

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**BETWEEN:**

**CRAWFORDSBURN INN LIMITED**

**Plaintiff**

**-v-**

**NEILL GRAHAM**

**Defendant**

**WEATHERUP I**

[1] This is an appeal against the Master's decision of 30 April 2013 dismissing the defendant's application for remittal of this case to the County Court. The matter turns on whether exemplary damages may be awarded in the plaintiff's action for breach of contract and breach of confidence. Mr McEvoy appeared for the defendant moving party and Mr Milliken appeared for the plaintiff.

[2] The Statement of Claim pleads as follows. The plaintiff carries on business as the Old Inn in Crawfordsburn and the defendant is a former employee of the plaintiff. By a confidential agreement made on 14 November 2011 in proceedings in the Industrial Tribunal, the defendant, who was the claimant, sought compensation for constructive dismissal against the plaintiff. The claim was settled on confidential terms agreed following conciliation by the Labour Relations Agency and the agreement constituted a certificate in writing pursuant to Article 21A of the Industrial Tribunal (Northern Ireland) Order 1996. In consideration of entering into the agreement the plaintiff paid the defendant the sum of £12,500. It was an express term of the agreement that the fact of settlement and the terms of settlement were to remain confidential. However, in breach of the agreement it is pleaded that the defendant provided a written witness statement on 14 September 2012 to representatives of another former employee of the plaintiff who was seeking to

maintain a claim in the Industrial Tribunal against the plaintiff. The witness statement of the defendant stated "I resigned my position and consequently litigated against The Crawfordsburn Inn Ltd for constructive dismissal and unlawful deduction of wages and was paid an out of court settlement". The plaintiff relies on the statement as a breach of the terms of the confidential agreement and claims that it has suffered loss and damage by reason of the breach of contract and negligence and breach of confidence of the defendant and claims damages against the defendant, including aggravated and exemplary damages.

[3] By the Defence the defendant admits that the witness statement contained the words recited in the Statement of Claim but denies that this constituted a breach of the agreement. It is pleaded that the information alleged to be confidential was at all material times in the public domain or was generally known to numerous persons to whom the plaintiff had supplied the information. It is denied that the plaintiff's duty of confidence subsisted beyond November 2011. The publication was said to be in the public interest as the plaintiff became subject to media scrutiny and a two page article appeared in the Sunday Life newspaper on 11 November 2012.

[4] The grounding affidavit sworn by Joseph McCollum solicitor for the defendant refers to authorities in relation to damages for breach of confidence and he avers that it is now clearly established that the amounts awarded have been very modest and for the most part commensurate with the District Judges' Court. He lists authorities on damages in the range of £2,500-£3,750. Further Mr McCollum refers to a decision of the Court of Appeal in Northern Ireland in McGaughey v Sunday Newspapers [2011] NICA 51, which upheld a decision of McCloskey J to remit a breach of confidence claim to the County Court. The affidavit further states that there is no known authority which establishes that exemplary damages are recoverable for this form of action and refers to Mosley v Newsgroup Newspapers [2008] EWHC 1777.

[5] The Master gave a written decision. He stated that this is really a breach of contract/breach of confidence case; that on any application for remittal the court must take the plaintiff's case at its reasonable height; that it is established law that exemplary damages are not available in breach of contract cases, although he refers to McGregor on Damages 18<sup>th</sup> Edition at 11.016 which suggests that this could change; the plaintiff referred to awards of exemplary damages that might be made in breach of confidence cases; to the decision of Higgins LJ in Breslin v McKevitt [2011] NICA 33; stated that a Court might take the view that a breach of confidentiality clause in an agreement encapsulating a Court agreement did merit punitive damages; that in the context of the case one would have thought that any amount of exemplary damages would be modest, particularly having regard to the likely level of general damages; referred to the scale of general damages noted above and to the claim for aggravated damages. The Master concluded that substantial and relatively complex issues arise with respect to exemplary damages which could only be resolved properly by an assessment of the facts, something which he was not

equipped to do and ought not to entertain except at a most cursory level and in the circumstances he was not satisfied that the matter should be remitted.

[6] The modern law on exemplary damages stems from the decision of the House of Lords in Rookes v Barnard [1964] AC 1129. McGregor on Damages 18<sup>th</sup> Edition describes the three categories of cases in which exemplary damages are possible as (1) the first common law category - oppressive, arbitrary or unconstitutional conduct by Government servants, (2) the second common law category - conduct calculated to result in profit, and (3) express authorisation by statute. Only the second category is potentially relevant in the present case.

[7] After Rookes v Barnard there also developed, in addition to the categories test, a cause of action test for exemplary damages. The cause of action test held that exemplary damages could only be awarded where the case fell within the categories of cases in which exemplary damages had been awarded before Rookes v Barnard. This cause of action test was approved by the Court of Appeal in AB v Northwest Water Services Limited [1993] QB 507, a claim in nuisance, as reflecting the combined effect of the decisions of the House of Lords in Rookes v Barnard and Broome v Cassels [1972] AC 1027.

[8] The Law Commission Report on Aggravated, Exemplary and Restitutory Damages (1997), in dealing with exemplary damages, set out the categories test and the cause of action test. The Report discussed the scope of exemplary damages and stated that there was no clear authority on whether exemplary damages were available when the defendant had committed an equitable wrong such as breach of confidence but that it was not then possible to recover exemplary damages for an equitable wrong. Further it was stated that exemplary damages were clearly unavailable in a claim for breach of contract, referring to Addis v Gramophone Company Limited [1909] AC 488 where the House of Lords had refused to award such damages.

