attention to detail." I acknowledge the difficulties inherent in solicitors representing themselves in litigation as the exercise does throw up all manner of issues, but what has been presented to the court is an example of gross, and unexplained, delay and then when a decision has been made to seek the leave of the court to amend the pleadings, a lack of precision and meticulous attention to detail.

[37] The defendants have argued that this all amounts to an abuse of process, and should be dealt with by the court as such. In *Loughran* (also a defamation action) the plaintiff had amended his statement of claim with leave of the court on 31 May 2013 and then made three further attempts to amend his statement of claim by 24 January 2014. No trial date had been allocated. At [54] and [55], Gillen J set out the principles and his decision:

> "[54] I commence by respectively adopting the comments of Waller LJ in Worldwide Corporation Limited … It is unacceptable practice as a rule to engage in lengthy and protracted amendments in any litigation. Moreover the obligations to colour the amendments appropriately are not unimportant, should be known by counsel and have not been adhered to in this instance. The complexities in this case are not at all unusual and counsel is expected to be fully au fait with the relevant legal principles applicable to a case and to the pleadings from the outset. Had this been closer to trial it is doubtful whether this court would have permitted the amendments to the statement of claim to be granted. As it is, the sheer number of amendments in the instant case come perilously close to constituting an abuse of the process given the lengthy period over which these amendments have unfolded and the delay in getting the pleadings in order.
>
> [55] In the event however, recognising that full and precise pleadings are required in an action for libel in order to ensure that both parties have a fair trial, I am prepared to accede to the plaintiff's application to amend in the interests of justice."

[38] Given the unexplained delay, the multiplicity of proposed amendments, and the proximity to the trial (a matter of days at the time of the first application and even now with a scheduled hearing date in November 2023) I do consider that the proposed amendments to the statement of claim, in principle, do amount to an abuse of process, and should therefore, in the absence of any compelling reason, be refused.

[39] Some of the proposed amendments are of little substance and are not controversial. Others have an element of controversy. I will deal with that block below. In general terms those proposed amendments although very late, can be considered separately because of their limited impact on the proceedings overall.

[40] At this stage I am looking at the significant block of amendments to paragraph 21, which radically alters the basis for the claim for damages by expanding the existing particularisation and including particularisation for exemplary damages.

[41] This block of amendments evolved between 15 February 2023 and 17 March 2023 in six different forms. The court is grateful to the defendant's solicitors for their provision of a single document incorporating the original statement of claim, the 2017 amendments and then the six sets of amendments of 2023. In accordance with best practice directions this is coloured and presents with a formidable kaleidoscopic appearance.

[42] In brief the proposed amendments to the damages section are as follows:

(a) An exhortation by the lead journalist to 'do a proper job' on the lawyers being demonstrative of an intention to harm the plaintiffs (21(a));

(b) A failure of investigation and the level of inaccuracy inferring a knowledge that the words were untrue or being reckless as to their truth (21(b));

(c) Ignoring source material contradicting the published story and ignoring people who may have commented on the story (21(b));

There are 23 particulars set out relating to 21(b).

(d) Original paragraph 21(h) has been expanded to refer to the continuation of the publication of the statements notwithstanding a number of statements from third parties, the meanings judgment, various findings at inquests and various prosecutions.

(e) Conducting the litigation in a 'high-handed manner' (21(l));

There are 9 particulars set out relating to 21(l), with 21(l)(i) containing 10 sub-particulars.

(f) Including a particularisation of the claim for exemplary damages (22);

(g) Repeating the particulars of aggravated damages alleging misleading of the court and the plaintiffs by omission during the injunction proceedings (23);

(h) Reliance of the affidavit of Steven Kennedy (24-32);

(i) Failure to disclose publication on the Scottish Sun's website, which included an image of a toilet and only removing the image when alerted to it by the plaintiffs (33 and 34).

