IN THE SUPREME COURT OF GIBRALTAR

Claim No. 2013-E-42

BETWEEN

TERENCE PATRICK EWING

Claimant

-and-

TIMES NEWSPAPERS LTD

Defendant

JUDGMENT

The claimant in person

Mr David Dumas QC for the Defendant

JACK, J:

1. On 11th February 2007 the *Sunday Times* newspaper published an article entitled "Fake nimbys hold builders to ransom". A similarly titled article appeared on the *Times Online*, the newspaper's website. Both the paper and the website are published by the defendant.

2. Mr Ewing complains that the article libelled him that its contents "meant and were understood to mean:

   (1) that the claimant had corruptly been involved with and/or had facilitated and/or condoned the payment of £10,000 or bribe a developer in order to drop objections to the developer's planning application and scheme.

(2) that the claimant had corruptly been involved with and/or had facilitated the acceptance of many other bribes from other developers systematically and serially in order to drop objections to other developers' planning applications and schemes and/or judicial review applications in connection with them.

(3) that the claimant had corruptly made planning applications for the purpose of extorting demands of the payment of money from developers and/or accepting corrupt payments of money and bribes from them systematically and serially.

(4) that the claimant was not genuinely interested or concerned about heritage and planning issues but had been using these issues along with others as a front for corrupt payments from developers in return for dropping planning objections and judicial reviews."

3. In addition to the claim in libel, the claimant complains of breach of confidence and breach of privacy arising out of the same publication. The breach of confidence was said to be that of the journalist, Mr Foggo, employed by the defendant, who wrote the article using information supplied by Mr Ewing. The breach of privacy was the publication of a small photograph of himself taken in the public house where he met Mr Foggo and the giving of details of his address in North London and the fact that he was living on benefits.

4. The defendant applies to strike out the claim as an abuse of process pursuant to CPR Rule 3.4 and/or the Court's inherent jurisdiction. (An alternative challenge to the jurisdiction of this Court has not been pursued.)

5. It may be thought strange that Mr Ewing should bring these proceedings before the Supreme Court of Gibraltar. The best estimate of the number of copies of the international Madrid edition of the *Sunday Times* sold in Gibraltar on 11th February 2007 is 282. Mr Ewing has no connection with Gibraltar. The

prospect of any who knew him reading that edition of the newspaper in Gibraltar is negligible and there is no evidence that anyone did. No statistics are available of the number of hits the article may have had from Gibraltar in its online version, but the numbers are also likely to be negligible.

6. Why, it might be asked, did Mr Ewing not sue in England, where he lived and where any reputation he might have would be found? The answer is that Mr Ewing is one of a select number of people whom the High Court of England and Wales has found to be a vexation litigant. On 21st December 1989 in *HM Attorney General v Ewing* (unreported), the Divisional Court, Queen's Bench Division (Mann LJ and Rose J) made a civil proceedings order under section 42 of the (United Kingdom) Supreme Court Act 1981 (now renamed the Senior Courts Act 1981). It was based on some 25 actions which had been commenced by Mr Ewing between 1979 and 1986.

7. In the course of delivering the Court's judgment, Rose J cited some correspondence sent by Mr Ewing in various of the actions:

> "I will not in any event comply with any order for payment or taxation order ... I shall knowingly and wilfully be defaulting on all debts owed to your trash wetback clients and the trash Law Society."
>
> "I shall of course be deliberately seeking to pursue vexatious objections, simply for the purpose of building up a further legal bill in respect of which you and the Law Society will be billed."
>
> "It is my policy on taxation to make the proceedings deliberately as expensive and convoluted for the opposition as I can possibly make them with every conceivable objection and point being taken, no matter how minor ... I can also assure you that I intend to make the proceedings in the Westminster County Court as embarrassing as I possibly can for your client and your department."

