

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

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**QUEEN'S BENCH DIVISION**

**BETWEEN:**

**GEORGE GALLOWAY**

**Plaintiff;**

**-and-**

- 1. WILLIAM FREDERICK FRAZER**
- 2. GOOGLE INCORPORATED T/A YOUTUBE**
- 3. INDEPENDENT NEWS MEDIA T/A BELFAST TELEGRAPH**
- 4. PERSONS UNKNOWN**
- 5. GOOGLE UK LIMITED**
- 6. GOOGLE IRELAND LIMITED**

**Defendants.**

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**HORNER J**

**INTRODUCTION**

[1] This is an interlocutory application brought by Google Inc ("Google") to set aside the Order made by Stephens J of 23 October 2014 in which he granted leave to the plaintiff to serve proceedings out of the jurisdiction on Google at its registered office in Delaware, USA.

[2] I do not propose to set out all the arguments advanced by counsel for the respective parties. This is not intended as a lack of respect for their efforts. I am acutely conscious that this judgment on an interlocutory matter is disproportionately long given the issues which are in dispute. Each party can be assured that I have taken into account all the various arguments advanced on behalf of the plaintiff and Google. I have endeavoured to read all the various authorities. All counsel can be commended for their enthusiasm, although in truth there has been a uniformity of effort which has resulted in every claim, regardless of its cogency, being often afforded the same investment of time and energy. There has been a failure to distinguish between strong and weak arguments. This has meant, and I take just

one example, although the criticism applies to both sides, that Google has expended much effort in claiming that it was misled by the plaintiff being called Connolly in a letter sent to it by the plaintiff's solicitors, KRW Law. Any reasonable reading of the letter of complaint dated 27 August 2014 would quickly lead to the conclusion that any confusion in the overall context was highly unlikely, as Mr Lockhart QC for Google did concede.

[3] The ex parte application and the inter partes hearing in respect of the application for leave to serve out of the jurisdiction involved 3 different judges, all of whom had to read voluminous papers, listing on 14 separate days and the citing and consideration of almost 100 legal authorities never mind various Statutes, Orders, Regulations and Directives. I will offer suggestions at the conclusion of this judgment as to how applications such as these can be better managed in the future. The need to prioritise other work, and the requirement on at least three occasions to re-read all the papers, has meant that delivery of this judgment has been delayed, which is also unsatisfactory.

## **BACKGROUND INFORMATION**

[4] George Galloway ("the plaintiff") is a prominent British politician. He is the founder of the Respect Party. William Frederick Frazer ("the defendant") is a Northern Ireland political activist who is well known in the province for his involvement in street protests. Google is the owner of YouTube, which offers a facility for posting video extracts on the internet. Google UK Limited is the UK subsidiary of Google. Google Ireland Limited is the Republic of Ireland subsidiary. There are other defendants, including Independent News Media PLC which owns and publishes the Belfast Telegraph but it has played no part in the present application.

[5] A writ of summons was issued on 9 September 2014 by the plaintiff claiming damages and alleging that Google had unlawfully posted on YouTube videos from the defendant and his supporters. These followed on from a "Saturday night with George Galloway" event which had taken place at the Ulster Hall, Belfast, on 23 August 2014. At that stage Google UK Limited or Google Ireland Limited were not defendants to the writ of summons.

[6] Google operates in 61 countries and across 61 languages. Each month, more than one billion unique users visit YouTube and over 6 billion hours of video are viewed. Sixty hours of video are uploaded each minute to YouTube. To date almost one billion videos have been uploaded to the YouTube website. It is a truly mammoth undertaking organised on a gigantic scale.

[7] YouTube asserts that it is an information society service as defined in the Directive 2000/31/EEC - the "E-commerce Directive" and it provides hosting functions within the ambit of Article 14 of the E-commerce Directive and Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002 ("the E-commerce

Regulations”). In Gestevison Telecinco SA v YouTube LLC [2014] 2 CMLR 13 the Madrid Court of Appeal ruled that YouTube was a “host” falling within the scope of Article 14 of the E-commerce Directive. There is no doubt that Google in its guise as a search engine is a data controller: see Google Spain SL and Google Inc v Agencia Espanola de Datos and Another [2014] 3 WLR 569. However the case which was originally made by the plaintiff did not include any complaints against the Google search engine. It is also fair to say that the changes wrought by the internet and social media in the field of communications have meant that the law has struggled to keep up. There still remains a level of uncertainty about the nature of the functions performed by these internet behemoths and what legal terms should properly be applied to the functions they perform. Very often it will depend on the factual matrix. A contested interlocutory application is not the forum in which to reach determinations on controversial factual disputes. The court intends to leave the resolution of such disputes well alone.

[8] YouTube has two ways of dealing with material which it is claimed is unlawful. There is (a) the flagging system and (b) legal removal.

(a) YouTube users can “flag” content about which they object. YouTube then reviews the flagged content to determine whether the video violates the YouTube policies which are posted in the Community Guidelines. The court has no idea how this review is performed.

(b) Alternatively, users can complain about legal issues and seek a video’s removal on that basis. This can be done either by using a Removal Request Page or through the “Reporting and Enforcement” section of YouTube. This permits users to complain about, for example, breach of copyright or defamation. It is averred that YouTube assesses each removal complaint on its own merits. Again it is not exactly clear to the court how this procedure is carried out.

[9] These two processes operate individually of each other and are staffed by different personnel who apply different review criteria. A “flagging review” considers whether the video complained of breaches YouTube’s terms of service and/or Community Guidelines. On the other hand a legal review considers whether the index video breaches the laws of that particular country from where the complaint emanates.

[10] If a video is flagged and reported under both processes, then each different section reviews it and determines on the respective criteria that that section has to apply what should be done. In 2014 9,900,000 videos were removed in response to user flags and over 3,800,000 videos were blocked in response to legal removal reports.

[11] As I have said the court remains in the dark about just how these reviews are carried out. It has no idea of the resources devoted by Google to these two separate

processes and who carries out the reviews and in what circumstances. It would be pointless for this court to speculate. But the court is entitled to take judicial notice of the fact that Google is a huge corporation. It is a profit making organisation. It has an enormous turnover and generates substantial profits. YouTube is a major contributor to this success. Prima facie the court can reasonably expect that Google will devote sufficient resources to ensure that it does not permit YouTube to be used to allow malefactors to post vile and scurrilous calumnies that remain available for access to the public for unreasonable periods of time.

[12] By letter dated 11 September 2014 the plaintiff's solicitors purported to serve on Google UK Limited a writ of summons, notice of motion and an affidavit from the plaintiff claiming an injunction contra mundum in respect of the misuse of private information by the defendants and the harassing of the plaintiff by the defendants. For reasons which have not been explained, no pre-action letter in accordance with the provisions of the Practice Direction in respect of defamation was sent. I do understand that the first defendant entered into an undertaking following the application for an injunction which precludes the defendant from publishing any video tape, film, recording or transcript of the defendant relating to the plaintiff taken in or about Bedford Street on 23 August 2014.

[13] The first video, URL2, was posted to a YouTube account on 23 August 2014. The following day another video URL1 was posted to another YouTube account. On 26 August 2014 the plaintiff's solicitors flagged the video, URL1, for review using the reporting tool on the YouTube website. It was asserted that the issue of the video was "Racial-Promotes Hatred". Within 5 minutes the entire channel upon which the video, URL1 was maintained was removed globally from YouTube because it was regarded as belonging to a spam channel. On 27 August 2014 notification and a take-down letter in relation to URL2 was received from the plaintiff's solicitors. These letters complained that the video contained "untrue imputations against the reputation of Mr Connolly". On 28 August 2014 YouTube's Legal Support responded to the plaintiff's solicitors by email stating that the "complaint has been sent for review".

[14] On 29 August 2014 a YouTube user flagged the video URL2 for review on the grounds of "pornography" using the reporting tools on the YouTube website. This was followed shortly afterwards with another flagging from another YouTube user on the grounds of "dangerous behaviour". On 1 September 2014 the plaintiff's solicitors flagged the video URL2 alleging "Racial - Promotes Hatred" using the reporting tool. On 10 September 2014 YouTube legal support replied to the plaintiff's solicitors confirming that the complaint had been sent for review and "in relation to video URL2". On 18 September 2014 YouTube Legal Support wrote to the plaintiff's solicitors noting that the video URL2 had been blocked for viewers in Northern Ireland having been considered not to comply with local law. No evidence has been adduced that would allow this court to conclude that anyone in Northern Ireland thereafter downloaded and viewed URL2. On 26 January 2015 a complaint was made about captions relating to URL2 for the first time by the

plaintiff's solicitors. On 3 February 2015 access to any caption was blocked to Northern Ireland users.

