Neutral Citation No: [2017] NICA 66 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **STE10429** *Delivered:* ***6-11-2017***

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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X

Plaintiff/Appellant:

-v-

MINISTRY OF DEFENCE

First Defendant:

THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Second Defendant/Respondent:

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Before: Gillen LJ, Stephens LJ and Maguire J

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STEPHENS LJ (delivering the judgment of the court)

Introduction, anonymity and reporting restriction

[1] The appellant, "X" alleges that in 2013 two police officers produced money in order to persuade him to provide information about named individuals. He states that he did not provide any information or accept any money and that he refused to be an informer. The appellant alleges that subsequently in 2017 the same two police officers again approached him but on this occasion threatened to identify him to people who may do him harm as having been an informant in 2013. The appellant asserts that the threat was:

> "If you want people to know what you actually said to us the last time it might not be in your interests."

[2] The day after this alleged threat the appellant issued proceedings against both the Ministry of Defence and the Chief Constable of the PSNI and mounted an ex parte application for an interlocutory injunction restraining "the defendants, their servants and agents from disclosing or causing to be disclosed, the personal information of the plaintiff to any third party and from harassing or causing the plaintiff to be harassed." McBride J required the application to be made on notice

and then after an inter partes hearing she refused to grant an interim injunction correctly stating for instance that an approach by a police officer to the appellant to be an informer is not an unlawful activity and that the injunction which had been drafted was in far too wide terms and if granted would have been completely unenforceable.

[3] The appellant appeals to this court and for the first time confines the relief that he seeks to preventing the police officers from threatening him with releasing information that he was an informant or carrying out what they have threatened.

[4] The learned judge granted an anonymity order and a reporting restriction order until further order of the court and we consider that she was correct to do so given, for instance, the decision of this court in *AB v Sunday Newspapers t/a Sunday World* [2014] NICA 58. We also note that the learned judge with her customary care directed that her judgment was not to be released until various parts had been redacted. In accordance with that direction the judgment has not been published on the internet and it has not been made available to either of the legal professions in Northern Ireland. These precautions were taken presumably to prevent the risk of jigsaw identification of the plaintiff and to allow the plaintiff an opportunity to suggest what if any further anonymisation was required prior to publication.

[5] We confirm until further order of this court or of the High Court the anonymity order prohibiting publication of the name or address of the appellant and requiring that in all court documents the appellant is identified by the cipher "X." We also confirm until further order of this court or of the High Court a reporting restriction order that no person shall publish any material which is intended, or likely, to identify the appellant involved in these proceedings except in so far (if at all) as may be permitted by direction of this court or of the High Court. We give liberty to apply to set aside or to vary these orders to the parties and to any third party.

[6] In accordance with those orders and in this judgment we anonymise the appellant as "X." Two weeks prior to giving this judgment in open court and on 23 October 2017 we provided a copy to both parties subject to the embargo on any further dissemination set out in the schedule. The purpose of doing so was threefold. First to enable the judgment to be checked for any apparent factual, typographical or grammatical error or ambiguities. Second it was to provide the parties with an opportunity of considering the terms of the judgment so that they could inform the office in writing within seven days one way or the other as to whether there is any reason why the judgment should not be published on the Northern Ireland Courts and Tribunals Service ("NICTS") website or as to whether it required any further anonymisation prior to publication or as to whether there was no objection to publication and no need for any further anonymisation. Third it was to provide time for the appellant's solicitor to make all the amendments, redactions and replacements indicated by us in paragraph [7]. We now deliver this judgment in

open court and a copy of this judgment as delivered will be submitted to the library for publication.

[7] We would observe that an application should have been made to the court for the proceedings to have been issued using a cypher rather than the appellant's names in accordance with the procedure set out in *KL and NN v Sunday Newspapers Limited* [2015] NIQB 88. Instead the writ, the ex parte docket, the notice of motion and the affidavit all contain the appellant's names in the title of each document. Furthermore the affidavit starts by identifying the appellant by his names and then at the end of the affidavit his signature identifies his names. All this means that the anonymity order could be rendered useless as under Order 66, Rule 5(1) of the Rules of the Court of Judicature (Northern Ireland) 1980 anyone upon payment of the prescribed fee is entitled to inspect and take a copy of the writ of summons and would thereby obtain the appellant's names. In order to address this we give leave to the appellant to amend the writ of summons by redacting his names so that they cannot be discerned and replacing his names with the cypher "X." We also give leave to amend the title of the proceedings in relation to the ex parte docket, the notice of motion and the affidavit again by redacting his names so that they cannot be discerned and replacing his names with the cypher "X." We also direct that the appellant's solicitors attend at the Central Office in order to redact the names of the appellant at the start of the affidavit and his signature at the end of the affidavit so that they cannot be discerned and to replace his names and his signature with the cypher "X."

