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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **09/06/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

AARON STERRITT

Plaintiff

and

TELEGRAPH MEDIA GROUP LIMITED

First Defendant

and

ASSOCIATED NEWSPAPERS LIMITED

Second Defendant

and

NEWS GROUP NEWSPAPERS LIMITED

Third Defendant

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Ronan Lavery QC and Sean Mullan (instructed by DA Martin Solicitors) for the Plaintiff
Gavin Millar QC (instructed by Carson McDowell Solicitors) for the second Defendant

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HUMPHREYS J

Introduction

[1] This is an application brought by the second defendant, the publisher of the Daily Mail and the Mail Online ('the defendant'), seeking to dismiss the plaintiff's proceedings against it.

[2] There are two discrete bases for the application:

(i) That the claim ought to be dismissed for want of prosecution; and

(ii) The action should be struck out as an abuse of the process of the court.

[3] The writ of summons was issued on 5 November 2015 and it seeks relief in the form of an injunction restraining the defendants from publishing any information as may serve to identify the plaintiff and damages in respect of negligence, misuse of private information, defamation, breach of confidence, breach of the Data Protection Act 1998 and the Human Rights Act 1998, arising out of prior publications by the defendants.

Background

[4] In October 2015, the plaintiff, who was aged 15 at the time, was arrested by the PSNI in relation to a cybercrime incident involving TalkTalk plc. On 27 October, a number of newspapers, including the Daily Mail, published material which revealed or served to reveal the plaintiff's identity. Further material, including a partially blocked image of the plaintiff, was published on 28 October.

[5] This led to injunctive proceedings being launched and the defendant offering an undertaking that no further material would be published.

[6] Subsequently, on 13 September 2017, the plaintiff pleaded guilty at Ballymena Youth Court to a charge under section 1 of the Computer Misuse Act 1990. He received a non-custodial sentence on 26 February 2018.

The Pleaded Cases

[7] A statement of claim was delivered on 15 June 2017. It asserts that the defendant was guilty of negligence in publishing material which led to the identification of the plaintiff and also in making injurious and vilifying comments about him. It is also alleged that the plaintiff had a reasonable expectation of privacy in relation to his name, his image, his physical appearance and the general vicinity in which he lived and the defendant had misused such private information by publication in the circumstances. It is further claimed that the plaintiff has sustained personal injury by reason of these tortious actions. The damages claimed include aggravated and exemplary damages.

[8] In its defence served on 13 October 2017, the defendant says that it owed no duty of care to the plaintiff and therefore the claim in negligence is without merit. In relation to the cause of action in misuse of private information, it is pleaded that there was no reasonable expectation of privacy in relation to the material and, in the alternative, it was published in the public interest and in exercise of the defendant's rights under article 10 of the ECHR.

[9] An 'amended' statement of claim was served on 30 January 2020 specifically referring to the articles which were published in the defendant's newspaper and

online and purporting to add a cause of action under the Data Protection Act 1998. The defendant's consent to these proposed amendments was not sought nor was any application for leave to amend made.

[10] A notice of intention to proceed was served, pursuant to Order 3, rule 6(1) of the Rules of the Court of Judicature (NI) 1980 ('the Rules'), on 11 January 2021.

Want of Prosecution

[11] The defendant relies on the following salient facts:

(i) The cause of action accrued in this case well over five years before this application was brought;

(ii) The statement of claim was served some 18 months after the entry of an appearance by the defendant, well outside the six week period prescribed by Order 18, rule 1 of the Rules;

(iii) The defence was served on 13 October 2017 and since no reply was served, the pleadings were closed on 4 November 2017 by virtue of Order 18 rule 20(1)(b) of the Rules;

(iv) Nothing happened in the case between the service of the Defence in October 2017 and the purported amended statement of claim in January 2020, save for an order made by Maguire J in March 2018 discharging a previous anonymity order;

(v) In correspondence dated 12 March 2021 the solicitor acting for the plaintiff stated that the delay was caused by giving the other defendants an opportunity to enter a defence before proceeding and a general reference to the pandemic.