[43] The only matter that could be said to have arisen from recent developments in the conduct of the case is the matter relating to the Scottish Sun's website. That was discovered by the plaintiffs in 2023. I will deal with this in more detail below.

[44] All the other matters, whether they be as a result of alleged acts or alleged omissions, have either been within the knowledge of the plaintiffs for a significant period of time and if not within the actual knowledge of the plaintiffs, capable of being within their knowledge.

[45] It is necessary to make reference to one matter relating to the provision of the original affidavit of Steven Kennedy and the pleadings associated with it. As part of the injunction proceedings a draft affidavit was filed on 30 December 2016. This was perfectly understandable as those proceedings were taking place just before and during the Christmas vacation period and the provision of an actual sworn document would have been very difficult. The affidavit was sworn on 3 January 2017 and then filed with a copy, together with the accompanying exhibits, served on the plaintiffs' then solicitors Mills Selig. Receipt is confirmed by an email from Mills Selig of 6 January 2017.

[46] As part of the alleged 'high-handed' manner of litigation (proposed paragraph 21(l)) sub-paragraph (ii) states "The Defendant by their solicitor failing to provide a sworn version of the Affidavit [with the Exhibits in the form required by Order 41 Rule 1(5) of the Rules] despite undertaking to do in formal correspondence dated 30 December 2016." The original form of this draft was provided on 15 February 2023 and the words within the square parenthesis were inserted in the draft of 9 March 2023.

[47] The inclusion of the requirements of Order 41 Rule 1(5) is confusing. This is a requirement that "every affidavit must be bound in book form and, whether or not both sides of the paper are used, the printed, written or typed sides of the paper must be numbered consecutively." 21(l)(ii) does not elaborate on how this could give rise to a particular of damage, including aggravated damage, and whether the default was in the lack of the provision of the affidavit or the lack of any binding or numbering.

[48] The reality is that the affidavit and exhibits were provided to the plaintiff's solicitors at the time and receipt of same was acknowledged on 6 January 2017. This is a fact which the plaintiffs are seeking to plead to justify their claim for both aggravated and exemplary damages. At proposed paragraphs 21(l)(i) and 24 reference is made to the exhibits not being served, yet at proposed paragraph 26 the plaintiffs actually quote from the Mills Selig email of 6 January 2017 (in the draft amendment an incorrect year of 2016 is stated) which acknowledges receipt of the exhibits. Proposed paragraphs 24 and 25 specifically state that the exhibits were not served. Paragraph 24 refers to the sworn version of the affidavit "minus the exhibits" and paragraph 25 refers to "what purported to be exhibits." Paragraph 24 materialised in the 9 March 2023 version and paragraph 25 in the 10 March 2023 version.

[49] Referring back to the need, already identified by Stephens LJ in this particular litigation, for precision and meticulous attention to detail, this is an example of the opposite. Since the beginning of 2017, the plaintiffs knew that the exhibits in the case had been properly served. Over six years later they are seeking to amend their claim to justify aggravated and exemplary damages with highly inaccurate pleadings. Not only are they not supported by any pleaded facts, or background evidence, but they are actually contradicted by the same facts relied upon and also pleaded in their proposed pleadings.

[50] As I have stated earlier, the only matter which has arisen in recent times relates to the Scottish Sun's website. The existence of this was only recently discovered by the plaintiffs. This is specifically pleaded as a particular justifying exemplary damages (proposed paragraph 33 and 34). It is not pleaded in respect of (general) damages and aggravated damages. Proposed paragraph 21(l)(i)(i) – the paragraphing is rather confusing as it refers to first roman one followed by the letter 'i' – does cross reference the particulars of exemplary damages, but specifically excludes paragraphs 33 and 34.