[8] At the outset of this judgment we make it clear that there were aspects of the appellant's appeal which were not argued at all before the learned judge and that there were other aspects which appear to have received only modest attention in the submissions to her. It is no part of a judge's duty to guess the torts upon which a party is relying or to find the evidence and muster the arguments to support a conclusion favourable to the appellant. We illustrate this by reference to the appellant's reliance before this court on the tort of misfeasance in public office. In relation to that tort the learned judge stated at paragraph [36] of her judgment:

> "Counsel for the plaintiff did not rely on this tort in his skeleton argument and at hearing did not actively pursue it. He conceded that the plaintiff's claim was a claim for breach of his human rights rather than a claim of misfeasance in public office. In view of this concession, I do not find that there is evidence of a serious question to be tried in respect of this tort and therefore an injunction should not be granted on this ground."

Upon enquiry we were told that this paragraph was accurate in that the learned judge was informed that the facts were demonstrative of misfeasance in public office but that the appellant did not have to rely on it. We deprecate the use of an appeal

process in order to challenge a decision of a judge on a basis that was not advanced to her. If, as here, that has occurred there may be consequences either as a factor to be taken into account in determining the appeal or in relation to costs.

The defendants to these proceedings

[9] The writ joined not only the Chief Constable of the PSNI but also the Ministry of Defence as defendants. This appears to have been done due to uncertainty as to whether the two men who approached the appellant were working "on behalf of the PSNI or security services." A question would have arisen as to whether the Ministry of Defence was the correct defendant if the two men were indeed officers employed by the security services but in any event it had been clear to the appellant since a letter from the office of the Police Ombudsman for Northern Ireland ("PONI") in 2014 that the two men were police officers. Accordingly the action against the Ministry of Defence has been discontinued with no order as to costs and the only remaining defendant is the Chief Constable of the PSNI.

The form of the injunction sought by the appellant

[10] In the writ of summons, in the ex parte application and in the notice of motion the appellant sought:-

> "An injunction to restrain the defendants, their servants and agents from disclosing or causing to be disclosed, the personal information of the plaintiff to any third party and from harassing or causing the plaintiff to be harassed."

[11] This draft injunction did not define the "personal information" so that if it had been granted it would have prevented the police from disclosing, for instance, the appellant's address, his photograph and the identity of his known associates. It might also have prevented the police from approaching the appellant as a witness, as a suspect or from approaching him to induce, ask or assist him to be an informer. We consider that the learned trial judge correctly concluded that it was so widely drafted that it would not be capable of enforcement.

[12] The skeleton argument on behalf of the appellant stated that the learned judge's "complaint about the wording of the proposed injunction being so widely worded that it would not be capable of enforcement is incorrect. If the court feels that it is too widely worded then alternative wording could be used." This was followed by the suggestion that the alternative wording "*could*" be rather than being "*sought*" to be:-

(a) An injunction restraining the defendants, their servants and agents from disclosing any personal information relating to the plaintiff which may suggest that he was/is an informer;

(b) An injunction restraining the defendants, their servants and agents from disclosing any personal information relating to the plaintiff which may endanger his life or safety;

(c) An injunction restraining the defendants, their servants and agents from disclosing any personal information relating to the plaintiff which is sensitive personal information and which is false and which the defendants have no interest in or duty to disclose.

[13] We deprecate the suggestion that an applicant for an injunction can put forward a draft injunction in wide unfocused terms placing the responsibility on the judge to hone it down to meet the particular facts of the case. If the application is on notice then the system is adversarial so that the other parties know what is being claimed and then the judge can adjudicate on that claim. Frequently draft injunctions which do attempt to focus and define are adjusted as a result of the adversarial system. That is not objectionable and is to be commended. However that is not this case as the draft presented to the learned judge was patently far too wide, unfocused and inherently defective.

[14] We also make it clear that it is inappropriate for the appeal process to be used as a method of advancing a narrower and focused form of injunction which was not advanced or considered at first instance. If, as here, that approach is adopted then there may be consequences either as a factor to be taken into account in determining the appeal or in relation to costs in which respect consideration should be given as to whether none of the costs should be borne by the clients or by the public purse in the form of the legal aid fund.

[15] We consider that the revised form of the draft injunction in paragraph (a) of the appellant's skeleton argument was focused on what the appellant was seeking to achieve. The drafts in paragraphs (b) and (c) were abandoned during the hearing of this appeal. The draft in paragraph (a) was open to the criticism that if granted it would have prevented police officers from suggesting to each other that the appellant was or is an informer and would have prevented the police from liaising with for instance, the security services, the DPP or other agencies as to whether the appellant was an informer in circumstances where those agencies would have a legitimate interest in that information. To meet that criticism and at the conclusion of the hearing before us the appellant submitted a final draft in the following terms:

> "An injunction restraining the defendant, his servants and agents from disclosing, other than for lawful reasons to state agencies including within the defendant

> organisation, any information relating to the plaintiff concerning the provision by him of information to state authorities about criminal activities."

We consider that the refinement of the draft injunction in paragraph (a) of the appellant's skeleton argument is an appropriate use of the adversarial system. We emphasise that the initial draft before the learned judge was inappropriate and we are sorry to say that the judge did not receive from counsel as much careful assistance as she was entitled to expect. It is the duty of counsel to settle the draft order personally and to be scrupulous and meticulous in the presentation of the draft to the judge so as to be able to respond to the judge's concerns and to assist the judge as to the final form of the order. That obligation has even more emphasis where, as here, the original application was ex parte so that the court is assisted fairly in the absence of the defendant, see *Memory Corpn plc v Sidhu* [2000] EWCA Civ 9, [2000] 1 WLR 1443.