[12] In an affidavit sworn in response to this application, the solicitor acting for the plaintiff avers:

(i) His client is a young man who suffers from Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder, factors which impact the ability to consult with him and take instructions;

(ii) Following the publications complained of, the plaintiff began to suffer from cardiac issues;

(iii) Judicial review proceedings were commenced in November 2015 in relation to the failure by the Department for Justice to bring forward legislation concerning the identification of minors facing criminal charges;

(iv) This application proceeded to a full hearing before Colton J and judgment was handed down in December 2016;

(v) The criminal proceedings commenced by way of summons in April 2017 and concluded with a Youth Conference Order in February 2018;

(vi) The decision of Colton J was appealed to the Court of Appeal who remitted the matter back in February 2019 for consideration of a fresh legal argument;

(vii) A second hearing took place in January 2020 with judgment being delivered in March 2020;

(viii) Hearing took place before the Court of Appeal in November 2020 and judgment was delivered in January 2021;

(ix) Permission was sought to appeal to the Supreme Court of the United Kingdom, which was ultimately refused in March 2022;

(x) It is said that these have been difficult and complex parallel proceedings which, when coupled with the plaintiff's difficulties, have made the management of the litigation time-consuming.

[13] The defendant asserts, in response to this affidavit evidence, that no correspondence ever issued explaining the delay and, in any event, the judicial review proceedings were entirely unrelated to the private law issues between these parties. It is noteworthy, however, that on 28 September 2017, the solicitors acting for the defendant had suggested staying this action until the judicial review application and the criminal proceedings had been determined. This offer was never acted upon.

The Legal Principles

[14] The defendant seeks relief pursuant to Order 3, rule 6(2) of the Rules:

> "Where two years or more have elapsed since the last proceeding in a cause or matter the defendant may apply to the Court by summons to dismiss the same for want of prosecution."

[15] It should be noted that Order 3, rule 6(2) is a peculiarly Irish provision but it is to be exercised on the same principles as an application to dismiss for want of prosecution under the court's inherent jurisdiction – see *Boyd v Sinnamon* [1974] NIJB June.

[16] A 'proceeding' for the purposes of Order 3, rule 6 means an act of some formality or significance in the action. It does not include a notice of intention to

proceed served under Order 3, rule 6(1) – see *Allen v Redland Tile* [1975] NI 75. Nor does it include a draft amended pleading served without leave. The defendant was therefore entitled to pursue this application.

[17] Lord Diplock's principles in *Birkett v James* [1978] AC 297 still govern applications to dismiss for want of prosecution at common law:

> "The power should be exercised only where the court is satisfied either: (i) that the default has been intentional and contumelious, e.g. disobedience to a pre-emptory order of the court or conduct amounting to an abuse of the process of the court; or (ii) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party."

[18] The defendant's application is grounded on the second limb of *Birkett*. There can be no doubt that the delay in progressing this action has been inordinate. A delay of over 18 months in the service of a statement of claim was followed by inaction for over two years before a draft amended pleading was furnished without either a request for consent to the amendments or an application for leave. In reality therefore, nothing happened in the action for over three years before this application was launched by the defendant.

[19] Equally, the delay in this case is inexcusable. The reasons put forward by the defendant's solicitor provide a background to the various issues and difficulties these events have presented, but do not amount to an excuse for the failure to progress the litigation.

[20] The question is therefore whether the inordinate and inexcusable delay has given rise to serious prejudice to the defendant or have made it impossible to have a fair trial. Whether serious prejudice has been occasioned requires an analysis of the form and content of the evidence which the defendant will adduce at the trial. The misuse of private information claim involves a familiar balancing of Convention rights and the defendant would no doubt wish to adduce journalistic and editorial evidence. No discovery has, as yet, been furnished in the action but it is reasonable to infer that there will be journalist's notes and internal emails relevant to the articles and the decision to publish. Given that legal proceedings were commenced within days of publication, it is also reasonable to infer that these have been retained and will be available for the benefit of witnesses and the court.