[51] Save for this Scottish Sun issue, there has been gross unexplained delay on the part of the plaintiffs, and then what can only be described as a mad rush of activity in February and March 2023 with the plethora of proposed amendments. This is an abuse of the court's process both in the lateness and the confused presentation. The application is very late, it will add to the cost of the proceedings, and standing back I do not consider that it is an application that requires the court to grant in the interest of justice. My decision in respect of the application for leave to amend the statement of claim at paragraph 21–32 is that it should be refused.

Exemplary damages in defamation actions

[52] The plaintiffs seek to amend their claim to particularise exemplary damages. The writ did claim exemplary damages, but it was only first particularised in the amended statement of claim of 9 March 2023, and then with the paragraphs 33 and 34 relating to the Scottish Sun added in the amended statement of claim of 14 March

2023. I have rejected the other particulars (at paragraphs 22–32), save for the Scottish Sun website issue. Exemplary damages by their nature are punitive damages and seek to punish a guilty party by ordering damages over and above any compensatory award for any loss suffered.

[53] It is well established that exemplary damages may be awarded in three sets of circumstances. Firstly, if they are expressly authorised by legislation, secondly as a result of oppressive, arbitrary or unconstitutional action by the state, or thirdly where a defendant has deliberately committed a tort with the intention of gaining some advantage which they calculate will outweigh any sum they will have to pay by way of compensation (see *Duncan and Neill on Defamation* (5th ed) at 25.34).

[54] The only possible avenue available to the plaintiffs would be the third category. Lord Devlin in *Rookes v Barnard* [1964] AC 1129, an industrial dispute case whereby the tort of intimidation was established, referred to the need to establish that a defendant's conduct had been calculated by him to make a profit for himself. Specifically referring to actions for libel he said that "one man should not be allowed to sell another man's reputation for profit" (at 1226).

[55] Later the House of Lords in *Cassell & Co v Broome* [1972] AC 1027 upheld an award of exemplary damages against the publisher of a book which defamed a captain of a war-time convoy. The judgment, from a seven judge panel, had numerous majority findings, although on the central issue of the availability of exemplary damages in defamation cases and the sufficiency of the evidence in the case to justify the jury award, their lordships were unanimous. On this issue the headnote states:

> "The fact that the tortious act was committed in the course of carrying on business was not sufficient; it must be done with guilty knowledge for the motive that the chances of economic advantage outweighed the chances of economic or physical penalty."

[56] Viscount Dilhorne at 1101G, referred, with approval, to the direction given to the jury by Lawton J in *Cassell* at first instance:

> "A man is liable to pay damages on a punitive basis if he wilfully and knowingly, or recklessly peddles untruths for profit."

[57] Earlier in his speech, Viscount Dilhorne did observe that it was not necessary for a plaintiff to show that the defendant had made something by way of the nature of a mathematical calculation with an assessment of the profit likely to ensue from the publication. However, newspapers and books are usually published for profit and that fact does not by itself make a publisher liable to pay exemplary damages (at 1101B and C).

[58] The plaintiffs sought to rely on the decision of the Irish Supreme Court in *Crofter v Genport* [2005] IESC 20, however the Irish position has to be seen in the context of the Irish Constitution. Whilst acknowledging the force of *Cassell,* the Irish Supreme Court recognised that a fourth category existed in Irish law resulting from an intentional publication of defamatory material which was known to be false, and thus a calculated breach of the constitutional right of a citizen to his good name (see [16] of *Crofter* and *O'Brien v Mirror Group Newspapers* [2001] IR 1).

[59] Turning to the consideration of the proposed amendment at paragraph 33 and 34. These relate solely to the image of the toilet published on the Scottish Sun's website. It is incorporated into one of the original on-line articles. That article had a picture of the residential home of the first plaintiff with a heading to the box containing the picture – KRW Law. There was an accompanying narrative within the box - "Winters family home: £1.1m five-bedroom home in South Belfast." The original publication in 2016 had the picture of the actual residence. The picture of the toilet was not created until 2018 and the explanation presented to me indicated that the picture first appeared on the Sun's website as part of a story about the conditions of a squalid homeless shelter in London funded at public expense. It was published on 15 March 2018. The explanation to the court is that it was then transposed on a date, as yet undetermined but obviously subsequent to March 2018, as a result of the Scottish Sun's website acquiring the picture reference number relating to the new photograph and replacing the old picture reference number.

