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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

_____

BETWEEN:

JR20

Plaintiff/Respondent

-and-

FACEBOOK IRELAND LIMITED

Defendant/Appellant

_____

Before: Morgan LCJ, Weatherup LJ and Horner J

_____

MORGAN LCJ

Introduction

[1] In this appeal Facebook Ireland Limited ("Facebook"), the appellant, challenges the judgment and order of Colton J who ruled in favour of J20, the respondent, and awarded him £3,000 general damages in respect of Facebook's misuse of private information.

[2] Facebook's appeal relates to a series of Facebook posts from September 2013 on two Facebook pages, entitled "Irish Blessings" and "Belfast Banter" ("the Pages"). These had all been removed or deleted by 9 October 2013.

[3] Facebook challenges the findings that:

(a) Two comments which referred to J20's children on the Irish Blessings page amounted to the tort of misuse of J20's private information;

(b) The words, "That's a tout so it is. Said the fish" on the Belfast Banter page and superimposed on a photograph of J20 holding a fish in a public place also amounted to the tort of misuse of J20's private information.

[4] Facebook also appeals against the award of £3,000 damages awarded to J20 as being outside the range of reasonable compensation on the facts of this case.

[5] There were other claims made by J20 about misuse of private information but these were rejected by the trial judge who also dismissed the claim by J20 for harassment under the Protection from Harassment (NI) Order 1997. There are no cross-appeals by J20 in respect of these decisions.

[6] The court is grateful for the thoughtful and challenging submissions made orally and in writing by counsel on both sides, Mr White QC and Mr Hopkins for Facebook and Mr Ronan Lavery QC and Mr Bacon for J20.

Background information

[7] Facebook operates a social networking site called Facebook outside of North America. Users of Facebook can post information on dedicated pages or sites. These can be accessed by other Facebook users who may contribute by interacting and posting their own material. Facebook claims to have over 1.5 billion users worldwide in over 200 jurisdictions. Facebook claims that 2 billion photographs are shared each day on Facebook's Apps. On any view Facebook is a vast enterprise dealing with enormous amounts of data on a daily basis.

[8] On the webpage entitled "Irish Blessing" on 11 September 2013 a photograph was posted of J20 standing in front of a Union Jack flag. J20 was named and the legend "Meet Sectarian Parade Organiser" was superimposed on to the photograph. There was a posting on the page calling for people to attend a protest on Saturday 21 September 2013 in relation to a decision taken by the Belfast City Council to restrict the flying of the Union Jack flag at Belfast City Hall.

[9] A number of comments were posted on the page. The relevant ones for this appeal are:

(i) "My daughter has three children to this scum woman beating snake who can't string two words together, he can only mumble. He deleted his children off his fb page because their names are Catholics. He must be full of Diazepam cause he is the biggest coward I have had the misfortune to meet. Love the page by the way."

Post by X dated 12 September 2013.

(ii) "He has Catholic children who he doesn't bother with. Probably because they are Fenians."

This was posted on 12 September 2013 by Y

[10] On the webpage entitled "Belfast Banter" on 14 September 2013 a photograph was posted of J20 in a public place standing outdoors, suitably attired, holding a fish in his hands. The words superimposed on the image are:

"That's a tout so it is. Said the fish."

[11] The plaintiff claimed that he used Facebook's reporting mechanism to complain about the postings. The trial judge described him as being extremely vague about what complaints he made and to which precise posts he objected. His pleadings also allege that the posts were reported as being offensive using Facebook's automated system but that no reply was received from Facebook.

[12] On 13 September 2013 J20's solicitors faxed a letter to Facebook in the following terms:

"Dear Sirs,

Re J20

We confirm we are instructed by J20 that a photograph and comments had been posted on Irish Blessings www.Facebook.com/Irishblessings page dated 11 September 2013 stating that another Loyalist bigot is exposed. Comments go on to call 'wee J20 organises more loyalist parades and protests than you can shake your fag at, he is as bitter as the day is long #sectarianscumbag'.