[15] On 21 October 2014 the plaintiff's solicitors wrote to Google's solicitors. On 22 October 2014 Google's solicitors replied to the plaintiff's solicitors confirming that it was Google's intention to dispute the jurisdiction of the courts in Northern Ireland to hear the plaintiff's claims and relying on the decision in Tamiz v Google Inc [2012] EWH 449; 2013 (EWCA Civ 68). At a review on 20 October 2014 before Stephens J, Google's solicitors had attended to represent Google's interests. Following service of the ex parte application, Mr Lockhart did attend on 23 October 2014. It was made clear that Google would dispute the jurisdiction of the courts of Northern Ireland to hear these claims. There followed an 'ex parte' application in which Google's legal team declined to take part, seeking leave to serve outside the jurisdiction in respect of a variety of claims, namely, harassment under the Protection from Harassment (Northern Ireland) Order 1997 ("the 1997 Order"), libels, slanders, malicious falsehoods and breaches of the tort of misuse of private information. This was heard by Stephens J who had heard the earlier application for an injunction, which had ended, as I have noted, with the defendant giving the plaintiff an acceptable undertaking in terms which require him to refrain from certain behaviour in the future. Mr Lockhart QC on behalf of Google says that he had attended as a matter of courtesy and was not in a position to make submissions. I accept Mr Lockhart's explanation. However, I would be surprised if Google had not been alert to the omission, for example, of an averment from the grounding affidavit that the plaintiff had a good cause of action as required by Order 11 Rule 4(1)(b) of the Rules of the Supreme Court (NI) 1980. For whatever reason, Google kept its powder dry and permitted the plaintiff to proceed unopposed. In any event Google could not have known that Stephens J would be given the incorrect test for granting leave out of the jurisdiction. He was told that it was an arguable case when it is now accepted that the test was much more onerous, namely a good arguable case. I have no doubt that this was an honest, if unfortunate, error on the part of counsel. It is not possible to determine what influence this had on the Judge and the decision he made. Following the granting of leave, Google has now made what can only be described as a root and branch attack on the Order. The plaintiff has chosen to defend this attack by calling in aid a "diffuse proliferation of other alleged claims against Google Inc". Google complained with some justification that these "simply obfuscate rather than illuminate the issues between the parties". The net result has been to increase judicial effort in the way in which I have described and to delay the progress of this action. This can make no sense and certainly does not comply with the imperative of Order 1 Rule 1(A) of the RSC (NI) 1980.

[16] The writ of summons did not conform with Order 82 Rule 2 which requires that a writ in an action for libel "must be endorsed with a statement giving sufficient particulars of the publications in respect of which the action is brought to enable them to be identified". There was no such statement endorsed on the writ. The writ also does not comply with Order 6 Rule 2: see Chandra v Brooke North [2013] EWCA Civ. 1559 at [92]. Much difficulty has been occasioned by these

straightforward failures to follow the Rules. The writ was accompanied by a draft statement of claim for the service out application. This included further causes of action, some of which were not included in the writ of summons at all. There was now a specific claim for breach of the Data Protection Act 1998 (“the 1998 Act”) and claims for breaches of the Data Protection Directive and the EU Charter of Fundamental Rights. Stephens J gave leave to serve proceedings on Google outside the jurisdiction. The precise basis on which this leave was given will be described later in the judgment.

[17] The statement of claim was served in a slightly amended form from the draft statement of claim on 14 November 2014 as paragraph 11 had been amended to plead libel against, inter alia, Google. On 27 November 2014 Google UK and Google Ireland Limited entered unconditional appearances.

[18] On 15 December 2014 Master Bell granted leave for Google Inc to enter a conditional appearance. This was served on 22 December 2014. Meanwhile, Google UK Limited and Google Ireland Limited entered unconditional appearances on 14 November 2014.

[19] On 20 January 2015 there was an exchange of skeleton arguments and authorities. On 22 January 2015 the case was adjourned to 6 February 2015 in the light of further amendments to the statement of claim and the stated intention of the plaintiff to further amend his statement of claim. A further proposed amended statement of claim was received on 26 January 2015. This application was listed for hearing before Gillen LJ but was adjourned. It then came before me and at the request of the parties was further adjourned. There were then further adjournments until the first hearing commenced on 14 May 2015. The oral submissions were finished on 26 June 2015. Eventually at the eleventh hour an affidavit was filed by Mr Durkan, a solicitor in KRW Law, on behalf of the plaintiff, averring that the plaintiff had a good cause of action filling in the hole which had previously been identified in respect of Order 11 Rule 4(1)(b) and which had been the subject of much argument. Final written submissions, made at the request of the court, were received before the end of the Michaelmas Term. During that period, namely up to the end of June, there had been further iterations of the statement of claim. A great deal of court time has been expended in hearing this bitterly contested application. The court has over 20 ring binders closely packed with documents and authorities. Each side has submitted initial skeleton arguments which have then been supplemented with further skeleton arguments. However, these are skeleton arguments in name only. They come fully fleshed out, running to many, many paragraphs. They are laden with myriad cases, burdened with text book extracts and interspersed with various statutory provisions. The effort expended by both sides has been truly prodigious, unfortunately some of it could have been better directed.

[20] URL1 was taken down within a matter of minutes of being flagged by the plaintiff’s solicitors. URL2 was flagged on 27 August 2014 and was taken down on

12 September 2014 and was blocked for viewers in Northern Ireland on 18 September 2014. The draft statement of claim introduced in the manner not in accordance with the Rules two further videos URL3 and URL4. These have now been taken down. I understand that URL2, URL3 and URL4 are blocked to anyone attempting to access them from the United Kingdom. However, they were or had been capable of being accessed from other countries by using addresses that appear to YouTube to be from outside the jurisdiction for a further period of time.

[21] URL1 has been removed. There is no transcription. The court is left completely in the dark about what is alleged to have been captured on the video footage and what, if anything, on that video has infringed the plaintiff's rights.

[22] URL2 claims, inter alia, that the plaintiff is a "tramp" who supports and "encourages terrorism" including those Islamic terrorists who "behead American citizens". It is obviously defamatory, attributing to the plaintiff's extreme political views that would be condemned by right thinking people in this country. In Northern Ireland especially, right thinking people would, given the province's troubled history, regard support for terrorism as wholly unacceptable. They would regard the support of a public representative for Islamic terrorists who carrying out beheadings of innocent civilians as being totally beyond the pale.

[23] URL3 complains that the plaintiff is against Protestantism, Christianity, that he is anti-unionist, and anti-Jew. Much of the video content relates to the first named defendant and it could not in any way be described as being defamatory of the plaintiff and, indeed, does not even relate to him. There is no pleading which sets out what parts of the video are the subject of complaint and why it is alleged that these defame or otherwise injure the plaintiff. This is most unsatisfactory.

[24] URL4 primarily relates to the refusal of the Protestant people who live at Cluan Place to be blackmailed. There are two references to the plaintiff. The first relates to the refusal of the people in Cluan Place to be blackmailed by the plaintiff and the video concludes with the comment that the plaintiff should 'go and get stuffed'. It has not been articulated in any pleading as to why the video is defamatory of the plaintiff. Nor has any pleading set out how this comprises private information. Again this is unsatisfactory. No attempt has been made to set out what part of the video defames the plaintiff. Most of the video, on any assessment, is not critical of the plaintiff. However, the suggestion that the plaintiff was attempting to blackmail those people living in Cluan Place, even in the context in which it occurs, might arguably be said to lower the plaintiff in the estimation of right thinking people.

[25] At this point I must draw attention to the untested evidence which has been filed so far. There has been no attempt by Google to stand over the allegations levelled at the plaintiff by the defendant. The court is genuinely in the dark as to what defences Google might employ if this case goes to trial.

[26] In his third affidavit of 21 January 2015 the plaintiff's solicitor made a complaint for the first time about the search results on Google's local search engine and the captions to the videos. On any assessment these were new causes of action, not included in the original summons, nor referred to in any previous iterations of the statement of claim, draft or otherwise, and in respect of which no leave could possibly have been granted by Stephens J. These matters were not before him for consideration.

## THE PLEADINGS

[27] The causes of action are contained in the original Writ of Summons of 9 September 2014 against the defendant, Google Inc, Independent News Media PLC and persons unknown. The writ stated:

"The first defendant has pursued a campaign of public vilification and harassment of the plaintiff by way of audio visual publications including publication upon the websites owned and operated by the second and third defendants websites <http://www.youtube.com> the title "Loyalist Protest under George Galloway" and further upon <http://www.belfasttelegraph.co.uk/> the same constituting a breach of the Protection from Harassment (Northern Ireland ) Order 1997. Each of the defendants has further been guilty of publishing libels, slanders and of publishing malicious falsehoods in respect of the plaintiff. The defendants have further committed breach/es of the tort of misuse of private information relating to the plaintiff. As a result of the said breach/es the plaintiffs (sic) have suffered loss and damage."

## AND THE PLAINTIFFS (sic) CLAIM

- "(i) An interim and final injunction pursuant to the Protection from Harassment (Northern Ireland) Order 1997 preventing the first, second and third defendants from harassing, pestering, knowing or molesting the plaintiffs whether by publishing, distributing, broadcasting or transmitting any information on the internet or otherwise and requiring the defendant to remove content specified within the schedule attached hereto.
- (ii) Further, or in the alternative, an interim injunction restraining the defendants, their servants or agents, from publishing, distributing, broadcasting



or transmitting any libels, slanders and malicious falsehoods relating to the plaintiff on the internet or otherwise in requiring the defendant to remove contents specified within the schedule attached hereto.

- (iii) An injunction *contra mundum* in respect of the republication of the contents specified in the schedule attached hereto.
- (iv) Damages pursuant to the Protection from Harassment (Northern Ireland) Order 1997.
- (v) Damages for publication of malicious falsehoods.
- (vi) Damages for libel and slander.
- (vii) Damages for breach of the tort of misuse of private information.
- (viii) Further or other order as deemed appropriate by the court."