[60] The existence of the page on the website was then discovered by the plaintiffs and they alerted the defendants to the picture by letters of 16 March 2023 and 22 March 2023. It was then removed by the defendants.

[61] Technically this is a fourth publication. The contents of the article on the web page replicates the 2016 article. Any defamatory content as to the wording of this article will merge with the claim brought in the writ. The picture and the juxtaposed linkage to the first plaintiff's home gives rise to a separate claim and potentially a fourth publication. I do not wish to decide this issue purely on a technicality and would have been sympathetic to an amendment to the statement of claim to include this picture as a fourth publication, although no such application has been made.

[62] My focus has been on the availability of exemplary damages for its publication. Clearly the delay issue does not arise and the test for amendment should follow the established principles, namely, that amendment should be permitted, provided there is no injustice to the defendant which cannot be cured by an award of costs. In this case the defendant argues that the claim for exemplary damages is bound to fail. This raises a further consideration for the court, namely the prospect of success. Nicklin J in *Morgan v Associated Newspapers* [2018] EWHC 3960 held that with the overriding objective (see Order 1A of the Rules) in play, amendments should be allowed provided there was a real prospect of success.

[63] More recently in *Amersi v Leslie* [2023] EWHC 1368, Nicklin J, in describing this as the 'merits test' stated that the test to be applied was the one applied in summary judgment cases (see [140]–[142]). At [142] he set out the general principles which include the need for a realistic, rather than fanciful, prospect of success, *i.e.* one that carries a degree of conviction, based on the evidence already before the court and evidence likely to be available at the trial.

[64] In Northern Ireland Order 18 Rule 19 (1) of the Rules provides that a court "may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything and any pleading or the endorsement, on the ground that – (a) It discloses no reasonable cause of action or defence, as the case may be …"

[65] Whilst Nicklin J referred to the prospects of success in a summary judgment application, case-law in Northern Ireland has approached the matter in a similar fashion, but from a different angle, questioning whether or not had there been an application to strike out the pleading it should be ordered. On this basis, Gillen J in *C v PSNI* [2014] NIQB 63 held that the test is whether the claim was unarguable or almost incontestably bad. The fact that the plaintiff only enjoys a weak case is not sufficient to justify striking it out (see *Rush v PSNI and Secretary of State for Northern Ireland* [2011] NIQB 28).

[66] Leaving aside the failure to plead the separate and fourth defamatory publication, it is not unarguable that the publication of the picture is defamatory and it is highly unlikely that a court would strike out such a pleading. However, as the plaintiffs claim exemplary damages, the issue is whether they could succeed in their claim for those damages. They have specifically not sought to plead this as a particular in respect of their claim for general and aggravated damages.

[67] Applying the test in *Cassell,* the burden falls on the plaintiffs to show that the defendant deliberately published the picture knowing it, and the accompanying text, was defamatory, that it was committing a tort, or it was reckless as to whether they were committing a tort, and further that it published because of a calculation that the prospects of material or financial advantage outweighed the prospects of any loss.

[68] No facts are pleaded in this regard, and no evidence has been provided to suggest that the plaintiffs would come anywhere near the standard necessary to satisfy the burden placed on them. The claim for exemplary damages based on the publication of the picture is both unarguable and incontestably bad.

[69] In all the circumstances, and for the reasons given, I refuse leave to amend the statement of claim at paragraph 21-34 (new particulars of damage, aggravated damage and exemplary damage). This deals with the substantive aspect of the application for leave, but for clarification, I will now deal with the other amendments contained in the six draft amended statements of claim (dated 15

February 2023, 24 February 2023, 9 March 2023, 10 March 2023, 14 March 2023 and 17 March 2023).