Background facts

[16] The background facts are obtained from two documents. The first is the appellant's affidavit grounding what was initially an ex parte application for the interlocutory injunction. The second is a letter sent in 2014 from the office of the PONI dealing with the appellant's complaint following the 2013 approach. As we will demonstrate the appellant's affidavit does not comply with the obligation on an ex parte application to make full and frank disclosure. As a matter of convenience in this part of the judgment we will set out various inferences that we consider can be taken from the primary facts contained in those two documents.

[17] In his affidavit the appellant states that in 2013 he was subject to "an approach to provide information on individuals." The nature of this approach was that two men, who did not identify themselves, said that his DNA had been found on explosives. These men then produced money which was placed on a table for him to provide information on named individuals. The appellant was unaware how much money was on the table "it could have been hundreds or thousands." The appellant also states that these men told him to meet them again in a particular restaurant and that they rang him immediately after the meeting but that he did not go to the restaurant and he did not provide any information to or accept any payment from these men. The appellant considered that these men either worked on behalf of the PSNI or on behalf of the security services.

[18] We consider that:

> (a) The two men (whom we shall refer to as the two police officers) believed that the appellant had a relationship with a number of individuals whom they named.

(b) The appellant does not deny that he had a relationship with the individuals named by the police officers.

(c) The police officers believed that as a result of that relationship the appellant would have information that would be of use in a detection or prevention of crime.

(d) The appellant does not deny that he had such information.

(e) The value of the information would have been apparent to the appellant not only because of its nature but also because of the indiscriminate amount of money which was being offered to him.

(f) The location at which this conversation occurred and the circumstances in which the two men were able to approach the appellant would have led the appellant to believe that the approach was an approach by officials.

(g) The fact that the appellant believed that the two men could have been officers in the security services could indicate that the matters about which he was being asked to inform were connected to the activities of terrorists or of persons who were connected to terrorists.

[19] In 2013 the appellant made a complaint to the PONI. The appellant did not in his affidavit give any details as to the nature of his complaint or as to the findings of the PONI. During the hearing before McBride J a copy of the letter sent in 2014 to the appellant from the office of the PONI informing him of the outcome of the complaint was handed into court. That letter disclosed that the complaint made by the appellant to PONI included an allegation that during the 2013 approach one of the men said that if the appellant did not co-operate his "DNA could end up at a crime scene." Both officers deny that they threatened the appellant with planting false DNA evidence. They also deny that they refused to let the appellant leave the room and said that he did not ask to leave. The letter concluded that there was insufficient evidence to support the allegations that the appellant had made and that the office of the PONI now considered the matter to be closed.

[20] The letter from the office of the PONI also revealed that police records showed that the appellant had been stopped and searched on 10 occasions over a period of approximately 8 months. That on one occasion there were a number of other persons who were also stopped and searched at the same time and location and that on this and on a number of other occasions the search was in relation to criminal activity which we take judicial notice can be associated with terrorist activity.

[21] We consider that:

(a) Both the appellant's complaint to the PONI and this letter ought to have been disclosed by the appellant in accordance with his obligation to make full and frank disclosure on his ex parte application.

(b) The appellant's allegation to the PONI was that the two police officers threatened to plant false DNA evidence. That allegation was denied by the police officers and it does not appear in the appellant's sworn affidavit. We have taken into account the appellant's hearsay evidence to the PONI, that there was a threat to him that false DNA would be planted at a crime scene together with the hearsay evidence of the police officers denying that allegation. However, given the appellant's failure to swear to such an incident in his affidavit which grounds his application for an interlocutory injunction we do not consider that there is sufficient at this stage to establish an arguable case that he was threatened in 2013.

(c) The appellant in his affidavit does not deal with the account given by the two police officers to the office of the PONI. For instance as to whether the two police officers were introduced to him.

(d) In relation to the stops and searches of the appellant he does not in his affidavit give any indication of having been suspected of involvement in any criminal activity nor does he give any description of whether he has or continues to have any relationship with any of the individuals who were stopped and searched at the same time as him.

(e) Upon receipt of the letter from the office of the PONI the appellant would have known that the two men were police officers.

[22] In relation to the 2017 approach the appellant in his affidavit states that he was brought to a room and questioned and that the same two men from the 2013 approach then entered the room. On this occasion the appellant states that he recorded the end of the conversations with the officers who brought him to the room and the beginning of the conversation with the two men. He exhibited to his affidavit a transcript of the recording. He states that the two men asked him where his phone was and then thanked him for "taking the time to speak to them that last time." They then said it was up to him "how this conversation goes and if I wanted people to know what I actually said to them the last time, it might not be in my interests." The appellant took this as a threat to identify him as an informant to people who may do him harm. He states that the men then went on to thank him for coming down to see them which as he was stopped by police was again untrue and he believes calculated to ensure that if he recorded the conversation that disclosing it may implicate him as an informant or as assisting them. The appellant also states that the two men said that the appellant had given them his number the last time which was not true. Again the appellant felt that this was an attempt to subvert him from releasing any recording of the conversation in case the appellant was linked as

an informant. The appellant again asserts that he believed that these men either worked on behalf of the PSNI or security services.