Thirteen offensive sectarian comments have been posted and J20 has advised us that he is in genuine fear of his life. There is no question that this article puts our client's life and physical well-being at risk. Please confirm you will ensure that the offending material is taken down immediately. If the offending material is not taken down by 5.00 pm on 14 September 2013 we have instructions to make an application to the court for an emergency injunction to force same and to fix you with a costs of the same."

The correspondence is described as being "extremely urgent". There was no response from Facebook.

[13] On 25 September 2013 J20 applied for emergency injunctive relief and on 27 September 2013 he obtained an ex parte injunction which, inter alia, ordered:

> "… That the respondent must remove forthwith from the '**Irish Blessings**' webpage of his website (having the URL: https://www.Facebook.com/Irishblessings/page) the 'Ardoyne Under Siege' webpage (https://www.Facebook.com/#/pages/ardoyne-underseige/505163022903072?fref=ts at the Belfast Banter webpage: (https:///www.Facebook.com#/pages/belfast-banter/207797202729326) references to pictures of the applicant, to include all entries and comments on same."

[14] By 9 October 2013 the relevant posts were deleted. Facebook claims to police all postings by reference to "Facebook Community Standards" ("the Standards") which make clear what is and is not permitted by way of freedom of expression. These standards are policed by Facebook's Community Operations Team who have the power to remove or delete any material which offends against the standards.

[15] An affidavit from Mr Gagne, Global Escalations Officer, Community Operations at Facebook Inc. made it clear that Facebook received "a number of letters and legal correspondence from the plaintiff's solicitors by fax". He said that "community operations is unable to discern, let alone review, any particular post (i.e. photograph) based on the vague information provided by the plaintiff." However he goes on to state that community operations reviewed the following page as a whole namely https://www.Facebook.com/Irishblessings/page and determined that it did not violate Facebook's terms of service.

[16] There are a number of explanations offered as to why Facebook did not act in respect of the posts, some of them relating to the failure to provide a valid URL. However, the trial judge reached the following conclusions which he set out in his judgment:

> "[74] Firstly, neither the plaintiff nor his friends can be criticised in relation to the online complaints. They do not provide the opportunity to set out a legal basis for complaint. The automated system involves the complainant clicking onto pre-prepared boxes for the reporting of abuse. Someone such as the plaintiff or his friends cannot be expected to categorise the legal nature of their complaints and indeed the automated system does not facilitate this. Having received the

> complaints it seems to me that the onus then shifts to the defendant to assess the alleged abusive content. Secondly, the solicitors' letter of 13 September refers to the Irish Blessings website (which the defendant was able to identify) and makes express reference to the plaintiff being described as a **loyalist bigot**, **as bitter as the day is long**, **sectarian scumbag**. The letter also refers to 13 offensive and sectarian comments which had been posted on the site and makes express reference to the fact that the plaintiff is in fear of his life.
>
> [75] I accept that the letter of 13 September could and should have been more specific in identifying the precise legal basis of the plaintiff's complaint. However, in my view the defendant should be expected to know the relevant law in relation to such matters as defamation, harassment and breach of private information when a complaint is drawn to its attention. It cannot simply turn a blind eye to complaints and say that a complainant has failed to properly categorise the legal basis of that complaint. At a minimum the defendant should consider the material in respect of which there has been a complaint and remove any unlawful content. In this case the unlawful content which I have found is apparent on the face of the material. This is not a case where the defendant required further information to come to a conclusion on the lawfulness of the material posted. The unlawfulness is apparent in the words themselves. …. The reference to the religion of the plaintiff's children and to him being referred to as a **tout** were unlawful and could not be justified. In the circumstances I have come to the conclusion that the defendant did have actual knowledge of the unlawful nature of the information in question. In short the defendant had sufficient facts and circumstances before it to make it apparent that the publication of the information which I have identified was private."

[17] The trial judge went on further to conclude that this is not a case in which Facebook acted expeditiously in removing the offending material. He went on to say that in circumstances of this particular case it is significant that Facebook made a decision not to remove the material when the complaint was made. In fact it specifically concluded that the posts on Irish Blessings did not violate the Standards.