[70] Paragraph 1 – This is permitted but may require further amendment to reflect the removal of the former fifth and eighth plaintiffs and to correctly identify the plaintiffs.

[71] Paragraph 3 – For reasons referred to below, I consider that discovery relating to on-line circulation has been satisfactory and nothing further can be gained in this regard. The amendment suggested by the 15 February 2023 draft is permitted although adds nothing. The amendments in the drafts of 9 March 2023 and 17 March 2023 are not permitted. They also fall into the category of a delayed application. I also consider that the inclusion of references to "posting on Sun social media accounts and Twitter account" is too vague. Much will depend on the actual content of these postings which are essentially separate publications. Any Twitter publication given its required brevity must be different from any of the pleaded publications.

[72] Paragraph 4 – permitted.

[73] Paragraph 5 – the deletion is permitted.

[74] Paragraph 6 – permitted.

[75] Paragraph 7 – the deletion is permitted.

[76] Paragraph 8 – permitted.

[77] Paragraph 9 – the deletion is permitted.

[78] Paragraph 10 – permitted.

[79] Paragraph 11 – This relates to particulars of identification. The plaintiffs seek to add 11 new particulars to the existing four. The defendants take issue with one of the particulars, namely 11 (i) which states "It is clear from a review of the Defendant's pre-publication materials that the Defendant intended to refer to the Plaintiffs in each Article." This does not add much to the pleaded case and in any event whether or not a defendant intended to refer to the plaintiffs is of no relevance to the issue of identification. It is a straightforward objective test. The test is whether a hypothetical ordinary reasonable reader would identify the plaintiffs (see *Economou v de Freitas* [2017] EMLR 4 and *Dyson v Channel 4* [2022] EWHC 2718).

[80] Given the irrelevance of intention this amendment is refused. All other proposed amendments in this paragraph are permitted.

[81] Paragraph 12 – permitted.

[82] Paragraph 13 – This is an additional or alternative claim relating to the on-line articles and claims that the first and third articles are to be treated as a single publication. The defendant objects to the inclusion of the words "including the AMP format of the articles which share the same 'Contact ID' number." (AMP is an abbreviation for 'accelerated mobile page' and as the words suggest it refers to web page loading.) The objection is based on its lateness and the fact that there is a need to plead each separate publication as a cause of action. I will permit this amendment. It is really a matter of clarification. Even if an AMP formatted page is a separate publication, it will not prejudice the defendant.

[83] That concludes my ruling in respect of the proposed amendments to the statement of claim and I will now turn to deal with the other set of applications. In summary, these applications relate to the following matters:

(a) Discovery by the defendant and TZN in respect of pre-publication communications with two MPs;

(b) Discovery by the defendant in relation to data pertaining to on-line publication by the defendant;

(c) Discovery by the defendant relating to the creation and promulgation of the Lazarus Memo;

(d) Production to the court of documents relating to the preparation of the Steven Kennedy affidavit;

(e) Issue of a subpoena duces tecum against TZN to produce documents relating to communication between two MPs and certain Twitter data.

Discovery

[84] In my earlier ruling of 19 April 2023 at [9] to [11] I set out the basic principles underpinning discovery in civil litigation. I made reference to the *Peruvian Guano* test, namely the need to show that a document contains information which may enable the moving party to advance their case or damage their adversary's case. I also referred to the judgment of Kerr LCJ in *Flynn* when he reiterated the provisions of Order 24 Rule 9 of the Rules and the requirement that discovery is necessary to dispose fairly of the case and to deal with costs. The test is comprised in three limbs – necessity based on relevance, achieving justice, and taking into account the costs relating to the burden of providing discovery.