8. The effect of being made a vexatious litigant is that the person may not bring proceedings in England and Wales without the permission of a High Court judge. Notwithstanding this restriction, Mr Ewing has since been gracing the law reports with his attempts to continue litigating in that jurisdiction: see *Henry J Garratt & Co v Ewing* [1991] 1 WLR 1356, *Ex parte Ewing* [1991] 1 WLR 388, *Ex parte Ewing (No 2)* [1994] 1 WLR 1553, *R (Ewing) v Office of the Deputy Prime Minister (Practice Note)* [2005] EWCA Civ 1583, [2006] 1 WLR 1260, *R (Ewing) v Department for Constitutional Affairs* [2006] EWHC 504 (Admin), [2006] 2 All ER 993, *Ewing v Davis* [2007] EWHC 1730 (Admin), [2007] 1 WLR 3223 and *Ewing v Camden LBC* [2013] EWHC 961 (Admin), [2013] CN 714. There are some further cases, which remain unreported: *R v Legal Services Ombudsman* (23 February 1998), *Ewing v Security Service* [2002] EWHC 3169 (QB), *Ewing v Director of Public Prosecutions* [2008] EWHC 2655 (Admin) and *Ewing v Director of Public Prosecutions (Rev 2)* [2010] EWCA Civ 70. A sustained theme of his applications has been that they have been categorised as "unarguable" by the judges hearing them.

9. In order to bring proceedings in England in respect of the 11th February 2007 article, therefore, Mr Ewing needed the permission of a High Court judge. He did make such an application, very close to the expiry of the one year limitation period for taking proceedings for libel in England and Wales. The application was heard by Coulson J who delivered a reserved judgment [2008] EWHC 1390 (QB) on 22nd July 2008 refusing permission.

10. The judge noted that Mr Ewing was convicted in 1981 of twenty-four counts of theft and forgery. Three of those counts were quashed by the Court of Appeal: [1983] QB 1039. (A petition to the House of Lords was dismissed: [1983] 1 WLR 1212.) The sentence of seven years imprisonment nonetheless was upheld by

the Court of Appeal. This, he considered, affected the reputation which Mr Ewing had to protect. The judge held that Mr Ewing would, even if successful in his libel action, receive only nominal damages: para [106](h).

11. The judge at para [79] held that the claim for libel was barred by the one year limitation period for such claims in England. Nonetheless he went on to consider the substantive merits of the claim. He concluded at para [107]:

> "that there are no reasonable grounds for the claim and/or the claim has no real prospect of success. Furthermore, I am in no doubt that those factors demonstrate that the bringing of the claims against the proposed defendants would be an abuse of the process of the court and would be an entirely disproportionate exercise."

12. As to the other claims of breach of confidence and breach of privacy, the judge held that Mr Ewing has no real prospect of success: see paras [115] to [118].

13. Nothing daunted, Mr Ewing brought proceedings in Scotland. He and an associate Peter Hayward (also a vexatious litigant) "made a special trip to Edinburgh in order to contrive the publication to them of the article": *Ewing v Times Newspapers Ltd* [2008] CSOH 169 at para [12]. Lord Brodie in the judgment cited, sitting in the Outer House of the Court of Session, required Mr Ewing to provide the Scottish equivalent of security for costs. He held at para [29] that:

> "it is difficult to discern any real interest that the pursuer needs to protect or harm for which he is entitled other than negligible reparation. I see this as an artificial litigation."

14. Mr Ewing failed to provide the security for costs and in due course the court granted a decree of *absolvitor*, effectively a strike out. An appeal to the Inner House of the Court of Session failed: [2010] CSIH 67. The Lord Justice Clerk (Gill) explained:

> "[16] All that I need say is that the pursuer agrees that he is impecunious; and that there is an abundance of evidence that he is a serial litigator, with a long and well-documented record of mischievous and irresponsible litigations. In these litigations and in numerous applications to the High Court for leave to institute proceedings he has inflicted untold costs on those whom he has sued. Ministers of the Crown, the Director of Public Prosecutions, the Security Service, the Registrar of Companies, the Criminal Injuries Compensation Board, the Legal Services Ombudsman, local authorities and developers are among his many victims.
> [17] The present action arises because the pursuer came to Scotland to acquire a cause of action. He has no connection with Scotland and has no apparent reputation here to defend. If he should have suffered hurt feelings when he read the article here, his hurt is self-inflicted. Even if there were to be a vestige of merit in the claim, this action would be disproportionate to its value (cf *Jameel* v *Dow Jones & Co Inc* [2005] QB 946, *per* Lord Phillips MR at para [69]; *Khader* v *Aziz* 2010 WL 2470646, at para [32]).
> [18] The pursuer has inflicted needless expense on the defender. He has imposed a needless burden on the overstretched resources of this court. It is time to bring down the curtain on this action before further time and money are wasted."

15. In the meantime, however, Mr Ewing had ventured across the Irish Sea. He issued two writs in the High Court of Justice in Northern Ireland. The first claimed libel and was issued under action no 2008 No 15921; the second under action no 2009 No 14508 claimed breach of confidence and breach of privacy as well as two claims (irrelevant for current purposes) under the (United Kingdom) Data Protection Act 1998 and for harassment.