[28] This Writ of Summons was subsequently amended on 20 November 2014 to claim against Google Inc, Independent News and Google UK Limited and Google Ireland Limited as data controllers for breaches of the "Data Protection Act 1998 ("the 1998 Act") and the EU Data Protection Directive and the EU Charter of Fundamental Rights". These amendments were not before Stephens J when he granted leave. They constitute new causes of action. However, Stephens J was told expressly that the plaintiff was relying on the 1998 Act at the ex parte hearing.

## **THE PRESENT APPLICATION**

[29] This is an application made before the defendant has entered an unconditional appearance, to discharge the Order giving leave to serve the writ on it out of the jurisdiction pursuant to Order 12 Rule 8. It would also appear that Google relies on the court's jurisdiction to set aside an ex parte order under Order 32 Rule 6 and/or under the court's inherent jurisdiction. As counsel for the plaintiff pointed out, the summons does not set out the grounds on which Google seeks to challenge the Order made by Stephens J. Similar criticisms can be levelled at the plaintiff's "ex parte notice of motion" which refers to Order 11 Rules 1(b), (c) and (f), 2, 3 and 4 which do not exist. These obvious errors (and others) should not have occurred but I will proceed on the basis of what must have been understood by the parties. The court retains an inherent jurisdiction to revoke leave given ex parte, when, for example it considers that leave was granted under a misapprehension as to the law or upon new matters being drawn to its attention: see Becker v Noel (Practice

Notice) [1971] 1 WLR 803. I will return to this issue in greater detail later on in the judgment. Although regrettable, I do not consider these errors to be a fatal to Google's application, although it would have been preferable if the grounds had been set out. Similarly the plaintiff's failure to accurately specify the correct provisions it was relying on in the ex parte motion does not invalidate it.

[30] The claims which had been made by the plaintiff against Google in the writ of summons were:

- (a) Libels and slanders.
- (b) Malicious falsehoods.
- (c) Misuse of private information.
- (d) Harassment under the 1997 Order.

There was a claim for breach of the EU Data Protection Directive, breach of the 1998 Act and the EU Charter of Fundamental Rights but these were only contained in the draft statement of claim which accompanied the application for leave. There was no mention of them in the writ of summons that had been issued.

The Order made simply gives leave to serve the writ of summons on Google without specifying whether the judge had considered whether all the causes of action satisfied the various tests under Order 11. The transcript records Junior Counsel saying that, inter alia:

- (a) Google is guilty of libelling the plaintiff.
- (b) Google has been guilty of the tort of misuse of private information.
- (c) The plaintiff intends to rely on the Data Protection Act.
- (d) As part of a belt and braces approach the plaintiff seeks to rely on breach of the EU Data Protection Directive and the EU Charter of Fundamental Rights.

[31] The trial judge acknowledged that this was a complicated claim, he reminded counsel of his duty on an ex parte application to bring to the attention of the trial judge any relevant matters. He concluded that:

“The present evidence before me establishes a prima facie case under the Data Protection Legislation ... and I also come to the same conclusion in relation to defamation and misuse of private information”.

[32] It will be noted that the writ did not seek an injunction for misuse of private information. It did seek an injunction contra mundum without specifying on what grounds the republication of the contents specified in the schedule was to be prohibited. The injunction(s) is so widely drawn as to be impossible to enforce. If the schedule referred to in the writ is intended to refer to the schedules attached to the draft statement of claim, then it captures much innocent material such as the defendant saying in URL4 that the people of Cluan Place are not going to be

blackmailed by Sinn Fein over welfare cuts. Again on URL3 there are requests for donations to help the defendant fight legal proceedings brought by the plaintiff.

No attempt whatsoever has been made to define the objectionable material that Google is to be prevented from republishing. Stephens J was not informed, as he should have been, that it is not possible to obtain an injunction to restrict the viewing of alleged defamatory material in other jurisdictions. "It is not for the court to restrict publications outside its jurisdiction": see KJO v XIAM [2011] EWHC 1768 (QB) at [24]. Duncan and Neill on Defamation (4<sup>th</sup> Edition) at 9.09 state relying on Berezovsky v Michaels [2006] 1 WLR 1004 that:

"If permission to serve out (of the jurisdiction) is required, the claimant must limit his claim to publication occurring in (Northern Ireland), even if the defendant was also responsible for publication of the same matter elsewhere."

[33] It is not at all clear what causes of action passed through what gateway(s) in respect of the application for leave. It is not possible to determine what cause of action, if any, passed through Order 11(1)(b) ("The Injunction Gateway"). Or what causes of action, if any, passed through Order 11(1)(c) ("The necessary and proper party gateway"). Nor can it be determined what cause of action, if any, passed through Order 11(1)(f) ("The tort gateway").

[34] The Order itself refers only to Order 11 Rule 1 and gives leave to serve "a generally endorsed writ of summons outside the jurisdiction". However, it is simply not possible that the judge could have given leave in respect of all the different gateways claimed under Order 11 Rule 1 as in some places they were clearly not relied upon. There were no submissions made in respect of malicious falsehood. There was no evidence before the court in respect of malice. The cause of action was never opened to the Judge and it was formally abandoned by the plaintiff in a letter from his solicitors dated 26 January 2015 well after the leave was granted. For example, it will be noted that Order 11 Rule 1(1)(a) relates exclusively to land. Furthermore, some of the causes of action disclosed no triable issue eg see the claim for damages for malicious falsehood referred to above. If the Judge granted leave for the entire Writ of Summons then for reasons which will appear later in the judgment, junior counsel should have pointed out to him the difficulties, for example, in making a case for slander: see 3.12 of *Gatley on Libel and Slander* (12<sup>th</sup> ed) which makes it clear that defamatory publications on the internet constitute libel by virtue of s. 201(1)(b) of the Broadcasting Act. Even on the most generous consideration of the facts, slander was never a cause of action which the plaintiff was entitled to rely upon. However, for the sake of completeness, the court will consider the possibility, albeit remote, that leave was granted for the cause of actions captured in the Writ of Summons as drafted at that time.

## LEAVE TO SERVE OUT OF THE JURISDICTION

[35] The plaintiff in this case relies it would seem on Order 11 Rule 1(1)(b), (c) and (f). These provisions state:

*“Principal cases in which service of writ out of jurisdiction is permissible*

1. - (1) Provided that the writ does not contain any claim mentioned in Order 75 rule 2(1) and is not a writ to which paragraph (2) of this rule applies, service of a writ or notice of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ-

...

(b) an injunction is sought ordering the defendant to do or refrain from doing anything within the jurisdiction (whether or not damages are also claimed in respect of a failure to do or the doing of that thing);

(c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction's necessary or proper person thereto;

...

(f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction.”

Rule 11(4) states:

*“Application for, and grant of, leave to serve writ out of jurisdiction*

4. - (1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating-

(a) the grounds on which the application is made,

(b) that in the deponent's belief the plaintiff has a good cause of action,

- (c) in what place or country the defendant is or probably may be found, and
  - (d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ or notice of a writ has been served a real issue which the plaintiff may reasonably ask the Court to try.
- (2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."

[36] The plaintiff has a duty when making an application ex parte of uberrimae fidei: see Brennan v Lokyer [1932] IR 101. In effect this means the plaintiff must disclose everything which casts doubt on his case. It is unreasonable to expect him to anticipate all the arguments or points which might be raised against his case: see Electric Furnace Co v SELAS Corp of America [1987] RPC 23. Dicey, Morris and Collins on the Conflict of Laws (15<sup>th</sup> Edition) at 11-142 referring to cardinal points which have been emphasised in the decided cases, say:

"First, the court ought to be cautious in allowing the process to be served on a foreigner out of England. This has frequently been said to be because service out of the jurisdiction is an interference with sovereignty of other countries ... . Secondly, if there is any doubt in the construction of any of the heads of jurisdiction, that doubt ought to be resolved in favour of the defendant. Thirdly, since the application for permission is made without notice to the defendant a full and fair disclosure of all relevant facts ought to be made."

Eady J in Metropolitan Schools Ltd v Design Technica Corporations RPN [2011] 1 WLR 1772 at paragraph 121 said:

"As long ago as a decision in Societe Generale de Paris v Dreyfus Bros [1885] 29 ChD 239, the court was acknowledging how serious it was for a foreigner to be troubled by English proceedings. In the light of this, it was said, at page 243, that **the court ought to be exceedingly careful before it allows a writ to be served out of the jurisdiction.**"

Burton J in Network Telecom (Europe) Ltd v Telephone Systems International Inc. [2004] 1 All ER (Comm) 418 at paragraph 566 said as follows:

“Insomuch as the application is made ex parte, full and fair disclosure is necessary, as in all ex parte applications, and a failure to make such full and fair disclosures should justify the court in discharging the order, even though the party might afterwards be in a position to make another application.”

There are numerous other authorities stressing the importance of the applicant seeking leave ex parte making sure that everything relevant is disclosed to the trial judge and stressing that an application for service out of the jurisdiction should be approached cautiously and with great care.

These requirements are linked. They are there to ensure that the court does not assume jurisdiction over a foreign natural or company unwisely or unfairly. These authorities hold good today. The courts should be very slow indeed on an application for leave to serve out of the jurisdiction to allow a plaintiff to profit from an order obtained in the absence of full disclosure. It remains of paramount importance that full disclosure should be made, and that the court can expect to proceed on the basis that counsel has put before it on an ex parte application for leave **all relevant material**.