Legal Principles

[18] It is common case that the tort of the misuse of private information is summarised accurately and comprehensively by Stephens J in his judgment in Callaghan v Independent News and Media Limited [2009] NIQB 1 paragraph [24] where he says:

> "(a) The Human Rights Act. The Human Rights Act 1998 requires the values enshrined in the European Convention on Human Rights be taken into account. The foundation of the jurisdiction to restrain publicity is now derived from Convention rights under the European Convention on Human Rights see In Re S (A Child) [2005] 1 AC 593 at paragraph (23). The relevant values in the actions before me are expressed in Article 2, 3, 8 and 10 of the Convention. The Convention **values are as much applicable in disputes between individuals or between an individual and a non-Government body such as a newspaper, as they are in disputes between individuals and a public authority**, see paragraph (9) of (Mosley v Newsgroup Newspapers Ltd).
>
> (b) Expectation of privacy. 'The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence', see paragraph (7) of Mosley v Newsgroup Newspapers Ltd. The question as to whether there is a reasonable expectation of privacy is an objective question and a question of fact. The reasonable expectation is that of the person who is affected by the publicity. The question was defined by Lord Hope in Campbell v MGN [2004] UKHL 22 at paragraph [99] as follows:
>
> > 'The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity'.
>
> The question whether there is a reasonable expectation of privacy 'is a broad one, which takes

> account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher' see Murray v Express Newspapers [2008] EWCA Civ 446 at paragraph [36]."

[19] It is also accepted that "posted" has a similar meaning as "published" in a defamation action.

[20] Further, in Tamiz v Google Inc [2013] 1 WLR 215 1 Richards LJ giving the judgment of the Court of Appeal held that the decision of the Court of Appeal in Byrne v Deane (1937) 1 KB 818 was directly applicable to the position of Google Inc which like Facebook also allows bloggers to post information. That particular case concerned an alleged defamatory verse which someone had posted on the wall of a golf club and which had then been allowed to remain there for some days. The defendants, who had not been involved in the initial publication, were the proprietors of the golf club, and one of them was also the club secretary. The rules of the club stated that "no notice or placards shall be posted in the club premises without the consent the Secretary". It was held by a majority of the court that the words of the verse were not capable of defamatory meaning, but all three members of the court agreed that there was evidence of publication by one or both of the defendants.

Greer LJ in Byrne v Deane said at page 830:

> "In my judgment the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it."

[21] The Court of Appeal in Tamiz went on to note that the decision in Byrne v Deane was considered in Godfrey v Demon Internet Limited [2001] QB 201 where the defendant ISP received and stored on its new server a defamatory article which had previously been posted by an unknown person using a different ISP. The plaintiff had notified the defendant of the article and asked it to remove it but the defendant failed to do so and the posting remained on the new server for ten days until it expired automatically. The judge, Morland J, held that when there was a

transmission of a defamatory posting from the storage of the defendant's new server, the defendant was a publisher of that posting but had a defence under Section 1 of the 1996 Act until it lost that defence as a result of the plaintiff's notification. This was followed by the decision of Judge Parkes QC sitting as a Deputy Judge of the Queen's Bench Division in Davison v Habeeb [2012] 3 CMLR 104 where he held that it was arguable that Google Inc. was a publisher from the outset, subject to the defence under Section 1 of the 1996 Act, but he also relied on Byrne v Deane as an alternative strand in reasoning that led him to conclude there was an arguable case against Google Inc. He said at paragraph [47]:

> "Even if [Google Inc] should properly be seen as a facilitator, the mere provider of a gigantic notice board on which others publish defamatory material, in my judgment it must also at least be arguable that at some point after notification [Google Inc] became liable for continued publication of the material complained of on the Byrne v Deane principle of consent or acquiescence."

Relevant Statutory Provisions

[22] Article 15 of Directive 2000/31/EC provides as follows:

> "1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.
>
> 2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."

[23] Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 provides as follows:

> "Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or

for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) The service provider—

(i) Does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) Upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) The recipient of the service was not acting under the authority or the control of the service provider."