16. An application to strike out this second claim came before Coghlin LJ, sitting as a High Court judge. He said [2010] NIQB 7:

> "[36] This plaintiff has no connection whatsoever with the Northern Ireland jurisdiction. No evidence has been produced that anyone in Northern Ireland who knew the plaintiff or was aware of his existence read the article in the Northern Ireland edition of the *Sunday Times* or drew the same to the attention of the plaintiff at any material time. Indeed, the only reference

> by the plaintiff to publication to a person other than himself seems to have been the lengths to which he and his friend James Brettle were prepared to go to expose themselves to publication. They travelled to Belfast for the purpose of attending Belfast City Library, accessed an on-line version of the article and downloaded it on to a memory stick for the purpose of obtaining a print out. ...it is difficult to see how the plaintiff enjoys the prospect of being awarded any substantial sum by way of damages even if he were to succeed."

He then cited *Jameel v Dow Jones & Co Inc* [2005] QB 946, and continued:

> "To-day it is necessary to clearly bear in mind the overriding objective contained in Order 1 Rule 1A of the Rules which requires the court to take into account not just the interests of the parties before the court but also the interests of other litigants and the overall administration of justice including the potential for the costs, expense and time to escalate out of all proportion. In my view such an approach is consistent with the proportionate observation of the Article 6 rights of individuals.
>
> [38] Taking an overall view of all the circumstances, I have reached the conclusion that the plaintiff's proceedings do not enjoy a reasonable prospect of success."

17. An application to strike the first claim out came before Gillen J. At [2011] NIQB 63 para [40] he held:

> "I have come to the conclusion that it would be an abuse of the process of this court to allow this case to continue both under the inherent jurisdiction of this court and under [the relevant rule]. I also consider it is vexatious litigation under [the relevant rule]."

In para [50] he said this was a paradigm case of an abuse of process by vexatious litigation.

18. Mr Ewing appealed to the Court of Appeal of Northern Ireland against both decisions. The lead judgment was given by Sir Declan Morgan CJ. The Court upheld the decisions of Coghlin LJ and Gillen J for the reasons they gave.

19. Mr Ewing has appealed to the Supreme Court of the United Kingdom against the decision of the Court of Appeal of Northern Ireland (who themselves refused him permission to appeal). He showed me the extensive petition seeking permission to appeal. On the basis that there were these outstanding proceedings, he submitted that I should stay the current action. I disagree. There is a public interest in determining whether Mr Ewing is abusing the process of this Court as quickly as possible.

20. I have to reach my own view on whether any of the claims advanced by Mr Ewing have any reasonable prospect of success and whether his claims are an abuse of process. I have done so and cannot express myself better than the Northern Irish judges have done so. I gratefully adopt their judgments as my own, save that the relevant procedural rule here is CPR Rule 3.4(2), which allows the Court to strike out a statement of case if "the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings." The only difference between the Northern Irish proceedings and the current ones is that the former concerned the Ulster edition of the *Sunday Times* whilst the current claim concerns the Madrid international edition.

21. I will, however, add that in my judgment the current proceedings are even more of an abuse of this Court than the proceedings in England, Scotland and Ireland. The numbers of copies of the newspaper are almost certainly smaller than in those jurisdictions. Moreover Mr Ewing is continuing the current proceedings in the full knowledge of the views expressed by the judges in those jurisdictions, including on appeal in Scotland and Northern Ireland. The only time he has ever visited Gibraltar, as he told me during his submissions, was when he came to issue his claim form in this matter and of course for the hearing of the striking out application.

22. What then is to be done? It goes without saying that the action must be dismissed with costs and a declaration that the action was totally devoid of merit. Costs, however, are no sanction, because Mr Ewing has never paid any costs and is impecunious. I am now the tenth judge to hear Mr Ewing's submisions. Mr Dumas QC tells me that the costs incurred in Gibraltar alone amount to some £30,000.

23. Section 10(1) of the Constitution of Gibraltar provides:

> "Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence."

24. This sub-section gives Times Newspapers Ltd a constitutional right to publish the *Sunday Times* with stories such as that exposing Mr Ewing. It is obvious that vexatious litigation of the type instigated by Mr Ewing will have a chilling effect on newspaper publishers. Indeed, the 2007 article was in 2011 removed from the website, although there is no evidence that this was connected with Mr Ewing's litigation.

