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Case No: HQ16X04316
Appeal Ref: QB/2017/0270

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

- -

Between :

Harlow Higinbotham (formerly BWK)	**Claimant/ Appellant**
- and -	
(1) Wipaporn Teekhungam **(2) Winton Anthony Perry**	**Defendants/ Respondents**

- -

Lorna Skinner (instructed by **Innovate Legal**) for the **Claimant**
Chloe Strong (instructed by **Gibson & Co Solicitors**) for the **Defendants**

Hearing dates: 1 February 2018, 22-23 March 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. This is the Claimant's appeal from a decision of Master Yoxall on 23 October 2017. The Master struck out the claim as an abuse of process. Permission to appeal was given by Choudhury J on 20 December 2017.

2. The Claim Form was issued on 14 December 2016 and on that same date the Claimant sought and was granted an anonymity order by Deputy Master Sullivan after a without notice application. The Claimant did not seek an order anonymising either Defendant. As can be seen from the first page of this judgment, I have discharged the anonymity order. My reasons for doing so are set out below ([67]-[73]).

3. The Claim Form was served with Particulars of Claim on 20 December 2016. The claim is for misuse of private information, breach of confidence and for alleged breaches of the Data Protection Act 1998 ("the English Proceedings"). Before turning to consider the claim in more detail, I need to set out the background and history that gave rise to the dispute between the parties.

Background and history

4. The Claimant is a US citizen who resides and works in the USA. He married his wife in 1991. The First Defendant is a Thai national who lived and worked in Thailand until about May 2013. The First and Second Defendant are married and live in the Norfolk.

The Claimant and First Defendant's relationship

5. The Claimant and the First Defendant first met in 2001 in Bangkok. Shortly after that, they began a relationship. The details of the relationship I take from a witness statement filed by the First Defendant. The Claimant has served evidence in response, but he does not make any material challenge to her account.

6. The Claimant and the First Defendant travelled to Singapore in 2001. The Claimant told the First Defendant that he loved her and wanted to marry her. He gave the First Defendant an engagement ring and told her that he wanted them to have children, telling her that she was the perfect age to bear his children. The Claimant returned to the US, but the pair remained in contact. The Claimant would visit the First Defendant whenever he was travelling in South-East Asia. They met up, the First Defendant estimated, on average three to four times each year. The First Defendant became aware that the Claimant was already married in 2003. When they met in Japan in 2003, the First Defendant told the Claimant that he had to make a choice between his wife and her. The Claimant told the First Defendant that he could not bear to lose her. He returned to the US, but told the First Defendant that he wished to prove his commitment to her by marrying her in a Thai wedding ceremony. He was insistent that they should have children. Demonstrating perhaps some flexibility in his own moral code, the Claimant told the First Defendant that he was not prepared to conceive children outside marriage.

The Marriage Ceremony

7. And so, on 24 January 2004, the Claimant and First Defendant got "married" at a ceremony in Thailand. I have put inverted commas around married not in any way to disparage it, but because it is common ground that the marriage was not a legal marriage. The Claimant and the First Defendant nevertheless clearly treated it as being a significant event in their relationship. Although there is a dispute about the number of guests in attendance, the ceremony was by no means private. Photographs taken at the event have been provided and they show several groups of people were in attendance to witness the wedding. One photograph shows the Claimant and the First Defendant standing in front of what appears to be an 8-foot square sign bearing a large inscription "*Love Forever*" over their two names. A woman is pictured to the couple's right holding a microphone, which I infer allowed her to address the audience of guests. The need for a microphone perhaps indicates that this was not a small intimate event, but a rather larger affair.

8. Prior to the wedding, the Claimant had accompanied the First Defendant to her home town to meet her parents. The Claimant paid a dowry to the First Defendant's father as the First Defendant says is traditional. The Claimant gave presents of gold, a diamond ring and a credit card that she was told that she could use (up to a limit of US$8,000 per month).