[37] The Supreme Court Practice Volume 1 1991 at 11/1/10 states:

“1. *Case must fall within the rule.*

The applicant for leave must show that his case falls clearly within one or other of the sub-paras of r. 1(1). In the application of this principle:

- (a) The applicant must choose which sub-paragraphs of R. 1(1) to rely on:
- (ii) In order for the plaintiff to obtain leave he must make a good arguable case that each claim falls within one or other of the grounds specified in Order 11 Rule 1(1), that is the gateways that permit service to be affected on a defendant outside the jurisdiction. The following points must be considered:
  - (a) The applicant must choose which sub-paragraphs of Rule 1(1) to rely on; the sub-paragraphs are, generally

speaking, to be read disjunctively (Matthews v Kuwait Bechtel Corp [1959] 2 QB 57).

- (b) The case must fall within the spirit as well as the letter of the Order (Johnston v Taylor Bros & Co [1920] AC 144 at 153);
- (c) The court must decide upon the application itself whether the case falls within Order 11; it can grant leave on terms, or as to part of the claim only, but cannot leave the question of whether the case falls within the Order to be determined at the trial (Vitkovice Horni v Korner [1951] AC 869);
- (d) The court must decide upon the application on the basis of the cause or causes of action expressly mentioned in the writ of summons. The plaintiff will not be allowed to rely on an alternative cause of action if he seeks to spell out of the facts pleaded, such cause of action that had not been so mentioned: (Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391) and DSQ Property Co Ltd v Lotus Cars Limited [1990] The Time June 28 CA: see 11/1/10 of Volume 1 of the Supreme Court Practice 1999."

(This advice at (d) must now be considered in the light of the comments of the Supreme Court in MNL Capital Ltd v Argentina 2011 UKSC 31 discussed later on in this judgment at paragraphs 47, 48 and 49.)

[38] The good arguable case required in respect of the gateways has been discussed in a number of authorities. It means that the courts will require something more than a mere prima facie case. While the court can decide issues of the law, it should not attempt to try disputes of fact on affidavit.

[39] Once the court has concluded that it has jurisdiction to make an order, it must be satisfied in respect of each cause of action that there is a serious question to be tried.

[40] The Supreme Court Practice Volume 1 at 11/1/12 goes on to state:

“The applicant must also satisfy the Court that it is proper to exercise its discretion to grant leave; this is second consequence of the requirement of r.4(2) referred to above. Moreover the Court retains an inherent discretion to decline jurisdiction on grounds such as *forum non conveniens* or failure on the part of the plaintiff to make out a good arguable case (Kuwait Asia Bank EC v National Mutual Life Nominees Limited [1990] 3 WLR 297).”

[41] Duncan and Neill on Defamation (4<sup>th</sup> Edition) succinctly sums up the requirements for service out at 9.09 when it says:

“To obtain permission, the claimant must satisfy the court:

- (1) There is a good arguable case that one of the grounds in (Order 11 Rule 1(1)) is made out;
- (2) There is a serious issue to be tried; and
- (3) (Northern Ireland) is a proper place in which to bring the claim.”

#### **THE REQUIREMENT OF ORDER 11 RULE 4(1)(b)**

[42] There was much debate about whether the absence of an averment in the original grounding application by the plaintiff that he enjoyed a good cause of action was fatal to the plaintiff’s application being a mandatory requirement under Order 11 Rule 4(1)(b). There can be no doubt that the present regime for civil justice in Northern Ireland requires that “procedural rules should be the servant not the master of the law”. The overarching imperative is set out at Order 1 Rule 1(A) which I will discuss in rather more detail later on in the judgment. Justice is not going to be served by dismissing an application for leave to serve out of the jurisdiction and requiring the plaintiff to start again when it is perfectly clear to the court on the papers that the plaintiff enjoys a good cause of action, simply because the plaintiff has omitted to include such an averment in the grounding affidavit. That would be in many cases a disproportionate response and a waste of court time. It would be far better to deal with such an omission by imposing some sort of proportionate cost sanction. Of course in a finally balanced application, the absence of an averment under Order 11 Rule 4(1)(b) might well be considered critical to the success of the application. However, I do note that Staughton LJ appears to have reached a different view in Kuwait Oil Tanker Co SAK v Al Bader and Others [1997] 2 All ER 855 at 859(d)-(e).



[43] In any event, eventually, an affidavit was filed by Mr Durkan, a solicitor acting for the plaintiff at the very last moment containing the missing averment. So if I am wrong and the requirement under Order 11 Rule 4(1)(b) remains a mandatory condition for obtaining leave, then, it has been satisfied in this case, however belatedly. It is fair to say that an enormous amount of time and energy was taken up in dealing with this issue which, as I found, must have been apparent to Google even before the original ex parte application for leave was made, and could have been raised and dealt with before Stephens J. The failure of the plaintiff to mend his hand until late in the application also contributed to the wasteful use of court time and resources.

### **THE RULE IN PARKER v SCHULLER**

[44] It is necessary to look at the rule in Parker v Schuller [1901] 17 TLR 299 before I examine the application for leave to serve out of the jurisdiction. This is a rule of the common law dating back to 1901 which Google calls in aid. This rule is said to prevent a plaintiff who has been granted permission to serve a writ out of the jurisdiction under Order 11 from seeking to defend an application to set aside the permission by pleading a new cause of action or by fundamentally altering the basis of his case. It was discussed in some detail in Metall und Rohstoff AG v Donaldson at Lufkin and Jenrett Inc. [1990] 1 QB 391. Slade LJ said 436(d) and (f):

“In our judgment, if the draftsman of pleading intended to be served out of the jurisdiction under Ord. 11, r. 1(1)(f) or indeed any other sub-paragraph can be reasonably understood as presenting a particular head of claim on one specific legal basis only, the plaintiff cannot thereafter, for the purpose of justifying his application under Ord. 11, r. 1(1)(f), be permitted to contend that that head of claim can also be justified on another legal basis (unless, perhaps, the alternative basis has been specifically referred to in his affidavit evidence, which was not in the present case). With this possible exception, if he specifically states in his pleading the legal result of what he has pleaded, he has in our judgment limited to what he has pleaded, for the purpose of an Ord. 11 application. To permit him to take a different course would be to encourage circumvention of the Ord. 11 procedure, which is designed to ensure that both the court is fully and clearly apprised as to the nature of the legal claim with which it is invited to deal on the ex parte application, the defendant is likewise apprised as to the nature of the claim which he has to

meet, if and when he seeks discharge in order for a service out of the jurisdiction.”

[45] In Al Sadi and Others v Al Sadi and Others [2011] EWHC 976 (Comm) Beatson J confirmed at paragraph [38] that it remained a binding authority in England and Wales despite the introduction of the CPR regime:

“The thrust of Mr Cooper’s submissions are that the Parker v Shuller jurisprudence was a product of the pre-CPR age. He in effect submitted that it would be a triumph for formalism if a defendant who had been served out is entitled to have the Order set aside only for the claimant to immediately given permission to serve him again with an amended claim. He submitted the proper approach is to allow the amended claim but to make an appropriate order for costs. I have noted that the Parker v Shuller principle has been applied in the context of CPR and thus reject the first part of Mr Cooper’s submission.”

[46] The CPR regime in England and Wales is based on the same over-arching imperative contained in Order 1 Rule 1(A) of the RSC (NI), namely:

“The overriding objective

1(A). (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.

(2) Dealing with a case justly includes, so far as it is reasonably practicable -

- (a) ensuring that the parties are on equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to -
  - (i) the amount of money involved;
  - (ii) the importance of the case;
  - (iii) the complexity of the issues;
  - (iv) the financial position of each party;

- (d) ensuring it is dealt with expeditiously and fairly; and
  - (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
- (3) The Court must seek to give effect to the overriding objective when it –
- (a) exercises any power given to it by the Rules; or
  - (b) interprets any rule.”

[47] The rule in Parker and Schuller was considered by the Supreme Court shortly after Beatson J gave his ruling in Al-Sadi in the case of MNL Capital Limited v Argentina [2011] UKSC 31. Lord Phillips looked at the rule and noted that the authority was an old one and had been “soon lost from sight” until it was “applied with obvious reluctance by Sir Nicholas Browne-Wilkinson in Re Jogia (A Bankrupt) [1988] 1 WLR 484”.

[48] Since then he noted that it had figured prominently in a significant number of decisions at first instance or in the Court of Appeal. He noted that the overriding principle was for the court to “deal with cases justly, and this involved saving expense and ensuring that cases are dealt with expeditiously.” He agreed with submissions that there was no longer any justification for following the decisions relying on the rule in Parker v Schuller. He said at paragraph [78]:

“For these reasons I would hold that rule in Parker v Schuller should no longer be applied. The same approach should be taken to an application to amend the pleading that has been served out of the jurisdiction as adopted to any other application to amend a pleading ....”

[49] Lord Collins with whom Lord Walker agreed, while noting that the Supreme Court “should be especially hesitant to decide points of procedure in appeals in which they do not even arise”, concluded that the rule in Parker v Schuller did not arise in the case under consideration but agreed with the general approach of Lord Phillips. He pointed out that in Parker v Schuller itself, Romer LJ (at page 300) based his decision on a ground very close to that of non-disclosure. He said:

“... an application for leave to issue writ for service out of the jurisdiction ought to be made with great care and looked at strictly. If a material representation upon which leave was granted in the

first instance turned out to be unfounded, the plaintiff ought not to be allowed, when an application was made by a defendant to discharge the order for the issue of the writ and the service, to set up another and a distinct cause of action which was not before the judge on the original application.”