[21] The defendant has adduced no evidence whatsoever of actual prejudice. There is nothing to say, for instance, that witnesses cannot be traced or have any difficulty recollecting events. There is no suggestion that documentation cannot be located. The court is asked to infer serious prejudice from the period of delay. I am not at all persuaded that this is an appropriate case to exercise the power to dismiss for want of prosecution. Whilst there has been inordinate and inexcusable delay, it has not been established that this has caused any serious prejudice or interfered with the fairness of a future trial.

Abuse of Process

[22] Order 18, rule 19 reads:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (d) it is otherwise an abuse of the process of the court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

[23] The defendant relies on two separate species of abuse of process. Firstly, the delay itself is said to be a ground for striking out the proceedings and secondly, it is argued that no substantial tort can be said to have been committed.

[24] The delay ground derives from the decision of the House of Lords in *Grovit v Doctor* [1997] 1 WLR 604. In that case the defendant and moving party was unable to show serious prejudice and could not therefore invoke the second limb of *Birkett*. However, it was argued that the action ought to be struck out as an abuse of process since the plaintiff had commenced proceedings which he did not intend to bring to a conclusion. Lord Woolf stated:

> "To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution

> under either of the limbs identified by Lord Diplock in *Birkett v James*."

[25] Recently, in *Asturion Foundation v Alibrahim* [2020] 1 WLR 1627, the Court of Appeal in England & Wales has considered the concept of 'warehousing' claims, whereby claimants do not intend to bring a claim to a conclusion either at all or only in the event of some contingency. Arnold LJ commented:

> "… a unilateral decision by a claimant not to pursue its claim for a substantial period of time, while maintaining an intention to pursue it at a later juncture, may well constitute an abuse of process, but does not necessarily do so. It depends on the reason why the claimant decided to put the proceedings on hold, and on the strength of that reason, objectively considered, having regard to the length of the period in question."

[26] On this principle, there is no automatic rule that delay amounts to an abuse of process. Even if it does, the court must then consider whether, in its discretion, to strike a claim out.

[27] The first question which arises is whether the approach adopted by the English Courts in *Grovit* and *Asturion* represents the law in this jurisdiction. I have no doubt that it does. Dismissal for want of prosecution and striking out as an abuse of process are separate juridical concepts. *Grovit* is a decision of the House of Lords and whilst it is not strictly binding on this court, it should only be departed from if compelling reasons could be shown. Furthermore, this judgment predates the adoption in England & Wales of the Civil Procedure Rules. It has also been cited in argument on many occasions in this jurisdiction without demur. Recently, for instance, in *AB v Universitair Ziekenhuis Gent* [2021] NIQB 47, McFarland J expressly held that the test for abuse of process was as laid down in *Asturion*.

[28] The question is whether, on the evidence, the plaintiff is guilty of an abuse of process in the manner in which this claim has been pursued. I accept that the focus of the plaintiff's legal representatives was on the pursuit of the application for judicial review during the period from 2015 to 2021. The judicial review application, whatever its outcome, would have had no bearing on the civil action against the media outlets. However, it has not been established that the plaintiff or his advisors decided to 'warehouse' this claim but rather the approach to this litigation was characterised by inattention and inactivity. As such, whilst this conduct should attract criticism, I am not satisfied that it represented an abuse of the process of the court.

[29] The application to strike out the claim by reason of delay therefore fails.

[30] The second limb of the abuse of process application arises out of the line of authority from *Jameel v Dow Jones* [2005] QB 946 to the effect that it is an abuse to commit court time and resources, and put the parties to expense, in a case where there has been no "real and substantial tort." This principle has been applied by the Court of Appeal in this jurisdiction in *Ewing v Times Newspapers* [2013] NICA 74.

[31] The basis of the decision in *Jameel* arises from the balancing act which the courts are obliged to carry out between articles 8 and 10 of the ECHR. A court faced with a claim by a media outlet that it was exercising its article 10 freedom of expression must consider whether the proceedings have the legitimate aim of protecting the plaintiff's individual reputation or whether its pursuit is disproportionate and therefore an abuse of process.