[85] Dealing first with the order sought against the defendant and TZN. TZN is a former employee of the defendant. He appears to have been involved in the preparation of the content of some, if not all, of the articles complained of. The plaintiffs have not issued proceedings against him and as a consequence he is not a

party to the proceedings. The court is not in a position to order him to make discovery. It is likely that the plaintiffs have acknowledged this reality and as a result are seeking the issue of a subpoena against TZN, and I will deal with that application below.

[86] The defendant does have a continuing obligation to provide discovery of all documents not only within its control but to refer to other discoverable documents which had been under its control but have passed outside its control. These would include documents and materials held by its employees, such as TZN.

[87] The material sought refers to pre-publication materials relating to communication between the two MPs. The inability of the plaintiffs to amend their statement of claim severely reduces the relevance of this material.

[88] The defendant argues that it has provided discovery of all journalistic material in 2017. It now asserts that there are no other documents not dealt with in that list.

[89] This raises the question which has already the focus of the court's attention. Having received the list of documents, and then the actual documents back in 2017, why have the plaintiffs only now decided that there may be other relevant documents.

[90] Applying the test in *Flynn* these documents have now very modest relevance to the litigation. Justice is not an open door which allows a party to do nothing for five years and then on the eve of the hearing bring a belated application. Justice is not being denied and can still be achieved in this litigation if focus is brought to the relevant core issues. The burden of costs by requiring the defendant to revisit and carry out a re-trawl of documents now of some six or seven years of vintage is also a factor. The fault lies solely with the plaintiffs and an order for costs would not be sufficient to compensate the defendant.

[91] I therefore refuse the order for discovery sought in relation to the communication with the MPs.

[92] The next application relates to the on-line data relating to the attempt to ascertain reliable internet circulation details. Circulation is clearly a relevant factor as the extent of any publication will have a direct impact on the potential to cause reputational damage. In my opinion, to date the defendants have provided a significant amount of data both in relation to hard copy print publication and to access to its on-line versions, which gives sufficient detail as to physical and internet circulation.

[93] A report with an addendum has been filed by the plaintiffs from Professor Kevin Curran, a Professor in Cyber Security at Ulster University. I will place some reliance on the report, but I must record some concern about the content

of the initial report as he appears to have been under the impression that he had been instructed by the plaintiffs "in connection with the production of an expert report forensically analysing the crowns evidence in respect of social media posts." There is no question of any alleged criminal conduct, any criminal prosecution in this matter and no evidence that the Public Prosecution Service have been involved in any way. Professor Curran believes that there is a prosecution in this case and that he has been instructed on behalf of a defendant to comment on the state of the prosecution evidence, when the reality is that he appears to have been retained on behalf of the plaintiff who is seeking damages from the defendant. As to how he has come to that belief remains a mystery.

[94] With regard to the *Flynn* test, relevance is clearly engaged. However, I consider that justice and cost need to be looked at carefully before the court could consider ordering this additional discovery. This will involve additional costs both to the defendant in seeking to produce the data, and then to the plaintiffs in having it analysed. It may also add to the already chronic delay in this case.

[95] Whilst not diminishing the relevance, one has to question the purpose of this additional material and how it will assist the court in coming to its overall conclusion in the case. Some data concerning internet access, or 'hits' on the website, has been provided. There appears to be a suggestion from Professor Curran that this is incomplete and further data is required to enable a more complete picture to emerge.

[96] The case of *Burton v News Group* [2019] EWHC 195 is instructive. It related to an MP's defamation application against this defendant about an article published in print and on-line in early 2017 (a few months after the three articles in this action). Dingemans J at [47] and [49] recorded the evidence in that case of the hard print circulation was 1,941,612 and the internet hits (both direct and through Facebook and Twitter links) as somewhere between 8093 and 8714. Obviously, each case stands on its own facts. The ratio between hard copy and internet publication, in that case, was approximately 99.9955 : 0.0045.