[23] In his affidavit the appellant goes on to state that the two men provided him with information which made him suspect that he had been followed as they informed him that they knew that he had been at a particular location with a particular person and that they never bothered him on that occasion. They also informed him that they knew where he had been shortly before the 2017 approach.

[24] We consider that:

(a) The appellant knew or ought to have known from the PONI letter that the two men were police officers.

(b) The appellant would have known that it was highly likely that the same two police officers would have been interested in the same sort of information about the same sort of individuals as in 2013.

(c) Although this was not articulated it was probable that the police officers would pay the appellant for information that he had or could obtain from or about the named individuals.

(d) The appellant knew that the police considered it appropriate to carry out a degree of surveillance of him so that they knew where he was on at least two occasions.

[25] In relation to the alleged threat it was suggested on behalf of the Chief Constable that it might have been cautionary advice to the appellant that it would be unwise to say that he had been engaging with the police. The proper construction of what was said is an issue for trial. At this stage *and on the evidence presented to us* we consider that there was a threat to the appellant's life or bodily integrity by disclosing to persons who could or would harm him information that he was an informer.

[26] The appellant concludes his affidavit by stating that he feels as though his life and safety have been directly threatened by these men. That he has never been an informant or provided information on any individuals. He fears that if relief is not granted to him then his life would be put at risk by the two men releasing untrue information that he has been an informant or that he has assisted police and security services.

Full and frank disclosure

[27] The application for an interlocutory injunction was originally made ex parte. The obligation in ex parte applications is to proceed "with the highest good faith"

and to make full and frank disclosure of all material facts including those that are favourable to the defendant, see *Siporex Trade SA v Comdel Commodities Ltd* [1986] 2 Lloyd's Rep 428, [1986] NLJ Rep 538; *Memory Corporation Plc v Sidhu and Another* [2000] 1 WLR 1443 (CA). The duty to make full and frank disclosure obliged the appellant to present the court with a full account of the dispute and its surrounding circumstances and avoid giving a partial and misleading impression. That obligation arises because the court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard. We have a number of concerns in relation to disclosure made by the appellant in his affidavit:-

(a) There is no information as to his age, approximately where he lives, his occupation, whether he does or does not have any criminal convictions and if so what convictions or whether he associates with or has a personal or other relationship with individuals whom he is aware have criminal convictions or whom he is aware are suspected by the police of being involved in criminal activity.

(b) The appellant knew that there had been a complaint to the PONI, he knew the conclusion of the investigation by the PONI, he knew that the two officers had been authorised and tasked to approach him and yet that was not revealed in his affidavit.

(c) The appellant states that in 2013 he was subject to an approach to provide information on individuals and that those individuals were named to him. No details were given by the appellant as to who those individuals were or as to whether and if so what personal or other relationship he had with them. For instance no information is given as to whether one or more of the named individuals was in the group of individuals that were stopped and searched at the same time as the appellant. No details are given as to why those individuals might be of interest to the police. No details are given as to what information was being sought by the two police officers. If those named individuals were known to the appellant in 2013 then no information is given as to whether they were still known to him in 2017.

[28] These failures mean that the appellant has not given a fair account to the court. A failure to observe the rule as to full and frank disclosure entitles the court to refuse to make an order even if the circumstances would otherwise justify the grant of an order. However in exercising that discretion a due sense of proportion must be maintained between marking the court's displeasure at the non-disclosure and doing justice between the parties. That proportion requires that consideration should be given to the degree of any culpability on the part of the appellant or of any prejudice to the respondent. A proper balance must be maintained between undermining "the heavy duty of candour and care" which fell on the appellant on the one hand and on the other preventing a windfall to a defendant who lacks substantial merit. The

exercise of discretion also takes into account that there are other sanctions available to the court apart from declining to make an order or discharging an ex parte order and those sanctions include, for instance the court disallowing costs or the court making an indemnity costs order.

The judge's decision in summary

[29] In summary the learned judge held that:-

(a) The approach to the appellant fell within Part II of the Regulation of Investigatory Powers Act 2000 ("RIPA") so that the Investigatory Powers Tribunal ("the IPT") had exclusive jurisdiction in relation to the appellant's proceedings for actions incompatible with Articles 2, 3 and 8 ECHR.

(b) As the IPT had exclusive jurisdiction the court had no power to grant injunctive relief in respect of the appellant's proceedings for actions incompatible with Articles 2, 3 or 8 ECHR. It would be wrong for the court to grant injunctive relief in circumstances where the IPT had no power to grant injunctive relief in proceedings for actions incompatible with Convention rights.

(c) The submission on behalf of the Chief Constable that all the matters complained of by the appellant fell within the exclusive jurisdiction of the Tribunal regardless as to whether they were proceedings for actions incompatible with Convention rights or whether they were proceedings based on other causes of actions, was incorrect. The court did not lack jurisdiction to deal with other torts which may arise out of the alleged activities of the defendant.