So, although Lord Phillips comments and those of the other members of the Supreme Court are strictly speaking obiter, they do carry considerable weight. The rule in Parker v Schuller is not binding on this court although obviously any decision of the Court of Appeal of England and Wales is highly persuasive: see the judgment of Holmes LJ in the Irish Court of Appeal in McCartan v Belfast Harbour Commissioners [1910] 2 IR 470 at 494-495. This was accepted as the proper approach for the courts in Northern Ireland to follow as can be seen from Northern Ireland Railway Transport Board v Century Insurance Co Ltd [1941] NI 77 at 107. However, I consider that I should not apply the rule in Parker v Schuller given the introduction of Order 1 Rule 1(A) as an overarching imperative to be applied by these courts. It makes no sense to have a rule that in some cases will require the court to deal with a case in a manner which is neither just nor proportionate.

[50] However, as I have observed, counsel when making an ex parte application, and in particular on applications for leave to serve out of the jurisdiction, must make full disclosure to the court. This obligation remains of paramount importance in ensuring that these types of case are dealt with fairly and justly. An application for leave to serve out of the jurisdiction is one which must be approached with the greatest of care. While the court should retain the right to allow a plaintiff to set up other causes of action not before the judge in the original ex parte hearing or to rely on evidence which was available at the original application, but which was not brought to the attention of the judge, it should be slow to do so in the absence of a cogent explanation from counsel as to why those causes of action and/or any additional facts on which they are based, were not drawn to the attention of the original judge. In this case no reason at all has been offered as to why the new causes of action now relied upon, together with new evidence, were not drawn to the attention of Stephens J. In the absence of any satisfactory or convincing explanation for their omission, I do not consider that in the exercise of my discretion the plaintiff should be permitted to rely upon them in making this application for leave and in attempting to defend the arguments made by Google in this set aside application. There will be cases where a plaintiff can rely on a new cause of action if they are based on the original facts or where a plaintiff can adduce further facts that may have been known at the time of the application. This may be acceptable and in accordance with Order 1 Rule 1(A). It depends on the circumstances. A good reason might include, where due to a judgment being given in another case between the time when leave was granted on the application to set aside being made, the understanding of a particular area of law had altered.

However, should I be wrong in my view as to the law and in particular on the exercise of my discretion, then given that this application may go further, I do propose to consider briefly, the new cause of action relied upon by the plaintiff when I look at the various gateways, and in particular URL3 and URL4.

### **THE APPROACH TO A SET ASIDE APPLICATION**

[51] McCloskey J in Ewing v Times Newspapers Limited [2010] NIQB 65 at [7]-[8] considered the jurisdiction of the court to review an ex parte order. The relevant matters considered include the following:

(i) The Supreme Court Practice Volume 1 at 58/1/3 states:

“(i) An appeal from the refusal of a Master to make an ex parte order lies to the Judge in chambers. On the other hand, where the Master has granted an order ex parte, the proper course is not to appeal, but to apply to him or another Master to set aside such order.”

(ii) Order 32 Rule 8 of the RSCI (NI) 1980 provides:

‘The court may set aside an Order made ex parte’.

In Ministry of Foreign Affairs v Vehicle Supplies Limited [1991] 1 WLR 550 at 55, the Privy Council approved what Sir John Donaldson MR had held in WEA Records v Visions Channel [1983] 1 WLR 721 at 727, namely that:

“Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent to the provisional nature of any order made ex parte and is reflected in RSC Order 32, Rule 6 ...”

Order 32 Rule 6 of the English Rules was the direct equivalent of Order 32 Rule 8 of our present Rules.

(iii) The Supreme Court Practice Volume 1 at 32/6/30 comments:

“The Court has an inherent jurisdiction to revoke leave given ex parte, e.g. if it feels that it gave its original leave under misapprehension upon new matters being drawn to its attention

per Lord Denning MR in Becker v Noel (Practice Note 1971 1 WLR 830). When applying for an ex parte order it is the duty of the applicant to make full and fair disclosure to the Court of all relevant facts of which he knows and failure to do so may itself be a ground for setting aside such an order. ....

By its nature, an ex parte order is essentially a provisional order made by the judge on the basis of evidence and submissions emanating from one side only and there is therefore no basis for making a definite order and accordingly when the judge reviews his provisional order in the light of the evidence and argument adduced by the opposite party, he is not hearing an appeal from himself and is in no way inhibited from discharging or varying the original order ....”

- (iv) Valentine on Civil Proceedings in the Supreme Court at 11.2 states that:

“The Applicant can appeal against refusal as with any interlocutory order, but the Respondent should apply to set it aside rather than appeal ...

On such applications the court has the advantage of hearing both parties and can freely review the order”.

- (v) The Supreme Court Practice Volume 1 at 11/4/16 states:

“... The application (under Order 12 Rule 4 to set aside the grant of permission to the Writ outside the jurisdiction) is decided on the affidavit evidence of the parties, and the issue is whether, upon the whole of the evidence, the plaintiff shows a good arguable case within one of the sub-paragraphs of Rule 1(1) or in the Court’s discretion the Order will not be made or to stand, whether the Writ or Notice was wrongly issued or the service is irregular, so that on those or other grounds the Order, Writ or service ought to be set aside ....

When leave to serve out of the jurisdiction is properly given, it cannot be discharged simply because the circumstances have changed, unless further evidence throws a new light on what should have been a relevant consideration at the time leave was granted (ISC Technologies v Guerin [1992] 2 Lloyd's Rep 430)."

[52] In ISC Technologies v Guerin Hoffmann J rejected the submission that an application under Order 12 rule 8 was a rehearing of the application to the Master on the exercise of a fresh discretion. He said at page 434:

"The application is under RSC Order 12 Rule 8(1)(c) to discharge the Master's order giving leave to serve out. The question is therefore whether the order was rightly made at the time it was made. Of course the court can receive evidence which was not before the Master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was likely given should be discharged because circumstances have changed. That would mean that different answers could be given depending upon how long it took before the application came on to be heard."

He went on to emphasise that the onus in an application to set aside remains on the plaintiff to establish that (Northern Ireland) is the:

"appropriate forum and the test has to be applied by reference to the same date, i.e. the date on which the order granting leave was made."

[53] Thus it is clear that while new evidence can be adduced at an inter partes hearing, it can only be done so insofar as it "may throw light upon what should have been a relevant consideration at the time". It is not permissible to rely on changed or new circumstances from the date of the original grant of leave. This approach by Hoffmann J has been approved in a number of subsequent decisions, including those in the Court of Appeal in England and Wales e.g. see Erste Group Bank AG v JSC "VMZ Red October" and Others [2015] EWCA Civ. 379 at [44]-[45]. I propose to approach this application in the manner recommended by Hofmann J.

## INJUNCTION GATEWAY

[54] There are three claims for injunctions. They relate to the content of a schedule attached to the statement of claim. The contents of the schedule appear to comprise of complete transcripts of videos URL2, URL3 and URL 4. The injunctions cannot be understood, much less complied with unless the content of the schedule is known. In respect of URL1 the plaintiff has chosen not to set out its contents at all. Further there is no suggestion that Google intends to republish URL1 at any time. URL2 has been denied to viewers in Northern Ireland from 18 September 2014 and has since taken down completely. There is no suggestion that there is any risk of it being republished.

[55] This leaves URL3 and URL4. As I have stated it is clear that URL3 and URL4 were not included in the original writ of summons given the nature of the application made for the injunction on 9 September 2014 and the grounding affidavit to that application. This is further confirmed by the correspondence at that time because no complaint was made by the plaintiff or his legal team about URL3 or URL4 before the application for leave to serve out. They are very much an afterthought and that is why they are only referred to in what can best be described as an elliptical manner in the draft statement of claim which accompanied the application for leave under Order 11 before Stephens J.

[56] There is a good arguable case at this stage, and I stress at this stage, that if material defamatory of the plaintiff is published on YouTube or other unlawful acts are committed by YouTube, then Google must act with reasonable expedition to remove that material or else be found for it. This issue will be examined in rather more detail when the “tort gateway” is analysed.

[57] However there is no realistic prospect of any court granting any injunction in the terms sought by the plaintiff.

- (i) The first injunction seeks to prevent Google from harassing the plaintiffs (sic) “by, inter alia, publishing any information on the internet” without specifying the nature of that information. If such an injunction was granted then that would result in a breach of, inter alia, Article 10 of the European Convention on Human Rights. There is no prospect of such an injunction being granted. It is far too wide and ill-defined. The injunction sought also requires Google to “remove contents specified within the schedule hereto”. The schedule includes URL2, URL3 and URL4. While the plaintiff wants URL2 in its entirety removed because it is an ad hominem attack on a plaintiff, much of URL3 and URL4 is unobjectionable. Nowhere does the plaintiff seek to define what part of the publication(s) is required to be removed. Again there is no prospect of such a wide and ill-defined injunction being granted.
- (ii) A second injunction seeks an order restraining Google from publishing libels relating to the plaintiff, without specifying what those libels are. It also seeks



to have the “Defendant to remove contents (sic) specified within the schedule attached hereto”. This is hopelessly imprecise and again there is no realistic prospect of any injunction being granted in such terms.