[97] In this case the evidence garnered already may not paint an exact picture as to internet hits. The nature of this technology is that one could possibly never provide such detail. Internet hits, in any event, do not equate to unique users. But such exactitude is not necessary. The standard of proof is the balance of probabilities. The court is unlikely to be greatly exercised by this issue, and the parties can rest assured on that point. This has however the makings of an Alice in Wonderland-type rabbit hole into which we have ventured a little, but any further penetration is likely to be a time-consuming and largely futile exercise.

[98] Justice can be done, to both parties and in particular to the plaintiffs, without the need for this additional material and investigation, and the additional costs do not justify the marginal benefit that may be achieved.

[99] The second aspect of the internet data request relates to the picture of the toilet and how it appeared onto the website. I have already refused to grant leave to the plaintiffs to include this matter in the statement of claim, and therefore any discovery relating to its creation is not relevant and fails the first limb of the *Flynn* test.

[100] I therefore refuse the order in relation to the internet data.

[101] The next order sought relates to the production order requiring production to the court of documents relating to the preparation of the Steven Kennedy affidavit relating to the interim relief application. The court has already refused leave to permit the amendment of the statement of claim, so the relevance of this request is greatly diminished.

[102] This is an application under Order 24 Rule 14 of the Rules. It provides that "at any stage of the proceedings in any cause or matter the Court may, subject to rule 15(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit." Rule 15(1) provides that "no order for the production of any documents for inspection or to the court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

[103] The purpose of Rule 14 is to allow the court to order production of documents not normally available under the discovery process. The purpose is primarily to allow the court to address an issue such as jurisdiction, illegality, or public interest privilege. However, the process is underpinned by the need for the court to be satisfied that the order is necessary for the fair disposal of the case or to save costs.

[104] The material sought relates to communication between Steven Kennedy and the defendant's solicitors in both Belfast and London relating to the preparation. The question of professional legal privilege is likely to arise, and it is not enough for the plaintiffs to suggest that it is up to the defendant to raise this. Should it be raised it is likely to add to the cost and delay in the proceedings. The route using Order 24 Rule 14 of the Rules requires the court to be satisfied that this is necessary for the fair disposal of the case.

[105] I am not satisfied that it is necessary. It has modest relevance to the overall case. The application is therefore refused.

[106] This brings me finally to the application to issue a subpoena duces tecum against TZN requiring production of two sets of documents, the material relating to pre-publication communication with the two MPs and Twitter analytics relating to TZN's Twitter use. The procedure in relation to the issue of a *Khanna* subpoena (see *Khanna v Lovell White* [1995] 1 WLR 121) is well established. The applicant must

show that it is clearly necessary for the witness to produce the document prior to the trial and further that the document has relevance in the overall context of the proceedings. It should not be used as a by-pass method to get round the general provisions relating to discovery by parties to the proceedings.

[107] The first set of documents relates to pre-publication communications. I have mentioned this above in relation to the discovery already provided by the defendant in respect of this material. As far as the court is concerned this is such a by-pass method. In any event the court has not permitted amendment to the statement of claim in relation to this aspect of the case.

[108] In relation to the Twitter analytics, I would again repeat what I have said about internet data generally. This material is of the most modest relevance to this claim.

[109] I therefore refuse this application.

Conclusion

[110] In summary, leave is granted to the plaintiffs to amend its statement of claim to the extent set out at paragraphs [70] – [81] above. All other orders are refused.

[111] I will reserve the costs of these applications to the trial.

[112] The court is reviewing this case on 12 September 2023, and I am directing that the amended statement of claim, with the permitted amendments, be served by 31 August 2023 and that any amended defence is served in draft form by 8 September 2023. I will then fix a timetable for any amended reply. Having heard exhaustive submissions in relation to the pleadings to date, I would consider that any outstanding issues concerning leave to amend pleadings will be dealt with by me, on the papers, without the necessity of further hearings and, if required, on the basis of short written submissions.