(d) There was no serious question to be tried in relation to the tort of assault as the appellant's claim relied entirely on the words used by the two men and according to Clerk and Lindsell on Torts 21st Edition at paragraph 15.13 threats per se do not constitute tortious assault.

(e) There was no serious question to be tried in relation to misfeasance in public office as counsel for the plaintiff did not rely on that tort in his skeleton argument and at hearing did not actively pursue it. Rather he conceded that the plaintiff's claim was a claim for breach of his human rights rather than a claim of misfeasance in a public office.

(f) There was no serious issue to be tried in relation to harassment under Article 5 of the Protection from Harassment (Northern Ireland) Order 1997 as there was no evidence of a course of conduct.

(g) In the exercise of her discretion she refused to grant an injunction on the basis that the claims in tort were weak; the real complaint that the plaintiff made lay within the jurisdiction of the IPT; the plaintiff was essentially seeking relief to stop the police officer approaching him to be a CHIS; injunctions should be capable of being enforced and the draft wording of the present injunction and the further amended draft which was provided to the court were so widely worded that they would not be capable of enforcement.

The Grounds of Appeal

[30] We summarise the grounds of appeal as follows:

(a) The appellant contends that the burden of establishing that the approach to the appellant was within Part II of RIPA rests on the Chief Constable and that on a consideration of the facts set out by the appellant and given the lack of any evidence on the part of the Chief Constable that burden had not been discharged so that the judge incorrectly concluded that the case fell within Part II of RIPA. Furthermore it is contended that this led the judge to incorrectly conclude that the IPT had exclusive jurisdiction for the appellant's proceedings for actions incompatible with Convention rights.

(b) In the alternative it is contended that if the case did fall within Part II of RIPA so that the IPT had exclusive jurisdiction for the appellant's proceedings for actions incompatible with Convention rights, then contrary to the finding of the learned judge the court must still retain jurisdiction to grant an injunction for threatened breaches of those rights given that the IPT cannot grant an injunction.

(c) Finally it is contended that a threat of the kind made to the appellant would amount to an assault, or misfeasance in public office, or harassment, or misuse of private information and that an interlocutory injunction ought to have been granted based on any of those torts.

Legal principles and discussion

[31] A ground of appeal was that the learned judge was incorrect to conclude that the approach to the appellant was within Part II of RIPA. The appellant contends that the burden of establishing that the approach was within Part II rests on the Chief Constable and that as the Chief Constable was neither confirming or denying that any approach had been made to the appellant that there was no evidence upon which the judge, in the circumstances of this case, could have concluded that this was not an approach to the appellant for instance to provide a single piece of information in return for a one off payment which approach would not have been within Part II, see paragraphs [37] and [53] of *Sheridan*.

[32] The significance of that submission is that if the case did not fall within Part II of RIPA then the IPT under section 65 of RIPA would not be the only appropriate tribunal for the appellant's proceedings for actions incompatible with Convention rights, see paragraph [60] of *Sheridan*. This in turn would mean that it would be plain that the High Court and this court would have jurisdiction to grant an injunction to prevent a threatened breach of the appellant's Convention rights. If it does fall within Part II so that the only appropriate tribunal to hear and determine the appellant's proceedings for actions being incompatible with Convention rights is the IPT then it is common case that the IPT cannot grant an injunction to prevent threatened breaches of the appellant's Convention rights. The learned trial judge held at paragraph [33] of her judgment that the appellant's proceedings for actions incompatible with Convention rights could "only be dealt with by the IPT and cannot be pursued before the courts as exclusive jurisdiction is vested in the IPT." She also held that the court "therefore has no power to grant injunctive relief in respect of any such claim."

[33] It follows from this that a number of issues arise namely:-

(a) Whether the burden lies on the Chief Constable to establish that Part II applies.

(b) Irrespective of the burden of proof whether there was sufficient evidence to support the learned judge's conclusion that the approach to the appellant fell within Part II.

(c) Whether the court retains jurisdiction to grant an injunction to prevent threatened breaches of Convention rights even if the IPT is the only appropriate tribunal to hear and determine the appellant's proceedings for actions incompatible with those Convention rights.

[34] However, those issues are to be seen in the context that the courts retain jurisdiction to hear and determine proceedings other than proceedings for actions incompatible with Convention rights even if those proceedings arise out of the same facts. Accordingly other causes of action, despite being based on the same facts, do not fall within the jurisdiction of the IPT see *Regina (A) v Director of Establishments of the Security Service* [2009] UKSC 12 at paragraph [33]. The significance is that if the appellant can establish that the facts supporting the proceedings for actions incompatible with Convention rights also gives rise to any other cause of action such as assault, misuse of private information, harassment or misfeasance in public office then those proceedings can still be brought in the courts and injunctive relief can clearly be granted to prevent threatened further invasions of the rights protected by such causes of action.

[35] In the event based on our conclusions in relation to the cause of action of misfeasance in public office which we set out at paragraphs [42] – [45] it is not

necessary for us to determine the issues which we have set out at (a) – (c) in paragraph [33]. However in deference to the submissions that we received we consider it appropriate to set out the competing arguments together with some of our provisional views though we emphasise that they are not necessary to our decision.

