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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **09/09/2014**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**BETWEEN:**

**AB**

**Appellant;**

**-and-**

**SUNDAY NEWSPAPERS T/A THE SUNDAY WORLD**

**Respondent**

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**Before: Morgan LCJ and Higgins LJ**

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**MORGAN LCJ (giving the judgment of the court)**

[1] This is an appeal from a decision of Gillen J refusing an application for an interim injunction preventing the respondent from harassing, pestering, annoying or molesting the appellant by publishing, distributing, broadcasting or transmitting any information relating to the plaintiff concerning alleged criminal activities including murder, his association with dissident Republican paramilitaries and the provision by him of information to state authorities about criminal activities. Mr Girvan appeared for the appellant and Mr Lockhart QC appeared for the respondent. We are grateful to both counsel for their helpful oral and written submissions.

[2] At the end of the oral hearing we indicated that we would give our reasons at a later date but made an interim order preventing the respondent their servants or agents from publishing, distributing or transmitting any information by any means that suggested that the appellant provided information to the state authorities about any criminal activities. These are our reasons.

**Background**

[3] In its edition published on 13 October 2013 the respondent published an article under the headline "Dossier of Death" naming the appellant as being suspected of ordering the murder of Kevin Kearney over a drug-related death. On 20 October 2013 in a further article under the heading "Hunters are hunted" it was alleged that the appellant was one of four men suspected of involvement in the murder who were being hunted by associates of the dead man. On 25 October 2013 the appellant issued a writ claiming damages for libel in respect of the said articles.

[4] In a third article published in 15 December 2013 under the headline "Dope Head" the appellant was described as a tiger kidnapper. On 22 December 2013 a further article under the headline "Dissident Tout Supplied IRA Chiefs with Cars Fitted with Spooks/Bugs Betrayal" and "Big Bugger" described the appellant as a convicted criminal who joined the ranks of the dissidents after befriending Colin Duffy while in prison and supplied the police with bugging devices and audiotapes planted in cars provided to dissident leaders. The appellant issued a further writ on 16 January 2014 claiming damages and an injunction by reason of harassment contrary to the Protection from Harassment (Northern Ireland) Order 1997, libel, malicious falsehood, misuse of private information and breaches of Articles 2, 3 and 8 of the ECHR.

[5] In his grounding affidavit the appellant stated that he had been given PM1 forms by the PSNI on 30 October 2013 and 1 November 2013 advising him that criminal elements were planning to carry out an imminent gun attack on him and that he should review his personal security immediately. He was concerned that his partner and her child were at risk as was his daughter who is currently studying at university. He stated that he was a Republican, that he had a criminal record and had been part of a Republican protest against prison conditions endured by Colin Duffy, Alex McCrory and others. He stated that the allegations made against him in the newspaper were untrue.

[6] Subsequent to the publication of the first article he was physically attacked by a relative of Kevin Kearney twice in the street and had been verbally abused and called a "tout" since the further articles. He had to move from his home due to fears for his safety. He had been arrested in connection with the investigation into the murder of Kevin Kearney on 11 October 2013 but had been released without charge. In September 2012 a blog posted by Dissident Media Watch under the heading " AB: Republican – Criminal – State Agent? You Decide!" raised an issue as to whether he was an informer and whether he could be trusted by Republicans. The appellant

had not been aware of the blog or the allegations within it until it was exhibited to these proceedings

**The decision of the learned trial judge**

[7] The learned trial judge recognised that the appellant's claim broadly required the court to effect a balance between various convention rights protecting the appellant and those protecting the freedom of expression of the press. This was specifically recognised in section 12 of the Human Rights Act 1998 which provided:

> "12. Freedom of Expression
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> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> ..(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic …, to –
>
> (a) the extent to which –
>
> (i) The material has, or is about to, become available to the public; or
>
> (ii) It is, or would be, in the public interest for the material to be published."

[8] The approach which the court should adopt to the likelihood test in section 12(3) of the 1998 Act was helpfully discussed by Lord Nicholls in Cream Holdings Ltd v Banerjee [2005] 1 AC 253. Delivering the judgment of the House he set out the problem of paragraph 19 and the solution at paragraph 20.

> "19…. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular

> person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a 'probability of success' test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial.
>
> 20. These considerations indicate that 'likely' in section 12(3) cannot have been intended to mean 'more likely than not' in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that 'likely' should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary."

He concluded at paragraph 22 that in order to achieve the necessary flexibility the degree of likelihood of success at trial needed to satisfy section 12 (3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. The court should not make an interim restraint order unless satisfied that the applicant's prospects of success at trial were sufficiently favourable to justify such an order being made in the particular circumstances of the case.