[9] The House of Lords revisited the subject of exemplary damages in Kuddus v Chief Constable of Leicestershire [2002] 2 AC 122, a claim relating to misfeasance in public office. The categories test was reaffirmed and the cause of action test was rejected. McGregor on Damages comments that it can confidently be said that today exemplary damages are possible across the whole range of tort. However question marks are raised over recovery of exemplary damages for breach of contract or breach of confidence.

[10] Some Commonwealth countries have not adopted Rookes v Barnard and have felt able to extend the reach of exemplary damages. The plaintiff referred to Witton v Pilot Insurance Company [2002] 1 SCR 595 a decision of the Supreme Court of Canada in relation to punitive damages for breach of contract. The case concerned an insurance company's breach of the contractual duty of good faith. Binnie J stated that the only basis for the imposition of punitive damages must be a finding of the commission of an actionable wrong which caused the injury

complained of by the plaintiff. This approach was said to have been approved in the Restatement of the Law of Contracts in the United States which also provides that punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. Binnie J concluded that punitive damages could be awarded as a breach of the contractual duty of good faith was independent of and in addition to the breach of contractual duty to pay the loss and constituted an actionable wrong.

[11] However as noted above the House of Lords decided in Addis v Gramophone Company Limited in 1909 that exemplary damages are not recoverable in actions for breach of contract. McGregor on Damages comments that that position might change, although it is not for this Court of first instance to make any such change. On the authority of Addis, exemplary damages are not recoverable for breach of contract. The parallel with the present case is that the claim for breach of confidence arises out of a contractual relationship. This is not the kind of breach of confidence that arises for example from press intrusion where there is not a contractual relationship between the parties.

[12] Further the plaintiff relied on the decision in Agricultural Corporation v New Zealand Green Mussel Company [1986] NZHC 109 a decision from New Zealand where exemplary damages were found to be recoverable in a claim for breach of confidence, although not awarded on the facts of the case.

[13] The issue of exemplary damages in a breach of confidence claim was considered in England by Eady J in Mosley v Newsgroup Newspapers in 2008. Breach of confidence has been developed in recent years in the context of the jurisprudence on the right to respect for private and family life. On a review of the authorities on the award of exemplary damages in relation to breach of confidence Eady J at paragraph [197] concluded -

“I therefore rule that exemplary damages are not admissible in a claim for infringement of privacy since there is no existing authority whether statutory or common law to justify such an extension and indeed it would fail the tests of necessity and proportionality.”

[14] Exemplary damages were considered by the Court of Appeal in Northern Ireland in Breslin v McKeivitt in 2011, the civil case arising out of the Omagh bombing involving intentional tort. At paragraph [139] Higgins LJ concluded -

“However upon reflection given the anomalous nature of the remedy [exemplary damages] and its longstanding restriction to very limited types of cases by the highest judicial authority we do not consider that it would be appropriate for this court to embark upon the radical extension sought by the plaintiffs.”

[15] The defendant referred to the decision of the Court of Appeal in Northern Ireland in McGaughey v Sunday News which concerned an action for misuse of private information by the press. The Court upheld the decision to remit the case to the County Court and did not address the issue of exemplary damages and thus is not of assistance on this issue.

[16] The plaintiff further relied on the remedies proposed in the Law Commission Report. The Report recommended that there should be alteration of the law in relation to exemplary damages. The alterations have not been adopted but the Report at page 184 does state that exemplary damages should be retained, that they should be referred to as punitive damages and that they might be awarded for any tort or equitable wrong and an equitable wrong includes breach of confidence.

[17] The plaintiff also relied on the Leveson Report of 2012 (Leveson Inquiry: Culture, Practice and Ethics of the Press) which states that, in line with the conclusion in the Law Commission Report, exemplary damages should be available as a remedy for breach of confidence. The Leveson Report and the Law Commission Report contain recommendations for reform that are a matter for Parliament to determine and not a matter for this Court.

[18] The result is that I am satisfied that exemplary damages may not be awarded in this action for breach of contract and breach of confidence. The House of Lords in Addis v Gramophone Company Ltd found that exemplary damages could not be awarded for breach of contract. Further I follow the general approach of Higgins LJ and the Court of Appeal in Northern Ireland in Breslin v McKeivitt that the anomalous nature of exemplary damages and the longstanding restrictions applied by the House of Lords render it inappropriate to extend the award of exemplary damages. I adopt the approach of Eady J in England and Wales in Mosley v Newsgroup Newspapers on the issue of awarding exemplary damages in claims for breach of confidence. There will be no award of exemplary damages in the present case.

[19] In any event, if exemplary damages were recoverable in an action for breach of contract or breach of confidence, I am satisfied that the conduct in this case is not such as would attract an award of exemplary damages. Such an award could only arise under the second common law category but this is not a case where a plaintiff is seeking to promote his profitability. The question of sanctions for breach of an agreement to settle an employment dispute in tribunal proceedings raises different issues. Exemplary damages under the second category would not be recovered in a case such as the present.

[20] Accordingly, I am satisfied that the plaintiff cannot recover exemplary damages. The value of the claim cannot reach the High Court limit. The case should be remitted to Newtownards County Court.