[36] The competing arguments of the parties in relation to the burden of proof as to jurisdiction are on the one hand that it is for the party bringing proceedings to establish that the court has jurisdiction rather than the IPT. In such a case the burden would be on the appellant to establish the facts supporting the court's jurisdiction. On the other hand that the court is presumed to have jurisdiction unless and until sufficient facts are established by the party contending that it does not. In such a case the burden would be on the party contending that it did not to establish the necessary facts. However it occurs to us that a question of jurisdiction is not a question between the parties but rather that the court has to satisfy itself as to its own jurisdiction irrespective of the attitude of either party. We were not referred to authorities such as *Rothmans of Pall Mall (Overseas) Limited and Others v Saudi Arabian Airlines Corporation* [1981] QB 368. In that case Mustill J stated that where the question of jurisdiction is one in respect of which jurisdiction has been actively withdrawn from the court and conferred on another tribunal the position is as stated by Asquith LJ in *Wilkinson v Barking Corporation* [1948] 1 KB 721 at 724:

> "It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce a right must resort to that remedy or tribunal, and not to others."

In situations of that kind Mustill J went on to say that:

> "it is immaterial whether the parties wish the court to try the action. It must disclaim jurisdiction since to continue with the action would be contrary to law. Still less can one party by unilateral act confer on the court a jurisdiction which Parliament has said it should not have."

We have not received full submissions in relation to this issue. We consider that the matter is not answered by reference to burdens of proof.

[37] Another potential solution might be found in the obligation to make full and frank disclosure. That obligation arises in relation to ex parte applications but we consider that it can also arise in relation to an application on notice where the other party can be heard. An instance of this continuing obligation is contained in the Practice Guidance issued by Lord Neuberger of Abbotsbury MR, as Head of Civil

Justice, entitled *"Interim Non-Disclosure Orders"* [2012] 1 WLR. 1003, [2012] EMLR 5, ("the guidance") which makes it clear that in relation to applications for anonymity and reporting restriction orders the obligation applies in relation to every application regardless of whether it is ex parte or on notice. We consider that this is because anonymity and reporting restriction orders affect the public who are not represented in court and also affect other media organisations and those who wish to use social media. So in that context the obligation of full and frank disclosure continues to apply given the public interests in play even if the application is on notice.

[38] The obligation to make full and frank disclosure as to the jurisdiction of the court might also arise in cases of approaches by the police to informers. In such cases the Chief Constable has a neither confirm nor deny policy ("NCND policy") for valid public interest reasons see *Re Scappaticci's Application for Judicial Review* [2003] NIQB 56 at paragraph [6]. We consider that the public policy reasons are equally applicable to approaches to individuals to induce, ask or assist that person to engage in the conduct of an informer so that it applies not only to an individual who may or may not be an informer but also to a person who may or may not have been induced, asked or assisted to be an informer. That means that, as in this case, the Chief Constable applying the NCND policy does not put any evidence before the court as to whether the approach to the appellant to be an informer falls within Part II of RIPA. It is only if the approach falls within Part II that the IPT is the only appropriate tribunal under section 65 of RIPA for the purposes of section 7 of the Human Rights Act 1998 ("HRA") in relation to any proceedings for actions incompatible with Convention rights. There are some approaches to persons to be an informer which do and some that do not fall within Part II of RIPA. For instance if an individual is induced or asked or assisted to provide information which he had obtained from a past personal or other relationship, which relationship was no longer maintained, and if he is not either expressly or implicitly being induced or asked or assisted to re-establish that relationship then the approach to him would not fall within Part II of RIPA, see paragraph [53] of *Sheridan's (Brian) application for judicial review [2017] NICA 54*. In such circumstances where a defendant cannot adduce evidence for what the court considers to be appropriate public policy reasons and where that evidence is necessary for the court to give consideration as to whether it has jurisdiction or whether the IPT has jurisdiction under section 65 of RIPA we consider that it may be that the obligation on the appellant to make full and frank disclosure of all material facts in relation to that issue continues even if the hearing is on notice.

[39] In relation to the issue as to whether there was sufficient evidence to support the factual conclusion that the approach to the appellant fell within Part II of RIPA we consider that the various factors we have identified in the background facts taken in isolation and particularly when combined with the lack of detail in the appellant's affidavit were sufficient to support the learned judge's factual conclusion. At the least the likely subjective effect on the appellant of the influences brought to bear on

him would have been to induce him to maintain personal relationships for the covert purpose of obtaining information and providing access to information, see paragraph [54] of *Sheridan*.