[32] In *Harlow Higinbotham v Wipaporn Teekhungam* [2018] EWHC 1880 (QB), Nicklin J held that the *Jameel* jurisdiction was not limited to defamation claims but applied equally to claims grounded in misuse of private information and under the Data Protection Act. This was followed in Northern Ireland by Scoffield J in *MacAirt v JPI Media* [2021] NIQB 52. I gratefully adopt the learned judge's exposition of the relevant principles:

> "(i) The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, "*the game is not worth the candle*": *Jameel* [69]-[70] *per* Lord Phillips MR and *Schellenberg v BBC* [2000] EMLR 296, *per* Eady J. The jurisdiction is useful where a claim "*is obviously pointless or wasteful*": *Vidal-Hall v Google Inc* [2016] QB 1003 [136] *per* Lord Dyson MR.
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> (ii) Nevertheless, striking out is a draconian power and it should only be used in exceptional cases: *Stelios Haji-Ioannou v Dixon* [2009] EWHC 178 (QB) [30] *per* Sharp J.
>
> (iii) It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value: *Ansari v Knowles* [2014] EWCA Civ 1448 [17] *per* Moore-Bick LJ and [27] *per* Vos LJ.
>
> (iv) The Court should only conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved where it is impossible "*to fashion any procedure by which that claim can be adjudicated in a*

> *proportionate way*": *Ames v Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] *per* Warby J citing *Sullivan v Bristol Film Studios Ltd* [2012] EMLR 27 [29]-[32] *per* Lewison LJ." [para 44]

[33] The plaintiff's claim in negligence is manifestly misconceived. There is no pleaded case as to how it is said that a duty of care arises in the circumstances of this case. Effectively, the plaintiff is saying that a newspaper publisher owes a duty not to carelessly cause harm, in the form of distress, anxiety, upset and psychiatric injury, to anyone about whom it publishes material. Counsel for the plaintiff were unable to identify a single authority which might make good this proposition, which is unsurprising. This must be particularly so in a situation such as the instant one where the material published is true.

[34] The negligence claim could have been struck out under Order 18, rule 19(1)(a) as not disclosing a reasonable cause of action but, equally, it is an abuse of the process of the court to pursue a claim which has no basis in fact or law. I therefore strike out the claim in negligence against the defendant.

[35] If the plaintiff enjoys a cause of action, it must be grounded in the misuse of private information. The Supreme Court held, in *ZXC v Bloomberg* [2022] UKSC 5 that, generally, a person who is under criminal investigation, but is not yet charged, has a reasonable expectation of privacy in relation to that information. As Lord Hamblen and Lord Stephens observed, liability for this tort requires the application of a two stage test:

> "Stage one is whether the claimant objectively has a reasonable expectation of privacy in the relevant information. If so, stage two is whether that expectation is outweighed by the publisher's right to freedom of expression." [para 26]

[36] The defendant relies on the principle that article 8 of the ECHR cannot be invoked in relation to harm caused which is itself a foreseeable consequence of the individual's own actions, such as the commission of a criminal offence – see, for instance, the decision of the Grand Chamber in *Axel Springer v Germany* [2012] 55 EHRR 6 and *ZXC* at paras [118] to [123].

[37] There may well be merit in the defendant's argument on this issue. However, I am conscious of the admonition that striking out should be a remedy confined to exceptional cases where the claim is obviously without prospect of success. Given the plaintiff's age at the time of publication, and the medical conditions from which he is said to suffer, I am not satisfied that this case falls into the exceptional category justifying striking out as an abuse of process.

[38] There is no evidence before me as to the likely cost of these proceedings but, in any event, this will not be a lengthy trial, and there is no basis to suppose that the costs will be disproportionate to any prospective damages claim.

[39] Accordingly, I refuse the application to strike out the claim of misuse of private information.

Conclusions

[40] For the reasons outlined, I refuse the relief sought by the defendant but strike out the plaintiff's negligence claim. It is apparent that this litigation has already been dogged by undue delay. I propose to make directions towards trial and will hear the parties on these, as well as on the question of costs.