[24] Regulation 22 goes on to provide that:

"In determining whether the service provider has actual knowledge, a court shall take into account all matters which appear to it in the particular circumstances to be relevant, and among other things, have regard to:

(a) whether the service provider has provided a notice through a means of contact made available in accordance with Regulation 6(1)(c); and

(b) the extent of which any notice includes:

(i) The full name and address of the sender of the notice.

(ii) The details of the location and the information.

(iii) The details of the unlawful nature of the activity or information it established."

[25] The trial judge held at paragraph [48]:

> "Having considered these Regulations and the well-established line of authority in relation to the liability of ISSPs for publication by third parties in the law of liable I conclude that there can be no liability in this case against the defendant prior to it being put in actual notice of the matters giving rise to a cause of action. There is no obligation to proactively monitor sites."

[26] The trial judge went to consider Regulation 6(1)(c) of the Regulations which requires that the ISSP make available to the recipient of the service in a form and manner which is easily, directly and permanently accessible the details of the service provider, including his electronic mail address, so as to make it possible to contact him rapidly and communicate with him in a direct and effective manner. He commented as follows:

> "The 2002 Regulations clearly envisage a scheme which provides an easily accessible notice and take down procedure so that a complainant can utilise a Regulation 22 provision to establish actual knowledge and thereby establish liability against the ISSP if there is a failure to take down an unlawful posting. The defendant employs such a mechanism. In the course of the hearing I was referred to **Facebook Community Standards** which sets out the type of expression which is acceptable to it and what type of contact may be reported and removed. The reporting mechanism to which I have referred permits members of the public to report a view which violates these standards which are then reviewed by Facebook's Community Operations Team who can remove or delete the material if it violates policy. In this way it says it complies with the requirements of Regulation 19 of the E-Commerce Directive."

The Facebook Appeal

[27] Facebook attacked the decision of the trial judge on a wide front. The case made by Mr White QC on behalf of Facebook included the following:

(a) The two postings referred to the religion of J20's two children. The action was brought by J20 not by the children or by J20 as their next friend. J20 did not have a reasonable expectation of privacy in respect of the religion of the children.

(b) Further, the trial judge made no finding that any of the children referred to in the two postings were minors. The evidence showed that at least two of the children were adults, as the plaintiff complained he had been unable to attend their weddings. No evidence was presented to the court that any of the children were minors at the time of these postings.

(c) Further the two postings were in response to a photograph of the plaintiff and a caption in respect of which the trial judge held that the plaintiff had no reasonable expectation of privacy. This posed photograph of the plaintiff taken in a public place, engaged in an act of public protest, was provocative and would inevitably attract strong comment. While the trial judge quite correctly held that the plaintiff did not have a reasonable expectation of privacy in respect of the photograph or its caption, the trial judge should also have concluded that this fatally undermined any claim by J20 to a reasonable expectation of privacy in respect of the comments posted in response to that photograph.

(d) The trial judge wrongly relied upon King v Sunday Newspapers Limited [2011] NICA 8 and essentially read across from that case to find a reasonable expectation of the privacy although there were clear distinctions between that case and this. In the case of King, there were 29 articles published over a seven year period in the Sunday World newspaper alleging that King had been involved in serious criminal activity and had a lifestyle funded by his criminal activities. One of the articles referred to the fact that the plaintiff's baby daughter was christened in a Catholic church in a County Down village and identified the parish of the church. The trial judge Weatherup J was satisfied there had been threats against the appellant for a number of years from Loyalist paramilitaries and dissident Republicans and that accordingly there was a real and immediate risk to the appellant, that the risk was objectively verified, and that it was present and continuing. The judge concluded on that basis that the plaintiff's Article 8 rights were engaged. There was a reasonable expectation of privacy for the child's details including its identification, its religion and details of the christening. There was no justification for publishing the information about the child's identity, its religion or details about the christening and an injunction was granted accordingly. The two critical features which distinguish King were the risk of harm and the identification of the infant child. In the present case the two postings were by the children's family members and thus were only published to those who sought to access and read the comments on that particular photograph and the children themselves

were not infants and were not identified. There was no evidence of any risk of harm.