[40] In relation to the issue as to whether the court still retained jurisdiction to grant an injunction to prevent threatened breaches of Convention rights even if the IPT is the only appropriate tribunal to hear and determine the appellant's proceedings for actions incompatible with those Convention rights we were assisted by the submissions of Mr McGleenan QC who appeared on behalf of the Chief Constable with Ms Best. Mr McGleenan conceded that the court, as a public authority, will continue to have jurisdiction to grant an injunction under section 6 HRA in certain circumstances particularly involving an immediate and serious risk to life. Our preliminary view, which we emphasise is not necessary to our decision, is that the concession was correctly made. We also consider there may be a distinction between on the one hand the process of authorisation under RIPA which insofar as it involves proceedings for actions incompatible with human rights would clearly fall within the jurisdiction of IPT and on the other hand actions which have nothing to do with the authorisation process and are plainly not defensible. A threat such as is alleged to have been made to the appellant in this case, would fall into the second category.

The other causes of action

[41] We give consideration to the other causes of actions relied on by the appellant as supporting his entitlement to an interlocutory injunction.

(a) Misfeasance in public office

[42] We have considerable sympathy for the judge in that this tort was raised on appeal but not before her.

[43] The tort of misfeasance in public office was defined in *Three Rivers DC v Bank of England (No.3)* [2003] 2 A.C. 1 at 191 by Lord Steyn. First the defendant must be a public officer. The second requirement is the exercise of power as a public officer. The third requirement concerns the state of mind of the defendant which Lord Steyn expressed in the following terms by reference to two distinct limbs:

> "First there is the case of targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public

> officer does not have an honest belief that his act is lawful."

The appellant contends that the police officer was a public officer, that he was exercising his powers as a public officer when he made the alleged threat and that there is a serious question to be tried as to the state of mind of the police officer which it is contended fell into either the first limb or the second limb.

[44] We consider that there is a strong case that the police officer issued a threat to the appellant and that the threat was a threat to his life or bodily integrity. We also consider that there was no conceivable justification for such a threat and that there is a serious issue to be tried as to whether this would have been known to the police officer. Furthermore we consider that there is a duty of care to informants and to persons who are approached to be informants and that the potential for informants to come forward is adversely affected if they perceive that they might be subject to threats of this nature. We consider that there is a serious issue to be tried in relation to the tort of misfeasance in public office.

[45] In the exercise of discretion we do not consider it appropriate to grant an interlocutory injunction for the following reasons:-

> (a) Several months have elapsed since the alleged threat was made. There is no evidence that the threat was ever carried out. There is no evidence of anything having been said to or done to the appellant in the intervening period by any third party indicating that they have reason to believe that he is or was an informer. An interlocutory injunction looks to the future between the date of this judgment and the date of trial. Its purpose is to restrain threatened breaches of the plaintiff's rights pending trial. We consider that any threatened breach in the circumstances of this case has now passed so that on the balance of probabilities no future threat exists.
>
> (b) We were informed by counsel on behalf of the appellant that a complaint has been made to the PONI. The Police Code of Ethics is a comprehensive human rights document which draws upon the ECHR. The preamble declares that "policing is an honourable profession that plays an important part in the maintenance of a just and fair society. The people of Northern Ireland have the right to expect the Police Service to protect their human rights by safeguarding the rule of law and providing a professional Police Service." It goes on to declare that this "Code of Ethics is intended to lay down standards of conduct and practice for police officers and to make police officers aware of their rights and obligations under the Human Rights Act 1998 and the European Convention on Human Rights." The professional duty of police officers is stated to be obeying and upholding the law, protecting human dignity and upholding the human rights and fundamental freedoms of all persons as enshrined in the Human Rights Act 1998, the

European Convention on Human Rights and other relevant international human rights instruments. Specifically in relation to privacy and confidentiality it states that "police officers shall gather, retain, use and disclose information or data in accordance with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights and shall comply with all relevant legislation and Police Service policy and procedure governing the gathering, retention, use and disclosure of information or data." The role of the PONI, which is totally independent of the Police Service, is to consider whether an officer's behaviour fell below the standards set out in the Police Code of Ethics. The current investigation by the PONI into the alleged threat made to the appellant has in our estimation a considerable impact on the question as to whether any future threat exists. We consider that the PONI investigation will have a serious chilling effect in relation to the potential for future threats of the type alleged by the appellant for which there can be no justification.

(b) Misuse of private information

[46] Applying the requisite elements of misuse of private information as set out by this court in *CG v Facebook Ireland Limited and McCloskey* [2016] NICA 54 we consider that the disclosure of information (whether true or false see *Ash v McKennit* [2006] EWCA Civ 1714 at paragraph 86) that the appellant was an informer would establish that cause of action, see also *AB v Sunday Newspapers t/a Sunday World*.

[47] A question then arises as to whether misuse of private information involves proceedings by the appellant for actions incompatible with Convention rights and therefore subject to the jurisdiction of the IPT. Girvan LJ in delivering the judgment of this court in *King v Sunday Newspapers Ltd* [2011] NICA 8 at paragraph [18] stated that:

> "In the context of a dispute between individuals as opposed to a dispute between an individual and a public authority, a plaintiff's claim is not per se a claim for breach of a Convention right. It is tortious claim, that tort claim being sometimes called an action for breach of personal confidence, an action for breach of privacy or, in the nomenclature adopted by Sir Anthony Clarke MR in *Murray v Big Pictures UK Limited* [2008] EWCA 446, an action for misuse of private information. As the Master of the Rolls also pointed out in *Murray* the values enshrined in Articles 8 and 10 of the Convention are now part of the action and should be treated as of general application and as being as much applicable to disputes between individuals as to disputes between individuals and public authorities."