[9] The learned trial judge looked first at the claims under Articles 2 and 3 of the Convention. Applying the test in Osman v UK [1998] 29 EHRR 245 he was satisfied on the basis of the PM1s served on 30 October and 1 November 2013 that there was a

real and immediate risk to the appellant's life. He then examined the extent to which that risk was linked to the impugned publications. He noted that the appellant had been sentenced to 4 years imprisonment on a count of robbery on 22 June 2012 closely associated with a tiger kidnapping. Coverage of his involvement was extensive. The Dissident Media Watch blog had questioned whether the leniency of that sentence suggested that he was a state agent. He had taken on a role as spokesman for Republican prisoners both during his period of imprisonment and when he was released. He attended trials of allegedly high-profile dissident republicans and participated in prison protests connected with them. The learned trial judge was satisfied that his arrest in connection with the murder of Kevin Kearney would have been common knowledge within the circles in which he moved.

[10] The learned trial judge concluded that in light of the appellant's engagement in public activities and the information available to those who might harm him there was no foundation for the appellant's contention that the real and immediate risk to his life was linked to these articles or that any additional risk was created by them. Even if there was some additional risk the response of the court had to be proportionate to that increased risk. It was in the public interest that investigative journalism should not be impeded where it was publishing legitimate information concerning serious criminal activity. This was not a case in which the newspaper was publishing his address or details about his children or family. His photographs had already been widely distributed in the media. The learned trial judge further took the view that it was in the public interest that investigative journalism should be free to reveal the fact that someone was acting on behalf of the state particularly where that allegation was already in the public arena.

[11] He then turned to the claim in defamation. He noted the principle in Bonnard v Perryman [1891] 2 Ch 269 that where the defender contended that the words complained of were true and asserted that he would plead and seek at trial to prove the defence of justification the court would not grant an interim injunction unless exceptionally the court was satisfied that such a defence was one that could not succeed. It was not enough for the defendant to state that he intended to justify without identifying the ambit or extent of that defence (see Sunderland Housing Company v Baines [2006] EWHC 2359). The learned trial judge was satisfied that the respondent had sufficiently identified the defamatory meaning or meanings which it intended to justify and that there was likely to be substance in the suggestion that to reveal sources at this stage would place the deponent's life in danger. He concluded that he should not grant an interim injunction on the basis of the alleged defamation.

[12] In respect of the claim for harassment the learned trial judge set out the six matters which Simon J considered in Dowson v Chief Constable of Northumbria Police [2010] EWHC 2621 had to be established in order to found a claim in harassment.

(i) There must be conduct which occurs on at least two occasions.

(ii) The conduct is targeted at the claimant.

(iii) The conduct is calculated in an objective sense to cause alarm or distress.

(iv) The conduct is objectively judged to be oppressive and unacceptable.

(v) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.

(vi) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways e.g. "torment" of the victim, or "of an order which would sustain criminal liability". Article 10 of the Convention is clearly a live issue in such matters.

[13] The learned trial judge also referred to the remarks of Lord Phillips in Thomas v News Group Newspapers Ltd [2001] EWCA Civ 1233 where he said that press criticism, even if robust, did not constitute unreasonable conduct and did not fall within the natural meaning of harassment. Before press publications were capable of constituting harassment they must be attended by some exceptional circumstances which justify sanctions and the restriction on the freedom of expression that those sanctions involve. Such circumstances will be rare. Given the material already present in the media the learned trial judge concluded that this was not one of those exceptional cases which justified sanctions on the basis of harassment at the interim injunction stage.

[14] The Article 8 claim was made firstly on the basis that there was a reasonable expectation of privacy in relation to the photographs of the appellant and secondly that there was interference with his family and privacy rights. So far as the photographs were concerned the learned trial judge considered that photographs of the appellant had already been widely distributed in the earlier media publications and since these photographs did not disclose any private activities the appellant did not have a reasonable expectation of privacy in respect of the photographs.

[15] In terms of the family and privacy rights the learned trial judge recognised that neither Article 8 nor Article 10 rights had precedence over the other. It was important to focus on the comparative importance of the specific rights being claimed in the individual case. He concluded that in the absence of any specific identifiable reference to family in the article there was no basis for the appellant's contention that his partner and her child were at risk because the child was at school or that this imposed limits on the extent to which routines could be varied. He concluded that there was sufficient public interest in the publications to justify the curtailment of any Article 8 right.

**The submissions of the parties**

[16] In this appeal the appellant placed considerable emphasis upon the assertion in the article on 22 December 2013 that the appellant was a confidential human intelligence source for the PSNI in respect of dissident republicans. It was submitted that the relationship between the police and an informant is a confidential relationship so that disclosure of the identity of an informant constitutes a breach of the obligation of confidentiality. In support of this submission the appellant relied on passages from An Informer v A Chief Constable [2012] EWCA Civ 197 and Attorney General v Guardian Newspapers Limited (No 2) [1988] UKHL 6. The former case had not been cited to the learned trial judge and the relevant passage in the latter case does not appear to have been brought to his attention.