(e) In respect of the posting of the photograph of the plaintiff with the words superimposed on the photograph "That's a tout so it is. Said the fish.", Facebook says the judge erred in law in concluding the plaintiff had reasonable expectation of privacy and that Facebook was liable for the tort of private information in respect of the words superimposed on the photograph. It says that the judge failed to take into account that there was no serious assertion that the plaintiff was an informer, rather that the use of the word tout was a play on words with trout. Further, there was no evidence that there was any assertion being made that J20 was an informer or that such an assertion might be taken seriously. The trial judge also failed to give any weight to the complaint of J20 that the words were "annoying or distasteful humour".

(f) Finally, the judge relied on AB v Sunday Newspapers in concluding that referring to the J20 as a "tout" constituted misuse of private information. The two cases were very different and clearly distinguishable. In particular there was no evidence of any threat or harm suffered by J20 or anyone else as a result of the publication of the photograph with the words superimposed.

[28] Facebook also claimed that the judge was wrong on the basis that even if the postings did give rise to a reasonable expectation on the part of J20 and so were potentially unlawful, this was not manifest or self-evident. Consequently the judge's finding imposed an unrealistically strict standard of liability on an ISSP such as Facebook and was inconsistent with the policy underlined by Article 14 of the E-Commerce Directive.

[29] Further, Facebook relied on Tamiz v Google Inc [2013] 1 WLR 2151 where the Court of Appeal in England made it clear that the ISSP had to have actual knowledge of the relevant facts or information and accordingly the claimant must have identified "a substantive complaint in respect of which the relevant unlawful activity is apparent". Facebook disputes the finding of the judge that Facebook had actual knowledge of the unlawful nature of the information by virtue of on-line reports/complaints and the solicitor's letter of 13 September 2013. Further, although the only sustainable finding as to Facebook having actual knowledge of the unlawful nature of the relevant content was by way of service of the injunction papers on 25 September 2013, the relevant content was removed within two weeks of the first valid notification. In Tamiz it appeared that over five weeks was viewed as being merely arguably sufficient to allow an inference to be drawn. But the real difficulty is that the trial judge failed to consider and determine this question. Although the trial judge said at paragraph [19] that he would "leave aside for a moment" the question of whether any of the material complained of by the plaintiff was posted or

published by Facebook, he never did return and determine that question later in the judgment. If he had done so, it is asserted by Facebook, he could only have concluded that no inference could properly be drawn that Facebook had become a publisher.

[30] Finally, Facebook contends that the award of £3,000 in general damages to the plaintiff was excessive as the sum awarded was not "modest" as required by McGaughey v Sunday Newspapers Limited [2011] NICA 51.

The Respondent's submissions

[31] In his focussed submissions Mr Lavery QC made a number of points: –

(a) The appellant took no issue with the learned trial judge's exposition of the law relating to misuse of private information. The criticism is essentially related to findings of fact in an area which is fact sensitive. The findings of fact made by the judge should not be interfered with by an appellate court.

(b) There is no proposition of law which would support the contention that an Article 8 intrusion could not occur in relation to a posting made by a family member, even a grandmother. Similarly there is no support for the proposition that the protection through Article 8 of the relationship between parent and child can only exist or be protected by the child as a minor. The respondent relied in particular on the passage in King v Sunday Newspapers Ltd [2011] NICA 8 where Girvan LJ said that an individual normally has a reasonable expectation of privacy in respect of information relating to his private, intimate and family relationships which are multifaceted.

(c) The respondent contended that the learned trial judge had applied the law to the facts of the case in the following passage at paragraph [34] of his judgement:

> "In this case the plaintiff said that he was "disgusted" by the reference to his children. He said that this has had an impact on his relationship with them and he was unable to attend two of their weddings. It may well be that the background to the history of his relationship with these children is complicated and I note that the postings concerning the children seem to come from the family of the mother of the children. Nonetheless, I have come to the clear view that in respect of the religion of his children he did have a reasonable expectation of privacy."

(d) In relation to the posting of the respondent holding a fish with the caption "That's a tout so it is said the fish" it is fanciful to suggest that the posting

meant anything other than that the respondent is/was an informer. The respondent relies on AB v Sunday Newspapers [2014] NICA 58 for the proposition that an informer has a reasonable expectation that his confidential relationship will not be disclosed. That applies whether or not the allegation is correct.