On that basis the plaintiff's claim for misuse of private information, being against a public authority, would be a claim for breach of a Convention right and subject to the jurisdiction of the IPT.

[48] However, subsequently in *Google Inc v Vidal-Hall and others* [2015] EWCA Civ 311 the Court of Appeal in England and Wales addressed the question as to whether the cause of action for misuse of private information is a tort for the purposes of the rules providing for service of proceedings out of the jurisdiction. Lord Dyson MR and Sharp LJ concluded that:

> "in the absence of any sound reasons of policy or principle to suggest otherwise, … misuse of private information should now be recognised as a tort *for the purposes of service out the jurisdiction*. This does not create a new cause of action. In our view, it simply gives the correct legal label to one that already exists. We are conscious of the fact that there may be broader implications from our conclusions, for example as to remedies, limitation and vicarious liability, but these were not the subject of submissions, and such points will need to be considered as and when they arise." (emphasis added).

The decision in *Google Inc* was specifically limited to whether misuse of private information was a tort for the purposes of service out the jurisdiction. This case therefore raises another aspect of the potential broader implications which were not decided in *Google Inc.* that is as to whether misuse of private information is a tort for the purposes of section 65 of RIPA or whether it falls within the category of proceedings for actions incompatible with Convention rights. That issue was not the subject of any submissions to us and the decision in *King* was not drawn to our attention. We consider that we should not give any preliminary view in relation to it in circumstances where it is not necessary for the determination of this appeal.

(c) Assault

[49] An assault is an act causing the victim to apprehend an imminent application of force upon him: see *Fagan v Metropolitan Police Commissioner* [1969] 1 Q.B. 439, 444D-E. In *R v Ireland* [1998] A.C. 147 Lord Steyn stated that:

> "There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, e.g. a man accosting a woman in a dark alley saying, 'Come with me or I will stab you.'"

He, therefore, rejected the proposition that an assault can never be committed by words and in that respect we reject the conclusion of the learned judge that:

> "As the plaintiff's claim relies entirely on the words used by the two men … there is no serious question to be tried that the defendants were guilty of the tort of assault …."

However, in *Ireland* Lord Steyn went on to illustrate that the fear has to be of the possibility of immediate personal violence. We consider that the learned judge was correct to determine that there was no serious question to be tried in relation to the tort of assault as there is no evidence of an apprehension of immediate personal violence. For instance the threat was not a threat of immediately disclosing to a terrorist organisation with the consequence of an immediate apprehension of personal violence.

(d) Harassment

[50] The facts as contained in the appellant's affidavit do not support two threats having been made to him so that there is no serious question to be tried as to one of the constituent elements of harassment, namely a course of conduct which must involve conduct on at least two occasions, see article 2(3) of the Protection from Harassment (Northern Ireland) Order 1997. We consider that the learned judge was correct to conclude that there is no serious issue to be tried that the defendant harassed the appellant as there is no evidence of a course of conduct.

Conclusion

[51] We consider that there is a serious question to be tried in relation to the tort of misfeasance in public office but in the exercise of discretion we decline to grant an interlocutory injunction. Accordingly, we dismiss the appeal.

[52] We will hear counsel in relation to costs.

Schedule

The judgment of the Court of Appeal is made available in both hard copy and in electronic word format before judgment is given. The contents of the judgment are confidential to the Appellant's and to the Respondent's legal representatives but can also be disclosed to the Appellant and to the Chief Constable themselves. Those to whom the contents are disclosed must take all reasonable steps to preserve their confidentiality. No action is to be taken in response to the judgment before being formally pronounced unless this has been authorised by this Court. A breach of any of these obligations may be treated as a contempt of court.

1. Counsel must check the judgment for any apparent factual, typographical or grammatical error or ambiguities and inform the Court of Appeal Office of any that are found indicated by tracked changes on a word format copy of the judgment, or of the fact that none has been found, by email at Courtofappeal@courtsni.gov.uk , by noon on **Monday 30 October 2017**, so that any consequential alterations can be made to the draft before judgment is delivered on **Monday 6 November 2017** in The Royal Courts of Justice, Chichester Street, Belfast.

2. Counsel and the parties must consider the terms of the judgment to determine whether there is any reason why the judgment should not be published on the Northern Ireland Courts and Tribunals Service website or as to whether it requires any further anonymisation prior to publication and the solicitors for the parties must inform the Court of Appeal Office by email at Courtofappeal@courtsni.gov.uk , by noon on **Monday 30 October 2017** one way or the other as to whether there is any objection to publication or as to whether there are any suggestions as to any further anonymisation indicated by tracked changes on a word format copy of the judgment, so that consideration can be given to any such representation and any consequential alterations can be made to the draft before judgment is delivered.

3. The legal representatives for the appellant must take the steps set out in paragraph [7] of the judgment and must inform the Court of Appeal Office by email at Courtofappeal@courtsni.gov.uk , by noon on **Monday 30 October 2017** that those steps have been completed.

Dated 23 October 2017