[17] Although submissions were made to support the claims both in Article 2 and Article 8 we accept the submission of the respondent that the learned trial judge had carefully analysed the nature and source of the Article 2 risks to the appellant. Those risks potentially emanated from those connected with dissident republicanism and that group in particular would have been likely to have had access to the Dissident Media Watch blog. We find, therefore, that there is no reason to disturb the learned trial judge's conclusion that the risk to life was not exacerbated by the publication or republication of the matters contained in the newspaper reports. We further consider that the learned trial judge was entitled to take the view that there was sufficient material disclosed by the respondent to indicate that it intended to justify its assertions at trial.

[18] Insofar as the harassment allegations are concerned we consider that the learned trial judge properly identified the leading cases and that his conclusion that there was a public interest in the publication of allegations of serious criminal conduct was plainly correct. Any other conclusion would involve a significant restraint upon the freedom of the press to engage in investigative journalism on matters of serious public concern.

[19] In respect of the claim for breach of confidence and misuse of private information the respondent maintained firstly that the learned trial judge was correct to conclude that it was in the public interest that investigative journalism should be free to reveal the full nature of criminal activity in respect of someone allegedly acting on behalf of the state. Secondly, it was maintained that the information in any event was in the public arena. It had been disclosed in the blog published in September 2012 which was accessible as the first item on a Google search against the appellant's name.

**Consideration**

[20] We considered that the only substantive issue in this appeal concerned the republication of allegations that the appellant was an informer on the basis that such republication would constitute a breach of confidence and misuse of private information. In respect of the other aspects of the claim we consider that the reasoning and conclusions of the learned trial judge were correct and we do not need to consider them further.

[21] This aspect of the claim appears to have received only modest attention in the submissions of the parties and in the judgment. It has been argued more fully before us. It is accepted by both parties that the truth or falsity of the information is irrelevant in considering whether there has been a breach of the duty of confidence in respect of which interim measures should be granted. If the allegation is untrue there is clearly no public interest in asserting it.

[22] The first question is whether or not such information gives rise to duty of confidence. We are satisfied that quite independently of the Human Rights Act 1998 a duty of confidence arises where information of this nature comes to the knowledge of another person. The issue was discussed in the House of Lords in Attorney General v Guardian Newspapers Limited (No 2) [1988] UKHL 6. The House noted and accepted the evidence of Sir Robert Armstrong that the confidence of informers who relied on their identity and activities being kept confidential would be damaged if publication of that information were not prevented. Accordingly there was a considerable public interest in preventing disclosure of their identities.

[23] That public interest has in our view been given statutory support by the provisions of section 29 of the Regulation of Investigatory Powers Act 2000. That section deals with the authorisation of covert human intelligence sources, colloquially referred to as informers. The fact that the source is covert is, of course, part of the description and by virtue of section 29 (5) those responsible for the source have an obligation to ensure that there is a person with day-to-day responsibility for the source's security and welfare.

[24] We are satisfied, therefore, that a person acting as a convert human intelligence source or informer has a reasonable expectation that his confidential relationship will not be disclosed. It is well recognised that many informers have criminal backgrounds and belong to a criminal social environment. Their motives for giving information to the police may be ambiguous or mixed (see An Informer v a Chief Constable [2012] EWCA Civ 197 per Toulson LJ at para 61). Those features do not, however, diminish the reasons for protecting the confidentiality of the relationship which are firstly, to secure the welfare of the informer and secondly, to encourage the supply of information to the police by people who are unlikely to come forward unless they can be confident that their confidentiality will be protected. We do not accept, therefore, that it is in the public interest that investigative journalism should be free in all cases to reveal the full nature of the criminal activity of someone acting as an informer.

[25] We have accepted in this case that investigative journalism should be free to publicise allegations of criminal conduct on the part of the appellant. The allegation that he was a state agent raises different issues. These issues relate both to the private life of the appellant and to the public interest in ensuring that others with valuable information can be confident that they can provide this to the relevant authorities without fear of disclosure. This appellant has been convicted of robbery. He was questioned about, but not charged with, his involvement in a murder. He has acted as a spokesman for dissident groups but no charges have arisen from that activity. Although the position might change in the event that he was convicted of murder we consider that there is a considerable public interest in the deterrence of publication of any allegation that he was a state agent.

[26] We accept that the duty of confidence can only arise in circumstances where the material has not entered the public domain. We also recognise that this information was published in the blog in 2012 and can be accessed through the internet. We further accept that this information is likely to be broadly known to those involved in dissident circles. That still leaves, however, a wide circle of the public who will be oblivious to these allegations. This matter will no doubt be pursued at trial but it seems to us on the evidence available at present that this is a case in which there has been a limited publication to a small section of the public through the blog. The fact that the information remains available on the internet does not mean that the public have accessed it.

**Conclusion**

[27] In considering the proportionality issues we gave particular weight to the interests of national security, the safety of the public and the prevention of disorder

and crime. We were satisfied that these interests made the appellant's prospects of success at trial sufficiently favourable to justify the imposition of an interim injunction in the terms set out at paragraph 2 above.