- (iii) Finally an injunction is sought “contra mundum” and refers to republication of the contents specified in the schedule. Not only is an injunction in such terms objectionable for the reasons which I have previously set out, but it also fails to take into account that this court, as I have stated earlier, has no power to restrain publications outside the jurisdiction: see Diamond v Sutton [1866] LR 1 XCH 130.

Accordingly in those circumstances I conclude that the injunction gateway is closed to the plaintiff.

### **THE NECESSARY OR PROPER PARTY GATEWAY**

[58] It is a precondition of leave to serve out of the jurisdiction under this ground that another defendant has already been served within or without the jurisdiction. In this case it has been satisfied because the defendant has been served and has also given an undertaking to the court in respect of his future conduct.

[59] The court needs to consider whether Google is a necessary or proper party to proceedings. The court notes that the defendant is not legally represented. It is alleged that he has defamed the plaintiff in URL 2, and that Google is liable, having been advised of the defamatory content on its hosting site and then failing to remove it for a period of over three weeks. For reasons to be discussed later, I consider that there is a good arguable case for Google being liable for such a libel because it did not act with sufficient expedition to prevent continuing access to viewers from Northern Ireland. There is a real advantage in Google being before the court because should the plaintiff obtain an award of damages against both the defendant and Google, then the plaintiff can choose to enforce against Google which is inevitably going to be a better mark than the defendant. Indeed it is highly unlikely that the defendant will be able to satisfy any judgment for damages or costs. I am satisfied that there is a good arguable case that Google is a necessary and/or proper party. I also consider for reasons which I will discuss later that the plaintiff enjoys a prima facie case (at least) against Google in respect of libel, harassment under the 1997 Order and for breach of the 1998 Act.

### **THE TORT GATEWAY**

[60] It is important to emphasise in my earlier conclusion that leave to serve out of the jurisdiction should not be granted in respect of any torts arising out of the publication of URL3 and URL4. The court, as a consequence of this serious and unexplained non-disclosure, although it has the power to do so, refuses to grant leave to serve out of the jurisdiction in respect of any cause of action not put fairly and squarely before Stephens J. For the sake of completeness I will set out briefly

my views in respect of the merits so far as they affect URL3 and URL4. I do this should this decision be the subject of an appeal.

**(i) Defamation**

[61] The content of URL1 has not been made available. The plaintiff has not seen fit to set out its contents. Accordingly it is not possible to comment as to whether or not this is defamatory of the plaintiff (or constitutes harassment of the 1997 Order or breach of his rights under the 1998 Act). In respect of URL2, there is on the face of it a clear case of defamation. With URL3 there is a serious question raised, namely whether accusing a political opponent of being anti-Christian, anti-Jew etc is defamatory because it is alleging that the plaintiff is both bigoted and sectarian. URL4 is much more difficult. On balance, I consider that the modest hurdle, namely whether there is a serious issue to be tried, has been overcome even in the context of one politician accusing another politician of blackmailing a section of the community on a video. Even in the rough and tumble of politics, such a charge may serve to lower that person in the minds of right thinking persons.

[62] It then falls to the plaintiff to satisfy this court that a libel was committed within the jurisdiction and/or that the damage has been sustained within this jurisdiction as a result of the libel. Accordingly, the plaintiff must satisfy the court that there is a good arguable case that:

- (a) the particular video was downloaded in Northern Ireland, and therefore published; and
- (b) Google bears a legal responsibility for the publication of that video.

[63] Just because a video is available for downloading by Northern Ireland citizens on YouTube, does not mean that it has been published. There is no presumption on online publication within any jurisdiction: see Carrie v Tolkien [2009] EWHC 29. The plaintiff has to make a good arguable case that the video has been downloaded within this jurisdiction: see Berezovsky v Michaels [2000] 1 WLR 1004 per Lord Hope at 1032 D-E.

[64] Any claim in respect of URL1 cannot pass through the tort gateway. The plaintiff avers that at least 4000 viewers downloaded URL2 after notification. It is clear that most, if not all these viewers, are likely to have been from Northern Ireland, as the defendant has few, if any, followers or supporters in Great Britain. The evidence such as it is establishes that there was a considerable number of downloads during the 23 day period between when URL2 was flagged and when access to viewers from Northern Ireland was barred.

[65] The court has been provided with details of the enormous amount of video footage downloaded on an hourly basis from YouTube. It truly is enormous. The court is really in the dark as to the facilities available to remove objectionable

material. That should become much clearer after discovery has been made. The court is asked to accept that the period of just over 3 weeks was sufficiently prompt to allow the court to conclude that the plaintiff cannot satisfy the tests under Order 11.

[66] Google claim to have knock out defences to the hosting of URL2 on its YouTube site. These can be summarised as follows:

- (a) At common law, Google had “no knowing involvement in the process of publication of the relevant words”: see Bunt v Tilley [2006] 3 All ER 336. It prevented publication within Northern Ireland after the video had been flagged within such a period that the court should be satisfied that any wrong was “so trivial as not to justify the maintenance of proceedings”: see Tamiz v Google [2013] EWCA Civ. 68 at [48].

In HL (A minor) v Facebook Ireland Limited [2012] NIQB 25 McCloskey J at [26] and [27] summarised the decision of the Court of Appeal in England in Tamiz v Google Inc [2012] EWHC 449 (QB) and [2013] EWCA Civ 68 as follows:

“In passing, I am mindful that in Tamiz, the Court of Appeal opined that while Google plainly facilitates the publication of blogs and associated comments, it is not to be considered a primary publisher and is not to be equated with the author or editor of a defamatory article or the corporate proprietor of a newspaper. Richards LJ also expressed grave doubts about whether Google could be considered a secondary publisher, particularly in advance of notification of a complaint: see paragraph [26]. He did, however, differ from Eady J on the issue of publication after receipt of a complaint. Without determining the issue, the appellate court recognised the potential viability of an argument that, in this discrete situation, it might be inferred that Google had associated itself with, or made itself responsible for, the continued presence of the material on the blog, thereby becoming a publisher thereof: see paragraphs [27]-[34]. Significantly, however, Richards LJ added:

‘[35] I do not consider that such an inference could properly be drawn until Google Inc had had a reasonable time within which to act to remove the defamatory comments’.” (Emphasis added).

In Byrne v Dean [1937] 1 KB 818 the proprietors of a golf club were held responsible for the publication of an allegedly defamatory note on display, without the requisite permission, on a club notice board, because they were aware of it. They could easily have removed it but failed to do so. However, liability through omission will only arise where, in the circumstances of the case, it can be inferred from the failure to prevent publication or to remove the words already published and that defendant consented to or authorised publication or continued publication. In that case, Lesser LJ said that:

“...persons who themselves take no overt action in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication.”

- (b) Under Section 1 of the Defamation Act 1996 Google was not the publisher and “did not know and had no reason to believe, that what it did caused or contributed to a defamatory statement”. Furthermore as soon as it had the requisite knowledge it removed the objectionable material as soon as reasonably possible.
- (c) Regulation 19 of the E-commerce Regulations. This provides:

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

Google will argue that it is entitled to rely on all these defences and claim that it did not have the necessary knowledge and that when it did have it acted expeditiously to remove or disable access to the objectionable material for viewers in Northern Ireland.

[67] While there are striking similarities between these different defences, there are obvious differences. At the very least I am not satisfied that Google has a common law defence to the plaintiff's claim in respect of the 23 days when URL2 was flagged but Google continued to make URL2 available for downloading in Northern Ireland and during which period it was downloaded a significant number of times. In determining what was a reasonable period of time the court is entitled to take into account the nature of the allegations made. These were on any reasonable view, vile and scurrilous allegations made against a sitting MP. To allow them to remain available for downloading for a period of 23 days from notification was, on the face of it, simply not good enough. I conclude that a court on the limited information available to it, may well conclude that Google should have acted more swiftly given the serious and alarming nature of the libel.

In Tamiz the Court of Appeal at para [35] said:

“In the context of the defence under Section 1 of the 1996 Act, considered below, Eady J described Google Inc's response as somewhat dilatory but outside the bounds of a reasonable response. Whilst I accept the judge's assessment in the context of the statutory defence, it is in my view open to argument that the time taken was sufficiently long to leave room for an inference adverse to Google Inc in the Byrne v Dean principle.”

So here. It may be at the trial the judge with all the facts will be in a position to conclude that Google acted with sufficient promptitude and therefore cannot be faulted. But at present on the untested information available to this court, it is not possible to conclude that Google is able to deliver the knock-out blow necessary to defeat the plaintiff's claim.

[68] Insofar as it is suggested that there is a complete defence to the scurrilous remarks contained in URL2 made by the defendant on the basis that it is mere vulgar abuse, I reject those submissions. Vulgar abuse is not defamatory because as Lord Mansfield said in Thorley v Kerry [1812] 4 Taunt 355 at 365:

“From mere general abuse spoken no action lies.”

[69] My view is that the words used did not constitute general vituperation or would be understood as such by those who heard them. To say of an elected public

representative that he was a “terrorist supporter to the hilt” and to claim that he sides with Islamic terrorists who are beheading American citizens would most certainly reflect very badly on the plaintiff’s character. There can be no doubt that any right thinking member of Northern Ireland’s society would view such accusations of supporting terrorism to be the most serious of libels. These claims most certainly convey defamatory imputations. Accordingly I conclude that the defence of vulgar abuse is likely to fail. However, it will be for the trial judge (and/or jury) ultimately to reach a concluded view on this issue.