(e) At paragraph [74] of his judgement the plaintiff referred to the online complaints system. In the following paragraph he accepted that the letter of 13 September 2013 could have been more specific in identifying the precise legal basis of the complaint. He considered, however, that the appellant did not require further information to come to a conclusion on the lawfulness of the material posted. The reference to the religion of the respondent's children and him being a "tout" were unlawful and could not be justified. These were postings which constituted evidence of an unlawful intrusion into Article 8 rights.

(f) It is accepted that publication is a necessary ingredient of the tort of misuse of private information. That was acknowledged by the learned trial judge. Paragraph 74 and 75 of his judgement supports the view that publication was concurrent with the receipt of the letter of 13 September 2013. Although that was an affidavit on behalf of Facebook about the receipt of the letter there was no explanation as to why the appellant did not regard the items as a violation of its terms of service.

(g) If the preceding paragraph is wrong the appellant acquired knowledge on 25 September 2013 with service of the injunction papers followed by the Order on 27 September 2013. The delay in removing the sites until 9 October 2013 was excessive.

(h) The award of damages was well within the area of discretionary judgement available to the learned trial judge.

Consideration

Misuse of private information

[32] There was no dispute about the applicable law which was helpfully set out by Stephens J in his judgement in Callaghan v Independent News and Media Limited [2009] NIQB1 at paragraph [24] and relied upon by the learned trial judge at paragraph [18] of his judgement in this case. A person is entitled to have his reasonable expectation of privacy protected. The question of whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. In this case the respondent particularised the information which was said to give rise to a reasonable expectation of privacy as being the religion of three of his children and his identification as a tout.

[33] The evidence was that the oldest of the children was 31 and the respondent had not seen the children since 1997/98. The youngest was at least 16. There was no evidence from the children and no evidence about their circumstances. When examining certain aspects of the respondent's privacy claim in respect of his identity the learned trial judge relied on the observations of McCloskey J in McGaughey v Sunday Newspapers Ltd [2010] NICh 7:

> "… a person's identity and appearance are unlikely to be capable of misuse in the context of this tort, since, in the vast majority of cases, these are obvious to and are relatively as ascertainable by the public at large."

[34] This passage helpfully highlights that the issue of whether or not information is private is highly dependent upon the factual circumstances surrounding that information. A person's identity and appearance are unlikely to be capable of misuse in the context of the tort because as a matter of everyday occurrence people engaging with the person will be aware of those factors. There is nothing private about them. The same may also be true of a person's religion. Many religious people engage in regular acts of worship in the company of large numbers of worshippers of a similar persuasion. Where that is the case the publication of the fact that the person adheres to that religion would almost invariably not be private information. Whether or not to disclose one's religious persuasion, if any, is a matter for the person holding that opinion. That is an aspect of personal autonomy.

[35] Where a litigant pursues a claim on the basis that there is a reasonable expectation of privacy in respect of the information it is for the plaintiff to set out the information and the facts and circumstances upon which he or she relies in order to establish that this is information in respect of which he or she has a reasonable expectation of privacy. There was no such evidential base laid in this case. There was simply no material upon which the judge could come to the conclusion that the information was private.

[36] To some extent, therefore, it was unsurprising that the respondent opened its reply by contending that the breach of privacy related to the publication of the respondent's relationship with the children. It was submitted that his relationship with the children was not in the public arena and that any complaint about that relationship should not be brought into the proceedings. The grandmother breached the respondent's Article 8 rights by posting that he had not seen the children for 16 years.

[37] Whether there is any proper basis for that allegation we do not have to determine. The case pleaded by the respondent was that the disclosure of the religion of the three grown-up children was information in respect of which he had a reasonable expectation of privacy. The judge noted his evidence that he was disgusted by the publication but made no finding about his relationship. He indicated that he was not impressed by the respondent. There was no allegation that

the publication of the fact that he was the father of these children was private. The nature of the relationship between the respondent and the children was not explored in the pleadings, the evidence or the judgement. That issue was not before the learned trial judge and cannot now be raised on appeal.