25. Is the Court in these circumstances powerless? The Court can make various forms of civil restraint order: see CPR Part 3 Practice Direction 3C. However, this is only an *ex post facto* power, after the damage has been done. Moreover, as can be seen by the numerous claims brought by Mr Ewing in England, even after being made a vexatious litigant, such techniques have only limited success in restraining the truly determined.

26. The answer in my judgment lies in two old cases. In *Anonymous* (1588) Gouldsbrough 31, an attorney of the Court of Common

Pleas had a man arrested in an action of debt (which would have been brought in the Court of Common Pleas) outside London. When the man came to London, the attorney had him arrested for the same debt in a separate action. When the Court of Common Pleas learnt what had happened, Anderson CJ said:

> "if a man be sued here for a debt, and after be arrested in another Court for the same debt, the penaltie is fine and imprisonment, and that is both the law and the custom of this Court, wherefore then have you done this? Surely we will send you to the Fleet [prison] for your labour.
> Attorney: I beseech you, my lord, consider my estate.
> Anderson CJ: I have well considered it and that is, that you shall goe to the Fleet, and therefore warden of the Fleet take him to you."

27. It is significant that Windham J then added that the fact that the contemnor was a lawyer was an aggravating feature. This implies that a lay person would have been equally liable, but that the penalty might have been less. In other words the Court was not acting under its disciplinary powers against its own officers, but rather under its general powers.

28. In *Higgens v Sommerland* (1613) 2 Bulstrode 68, Higgens had had Sommerland arrested for a debt of £200. Sommerland was released on bail provided by Montgomery. In due course, Higgens tried to get the judgment debt from Montgomery, but he could only pay £65. Higgens took this and granted a release to Montgomery. He then tried to get the balance of the money from Sommerland. The Court of King's Bench took it that it was well-established, indeed trite, law that "if the bail be once taken in execution, he shall never after this have execution for any part against the principal." The report concluded that:

> "the whole Court were clear of opinion, that these proceedings were very bad and undue, and so done in contempt of the Court."

29. From these two cases I deduce that serious abuse of process can be a contempt of court. Contempt of court takes two forms: civil and criminal. Civil contempt is largely concerned with breaches of injunctions. Abuse of process by contrast is a criminal contempt. Where it is committed by a litigant pursuing vexatious litigation by bringing vexatious proceedings and then by advocacy in court, in my judgment it is a form of criminal contempt in the face of the court. Whether the abuse of process in this matter is so serious as to amount to a contempt of court is something on which I will hear representations.

30. The appropriate procedure is set out in CPR Rule 81.16 and para 4.1-4.5 of the Part 81 Practice Direction. By para 4.3, I should

> "(1) tell the respondent of the possible penalty that the respondent faces;
> (2) inform the respondent in detail, and preferably in writing, of the actions and behaviour of the respondent which have given rise to the committal application;
> (3) if the judge considers that an apology would remove the need for the committal application, tell the respondent;
> (4) have regard to the need for the respondent to be –
> (a) allowed a reasonable time for responding to the committal application, including, if necessary, preparing a defence;
> (b) made aware of the possible availability of criminal legal aid and how to contact the Legal Aid Agency;
> (c) given the opportunity, if unrepresented, to obtain legal advice;
> (d) [irrelevant] and
> (e) brought back before the court for the committal application to be heard within a reasonable time;
> (5) allow the respondent an opportunity to –
> (a) apologise to the court;
> (b) explain the respondent's actions and behaviour; and
> (c) if the contempt is proved, to address the court on the penalty to be imposed on the respondent..."

31. As to (1), the maximum sentence in Gibraltar is two years imprisonment. As to (2), this judgment gives details of the abuse of process which may amount to contempt of court. As to (3), I am not sure that an apology would suffice if contempt is made out, but I am happy to hear representations. It may be that Mr Ewing could give undertakings to prevent any risk of a repeat of his abusing the process of this Court, but again I will hear representations. As to (4), the Court will endeavour to make legal representation available to Mr Ewing and give any legal representative a reasonable opportunity to prepare his defence. I shall of course afford him every opportunity as required by (5). I shall also consider representations as to whether it is appropriate for me or some other judge to deal with the matter.

32. Because of the risk of Mr Ewing leaving the jurisdiction, it is appropriate to remand him in custody, pending determination of the contempt matter.

Adrian Jack
Puisne Judge

17th November 2014