[70] It follows from the above that the court is satisfied that the plaintiff can avail of the tort gateway in respect of the claim for libel for URL2 because there is a good arguable case for that gateway, there is a serious issue to be tried and Northern Ireland is the proper place in which to bring this claim. For the avoidance of doubt, although I would refuse permission in respect of URL3 and URL4 for material non-disclosure, I do not consider that the tests have been satisfied in respect of them. There is no satisfactory evidence of downloading in Northern Ireland and given the nature of the allegations contained in those videos, Google did act with reasonable expedition.

## **MISUSE OF PRIVATE INFORMATION**

[71] There had been no cause of action for invasion of privacy in the common law of Northern Ireland. However, the landscape changed with the passing of the Human Rights Act 1998 (“HRA”) which came into force on 2 October 2000 and the protection offered by Article 8 of the European Convention on Human Rights (“ECHR”). The House of Lords in Campbell v MGN Limited [2004] UKHL 22 devised a new cause of action, which it called “Misuse of Private Information” or “The unjustified use of Private Information”. This covered the publication of information in which a plaintiff had a “reasonable expectation of privacy”: see Campbell v MGN Limited at [51] and [134].

[72] The plaintiff is a public figure, a controversial politician, who is often in the spotlight. He complains about the views attributed to him by the first defendant in these videos which were posted on YouTube. However, by no stretch of the imagination could it be said that in some way the plaintiff has an expectation of privacy on the issues raised in these videos and in particular his attitude to terrorism. It is to the plaintiff’s immense credit that he is always prepared to challenge and does so challenge his detractors in open debate. His critics claim that his views amount to support for terrorism. He is emphatic that they do not. His real complaint is that his position has been either wilfully or carelessly misrepresented on these issues and his reputation traduced as a consequence. The thrust of the plaintiff’s complaint has always been libel, namely that his views have been wilfully misrepresented by his opponents, including the defendant, not that his views on these highly topical issues should remain private.

[73] In Murray v Express Newspapers PLC [2008] EWCA Civ 446 the Court of Appeal said in respect of the question whether there is “a reasonable expectation of privacy” in respect of the information in question as follows:

“As we see it, the question where 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 in 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.”

[74] Accordingly in respect of URL2 I do not consider that a claim for misuse of private information has any prospect of success whatsoever. Although I would not permit service out for URL3 and URL4 for reasons of non-disclosure, I do not consider that any claims for misuse of private information in respect of these two videos have any prospect of success either.

**(ii) Data Protection Act 1998**

[75] The plaintiff makes some general claims that there have been breaches of the Data Protection Act in the amended writ of summons. The draft statement of claim before Stephens J failed to allege what data protection principle had been breached. Indeed the complaints made by the Court of Sessions in Lyons v Chief Constable of Strathclyde [2013] LLR 748 at [27] seem apposite:

“The pursuer sues for compensation for contravention by the defendant of one or more of the requirements of the Data Protection Act 1998. To plead a relevant case he must identify a requirement of the Act and aver the manner or respect in which he says that it was contravened by the data process he complained of. In our opinion the pursuer has clearly failed to do that ...”

However there is no requirement under the Rules to serve a draft statement of claim although the Supreme Court Practice recommends it as good practice. The issue at this stage and before this court is whether leave should be given to serve out of the jurisdiction not whether the pleadings comply with the rules of court. That may be a matter for another day. But in this case the plaintiff did not see fit to include a claim for breach of the 1998 Act in the original writ.

[76] There was a considerable debate as to whether Google in operating YouTube acted as a data controller or a data processor. A data controller is someone who “determines” the purposes for which and the manner in which personal data, are, or are to be, processed. On the other hand a data processor is a person “who processes the data on behalf of the data controller”.

[77] Section 1(1) of the Act defines processing as follows:

“Processing, in relation to information of data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information of data, including –

- (a) organisation, adaptation or alteration of the information or data;
- (b) retrieval, consultation or use of the information or data;
- (c) disclosure of the Information or Data by transmission, dissemination or otherwise making available; or
- (d) alignment, combination, blocking, erasure or destruction of the information or data.”

[78] There is force in the submissions on behalf of the plaintiff that YouTube’s conditions of use suggest that it acts as a controller rather than a processor. However the court does not have enough information it can rely on in order to come to a definite conclusion on what is bound to be a fact specific investigation and which will be heavily dependent on the evidence which is adduced. That will have to await the full trial. I am of the view that issues such as whether Google when in its guise as YouTube is a data controller and, if so, whether there is a defence when, for example, there is publication of sensitive personal data in cases such as the present one, are controversial matters in a developing area of law which are going to be heavily dependent on the facts as found by the trial judge. I agree with Tugendhat’s comments at paragraph [102] in Judith Vidal-Hall and Others v Google Inc [2014] EWHC 13 (QB) where he said:

“This is controversial question of law in a developing area, and it is desirable that the facts should be found. It would therefore be the better course in the present case that I should not decide the question on this application.”



[79] Section 4(4) imposes duty on a data controller (subject to specified exemptions) to comply with the “Data Protection Principles” in relation to all personal data with respect to which he is a data controller. The data protection principles are set out in Part I of Schedule 1 to the Act. Included within these principles is the principle at paragraph 4 of Schedule 1 Part 1 which states:

“Personal data shall be accurate and, where necessary, kept up-to-date.”

[80] Sensitive personal data means personal data consisting of information as to “his personal opinions”, “the commission or alleged commission by him of any offence”: see Section 2(b) and (g) of the Data Protection Act.

[81] Schedule 3 of the Act sets out the conditions for processing sensitive personal data. Compensation is available under Section 13 and this includes compensation for distress according to the most recent authority of Judith Vidal-Haulage LL v Google Inc [2015] EWCA Civ. 311 and in particular para [105].

[82] There can be no doubt that the information contained in URL2 constituted sensitive personal data: see Section 2(b) and (g) of the Data Protection Act 1998. The conditions relevant for purposes of processing the sensitive personal data are set out in Schedule 3. It may be that Google will seek to argue that the plaintiff has given his complicit consent to the processing of the personal data: see paragraph [1]. It may be that it will argue at paragraph [5] that “the information contained in the personal data has been made public as a result of steps already taken by the data subject”. However whether or not Google can persuade the court that no liability arises from the processing of this sensitive personal data will have to await a full hearing. The facts as presently put before the court would suggest that Google will not find it easy to defend this claim if it is found to be a data controller. Accordingly, as matters presently stand, I consider that the plaintiff has a good arguable case in respect of the publication of his sensitive personal data on URL2 by Google as a data controller. If successful, then the court on the present authorities is able to award damages for upset and stress.

[83] The plaintiff has persuaded me that there is a good arguable case that the plaintiff has suffered damage within this jurisdiction and/or particularly damage has resulted from an act committed within this jurisdiction, namely upset and distress. But the writ of summons did not plead a claim under the 1998 Act. There was material non-disclosure. I also accept that in an application for leave the benefit of any doubt should be given to the foreign national or company. However I am not persuaded that the failures are fatal to the plaintiff here because there can be no doubt that this cause of action was discussed with Stephens J and that the Judge proceeded on the basis that it formed part of the application for service out. Accordingly, I consider that leave should be granted in respect of the posting of URL2 on YouTube. For the reasons given I would not grant leave in respect URL3

and URL4. In any event, the evidence before me was not sufficient to satisfy me that there was a good arguable case in respect of this gateway.

[84] Stephens J did not grant leave in respect of URLs 3 and 4 for the reasons which I have set out. There was material non-disclosure, which as I have said, is fatal. In any event I do not consider that in the absence of evidence that these videos were downloaded and published in Northern Ireland, that the test under Order 11 Rule 1 has been satisfied in respect of breaches of the Data Protection Act 1998 so far as URL3 and URL4 are concerned.

### **(iii) Harassment**

[85] Article 3(1) of the Protection from Harassment (NI) Order 1997 (“the 1997 Order”) provides:

#### **“Prohibition of harassment**

3(1) A person shall not pursue a course of conduct –

- (a) which amounts to harassment of another; and
- (b) which he knows or ought to know amounts to harassment of the other.”

Article 3(2) states:

“For the purpose of this Article, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.”

Harassment is not defined. In Drew Robert King v Sunday Newspapers Limited [2011] NICA 8 the Court of Appeal made it clear that a plaintiff must show that “the conduct was oppressive and unreasonable”. In that case it concluded that:

“The articles did not constitute an abuse of freedom of the press which the pressing social needs of a democratic society required should be curbed.”

The Court of Appeal went on to say at paragraph [35]:

“The fact that the articles have caused him distress is not of itself established harassment. It would have to

be shown that the respondent knew or ought to have known it was harassing the appellant. While the articles contain some factual errors and misuses of some private information that does not of itself show the respondent set out to harass the appellant as opposed to printing a story in which it was intended to expose those aspects of the appellant's life which the respondent regarded as justifying exposure in the public interest in the exercise of its right of free expression."

[86] The affidavit sworn by the plaintiff complains that the defendant's speech as captured on URL2 caused him to feel threatened, harassed and degraded. There can be no doubt that accusing an elected politician of being a supporter of terrorism and of the people who are "beheading American citizens" is going to alarm anyone so accused and to cause him distress. In particular he complains of a personal attack upon him in London. This however relates to damage caused outside this jurisdiction and the likelihood is that any such viewing of URL2 was carried out in England as well.