[38] In defence of the claim in relation to the publication of the religion of the children the respondent relied on King v Sunday Newspapers Ltd. That case concerned the publication of a number of articles involving allegations of serious criminal activity by the plaintiff as part of a loyalist paramilitary group. It was accepted that there was a real and immediate risk to the life of the plaintiff. In the course of those articles the Catholicism of the plaintiff's partner, the baptism of their child as a catholic and the location of the church were disclosed so as to identify the partner and the child. Girvan LJ relied heavily on the Editor's Code of Practice on Reporting of Crime in order to establish a reasonable expectation of privacy in that case. The background was that the identification of such family members might align them with the wrongdoing alleged against King and thereby expose them to reputational damage or danger. That background is clearly completely different from this case involving disclosure by a grandmother of the religion of her adult grandchildren. There is no question of reputational damage to the children. If there is reputational damage to the respondent it is because of his conduct towards children but there was no pleading or case made that this was private information. The King case does not assist the respondent on this issue.

[39] The other issue in respect of which the respondent complained was the reference to "tout". Although not specifically referred to in the statement of claim this matter was included in the replies to particulars and it is clear that the case proceeded on the basis that it formed part of the claim in misuse of private information. It was also specifically referred to in the material served upon the appellant on 25 September 2013 in support of the injunction application. In a supplemental skeleton argument it was advanced on behalf of the appellant that since this allegation had not been specifically made in the statement of claim we should dismiss the claim. We do not accept the submission. We are satisfied that the case proceeded on the basis that the information was private and that the appellant was responsible for its publication.

[40] The learned trial judge was satisfied that this reference constituted misuse of private information. We consider that he was entitled to come to that conclusion. An allegation that a person is a tout or informer automatically gives rise to the allegation that there has been a confidential relationship between the person and some agency that he is assisting. A person who had provided confidential information to a relevant agency would as a matter of course reasonably expect that the fact of this communication of the material would be private. The very allegation, therefore, lays a basis for the required level of privacy.

Publication

[41] At the commencement of the hearing of this case before the learned trial judge an application was made to amend the pleadings to rely upon the inadequacy of the online reporting system in order to fix the appellant with knowledge of the posting of the tout allegation on the Belfast Banter page. In light of the late stage at which this application was made the learned trial judge rejected it. Although the respondent made reference to criticisms of the effectiveness of the online reporting system, that matter is, therefore, not before us. We note, however, that this is the second case in which there has been judicial criticism of the effectiveness of the system. In another case we may have to review the effectiveness of the online reporting system and the consequences of any inadequacies found.

[42] Although the respondent's solicitors wrote an extremely urgent letter to Facebook on 13 September 2013 the letter only referred to the Irish Blessings page and did not contain any reference either to the Belfast Banter page or to the suggestion that the respondent was a tout. This was the material upon which the learned trial judge relied to fix the appellant with actual knowledge. In the absence of any reference in that letter to the Facebook page in which the offending passage appeared or to the allegation that the respondent was a tout there was simply no basis upon which the judge could have come to that conclusion in respect of the tout allegation. The first intimation to the appellant about that allegation was the service of the material on 25 September 2013 which led to the making of the injunction on 27 September 2013.

[43] It was contended that the learned trial judge did not consider an appropriate period of time for the appellant to take the material down and it was suggested that the appellant should not be criticised for failing to take the material down until 9 October 2013. We do not accept that submission. Once the material was supplied on 25 September 2013 and the Order served on 27 September 2013 the appellant was required to act expeditiously. We are satisfied that the learned trial judge was correct to conclude that it failed to do so.

[44] We agree, therefore, that the appellant is liable for the publication of the tout allegation from a date around the end of September until 9 October 2013. We assess the damages in respect of that publication at £500 having regard to the limited period of time during which the post was available to be viewed. The appellant obviously has no liability in relation to any viewing of the allegation between 14 September 2013 and the end of the month.

Conclusion

[45] For the reasons given we allow the appeal in relation to the publication of the religion of the respondent's three children and reduce the award of damages to £500.