[87] In Dowson v Chief Constable of Northumbria [2010] EWHC 2612 (QB) at [142] Simon J offered a summary of what must be proved in order for a claim in harassment to succeed:

- (i) It must be conduct which occurs in at least two occasions.
- (ii) Which is targeted at a claimant.
- (iii) Which is calculated in an objective sense to cause alarm or distress.
- (iv) Which is objectively judged to be oppressive and unacceptable.
- (v) What is oppressive and unacceptable may depend on the social working context in which conduct occurs.
- (vi) A line has to be drawn between conduct which is unattractive, unreasonable, and conduct which has been described in various ways: torment of the victim, **of an order which would sustain criminal liability**.

I consider that making the video available for an appreciable period of time when Google knew or should have known (on the present evidence) that it would harass the plaintiff and distress him, constituted a "course of conduct".

There can be no doubt that somebody will be guilty of pursuing a course of conduct if that person keeps publishing newspaper articles or blogs which are designed to degrade and/or upset the victim. There cannot be any practical difference between

that as a course of conduct and someone who keeps posted (and fails to take down) a video which achieves exactly the same result. Whether the video is taken down each evening and reposted each morning has no practical effect. The video is available for downloading over a period of time

[88] Taking all the evidence into account I am satisfied that there is a good arguable case for the following reasons:

- (a) The content of URL2 capturing as it does the comments made by the defendant outside the Ulster Hall, is capable of causing harassment to the plaintiff.
- (b) The plaintiff has been harassed.
- (c) Making available of the video on YouTube and its downloading during a period of 23 days between when it was first flagged and taken down occurred in Northern Ireland.
- (d) The plaintiff has suffered damage for an act committed within this jurisdiction and further the plaintiff has suffered damage in this jurisdiction from that act.
- (e) The availability of the video on YouTube over a period of days constituted a course of conduct.

[89] Therefore on the evidence presently available, and I stress presently, I consider that there is a good arguable case in respect of URL2:

- (a) A tort has been committed.
- (b) Damage has been sustained within this jurisdiction.
- (c) Damage has resulted from an act committed within this jurisdiction.

[90] As I have emphasised this conclusion is necessarily a provisional one. The court only has access to some of the evidence. It retains and must retain an open mind. Google still remain able to adduce evidence that, for example it did not have the necessary actual or constructive knowledge of the harassment within that 23 days period. This will involve scrutiny of the measures taken by Google to investigate the complaints when they were first made which cannot adequately be conducted by affidavit.

[91] I am not persuaded on the evidence put before the court that leaving aside the issue of material non-disclosure, that URL3 and URL4 constituted harassment under the 1997 Order given the absence of evidence as to the

downloading of these videos in Northern Ireland, and Google's knowledge and the nature of their contents.

**(iv) Malicious Falsehood**

[92] The plaintiff has abandoned any attempt to rely on the tort of malicious falsehood.

**(v) Breach of the Data Protection Directive and Breach of the EU Charter of Fundamental Rights**

[93] I do not consider that leave was given for either of these grounds. However if it was then it should not have been. I do propose to make my views clear. It is well established that EU Directives do not provide rights or impose obligations as against private individuals; see Marshall v Southampton Area Health Authority [1986] 1 QB 401 at [49]. While a Directive may not be relied upon as a basis for a claim against any individual, a domestic court should construe domestic legislation in a field covered by EU law so as to accord with the interpretation of a directive, provided this can be done without distorting the meaning of the domestic legislation: see Webb v EMO Cargo Limited [1993] 1 WLR 49 at 59 E-G. Article 51 of the EU Charter of Fundamental Rights does not confer or establish any rights as against individuals. It does not give rise to a claim for damage for "breach of EU law". The court at the leave application was told that this was included as a "belt and braces" approach. There was a failure to draw to the judge's express attention the difficulty in relying upon either a breach of the Directive or the Charter as a cause of action. I have no hesitation in concluding that the plaintiff has failed to satisfy the court that it is a good arguable case to be admitted through the tort gateway.

**(vi) VPN's, Proxy Servers, Search Engines and Captions**

[94] There was much discussion about whether citizens of Northern Ireland could view videos which had been blocked on YouTube to users in the United Kingdom by use of virtual private networks (VPN) and/or proxy servers. However, this matter can be dealt with briefly. No credible evidence has been offered by the plaintiff to demonstrate that any Northern Ireland citizen, never mind substantial numbers of Northern Ireland citizens, have used a VPN and/or a proxy server to download any of the URLs under consideration. There is no evidence that a tort was committed using a VPN or a proxy server in Northern Ireland or that any damage has been suffered by the plaintiff because any of the videos and particular URL2 has been downloaded using such a device in Northern Ireland. More importantly these matters were not canvassed before Stephens J. No explanation has been offered for this serious omission. Prima facie the failure to raise it on an ex parte application amounts to material non-disclosure. No explanation has been offered for the omission. In the exercise of my discretion, I would have refused to permit leave to be served out of the jurisdiction in respect of these matters, regardless of my conclusion that there had been no evidence of any access to URL2 via a VPN or a

proxy server in Northern Ireland. The same reasoning applies to the cause of action which the plaintiff attempted to canvass in respect of captions and/or material appearing on the Google search engine. This evidence should have been available at the time of the application to Stephens J. The failure to draw these potential causes of action to his attention was a material non-disclosure. The court should not permit the plaintiff to mend his hand at this stage.

## CONCLUSION

[96] In the circumstances, the plaintiff has leave to serve proceedings out of the jurisdiction on the grounds of libel, breach of the 1998 Act and the 1997 Order in respect of URL2 only. This relates exclusively to the period of 23 days (at most) between when Google were notified about the objectionable content of URL2 and access to URL2 being blocked to Northern Ireland citizens.

## FURTHER THOUGHTS

[97] This interlocutory injunction has taken up considerable court time. Enormous efforts have been expended by both sides. Such applications need to be better managed in the future. I have spoken to the judge in charge of the Queen's Bench list before making these recommendations which follow.

- (i) If, at all possible, the judge who hears the ex parte application should hear the application to set aside leave for service out of the jurisdiction. This will prevent extensive discussion of what did or did not take place before the original judge. Of course, sometimes it will not be possible for the same judge to be available and that is why the judge hearing the Order 12 Rule 8 and/or Order 32 Rule 8 and/or inherent jurisdiction application must know exactly what case was made before the original judge at the ex parte hearing and whether there had been any material non-disclosure on the part of the moving party.
- (ii) If the proposed defendant is advised of the ex parte hearing and attends but chooses not to take part, despite being offered the opportunity to do so, either by making submissions then, or if necessary, obtaining an adjournment of the application so as to allow its legal team to take further instructions and make submissions at a later date, an issue will arise as to whether it should be permitted later to bring an application to set aside the order that has been granted for leave to serve out of the jurisdiction. It may be taken to have waived its rights to do so and that a further application would be an abuse of the process to the court and/or contrary to Order 1 Rule 1(A). **This will obviously depend on all the circumstances.** However a defendant should appreciate that it chooses not to appear at the original hearing at its future peril.

- (iii) Great care must be taken at the start of any proceedings to focus the plaintiff's case on the relevant cause(s) of action. In an application for leave to serve out of the jurisdiction, good practice dictates that there should be a draft statement of claim which is focussed and highlights both the relevant causes of action and the material facts relied upon. There is no room in such an application for a "belt and braces" approach and the inclusion of causes of action which at the very best may only be of marginal importance. Indeed, if such a tactic is to be adopted, then it may well have adverse consequences in costs for the plaintiff.
- (iv) In any ex parte application for leave to serve out of the jurisdiction counsel for the plaintiff should, if possible, in a skeleton argument:
  - (a) set out what gateway(s) the plaintiff is relying upon and demonstrating in respect of each gateway that there is a good arguable case in respect of each cause of action relied upon;
  - (b) explain why in respect of each cause of action there is "a serious question to be tried".

Junior counsel must be aware that failure to raise a matter of which the plaintiff has knowledge or should have knowledge may well preclude the plaintiff, in the absence of a cogent explanation, from relying on that matter at a later date to justify the order which has been made. The court will be quick to punish material non-disclosure. The judge should then comment expressly on the basis upon which leave, if any, has been granted, and identify the relevant gateways and causes of action. The ex parte order should be drafted for the approval of the judge and he should settle it at the conclusion of the hearing. The order should specify on its face under what gateways and for what causes of action leave to serve out of the jurisdiction has been granted.

- (v) Skeleton arguments should be as brief as reasonably possible and should never be used to adduce factual evidence. Affidavits are for facts. The judge should be able to find all the facts solely by looking at the affidavits without having to hunt through exhibits, correspondence and skeleton arguments. Affidavits should not be used as an opportunity to rehearse legal argument or make comments. Skeleton arguments are for legal propositions and comments. The parties should pay attention to the Practice Direction. Key authorities must be marked with an asterisk and the relevant sections of any other authorities should be underlined. Producing and relying on numerous authorities can be counter-productive. In most circumstances it should only be necessary to produce one authority for any particular proposition of law. Failure to adhere to these elementary but fundamental rules may result in a judge refusing to hear the application until there has been full and adequate compliance with the Practice Direction.