Birth of the Triplets

9. The First Defendant underwent IVF treatment which she described as "*concerted, intensive, and at times painful and distressing*". It was ultimately successful. The First Defendant became pregnant and, on 5 November 2008, she gave birth to triplet sons. Following their birth, the Claimant sent a copy of his passport so that he could be included on the children's birth certificates as their father. The triplets were named after the Claimant's family and took the Claimant's surname; one of the sons was given the same first name as the Claimant.

10. The birth of the triplets received media attention in Thailand where IVF treatment (and associated multiple births) was (at least in 2008) relatively uncommon. The First Defendant and her sons were featured in a television news feature broadcast on Channel 7 news in Thailand. Although a recording of the item is not available, photographs of the First Defendant apparently being interviewed in her hospital bed (with the triplets beside her) have been exhibited to the Second Defendant's witness statement. He states that, in the broadcast, the Claimant, First Defendant and triplets were all named.

11. By January 2009, it appears that the First Defendant was contemplating what the future held for her children and her relationship with the Claimant. She was considering moving to Europe as she did not feel safe in Thailand and had sent an email to the Claimant on 3 January 2009 about her plans. I have not seen the full exchange (and the Claimant has apparently deleted all copies of his email correspondence with the First Defendant), but the Claimant replied to the First Defendant on 4 January 2009:

> "Thank you for all your thoughts and thoughtful expressions. You are my first wife and the best wife by far that I could ever imagine.

> I may need some time to develop concrete answers to all of your questions, but I don't need any time to tell you that I know what I want to do and that from November 5 [the birth of the triplets] you and our sons come ahead of everything else. Please don't be so concerned about money: it's not that important and there's always plenty of it.
>
> I would like to hear more about what this opportunity in Europe is all about. I think it would be great if you could find a way to earn a living and make some kind of career. I worry about the risks and of course you've heard how badly some of these 'opportunities' often turn out. No matter what you do or what happens to you, my love, I'm always (ALWAYS) here for you.
>
> I'll write again tomorrow when I've had a bit more time to reflect on everything that you are saying. I am proud to be the father of our three sons and even prouder to be honoured by calling you my wife, and I'll accept whatever are the consequences of those wonderful events in my life… I'm not shirking from this responsibility and challenge, and I know you aren't, and that you'll let me know what we need to do to make this work…"

12. Nevertheless, the relationship between the Claimant and the First Defendant broke down towards the end of 2009. The Claimant says that the cause was his discovery that the First and Second Defendants were having a relationship. There were disagreements between the couple as to the Claimant's provision of support for the triplets.

The First Thai Proceedings

13. In March 2010, the First Defendant commenced proceedings in Thailand seeking an order for child support ("the First Thai Proceedings"). One immediate consequence of the First Thai Proceedings was that they led the Claimant's wife to discover the Claimant's relationship with the First Defendant. She did so when she saw correspondence relating to the case that had been delivered to one of their homes. In his Particulars of Claim the Claimant states that, on 5 September 2009 he told his wife of "*the fact of his relationship with the First Defendant and of his paternity of the boys*". He maintains that the Claimant and his wife "*continued to maintain secrecy in relation to these matters in relation to his friends and business associates.*"

14. At first instance in the First Thai Proceedings, the Court found for the First Defendant and made an order on 21 December 2010 requiring the Claimant to pay a monthly sum ("the Child Support Order"). The Claimant sought to appeal that decision.

The Claimant's wife's claim in Thailand

15. Meanwhile, in January 2011, the Claimant's wife brought proceedings in Thailand against the Claimant and the current Defendants ("the Second Thai Proceedings"). In what under English law might be regarded as a somewhat ambitious claim, she sought repayment of sums that had been paid by the Claimant to the First Defendant during their relationship. I have been provided with a translation of a document filed in the Second Thai Proceedings that sets out the detail of the Claimant's wife's claim ("the Thai Claim Form"). In it, the Claimant's wife described herself as a "*civic leader, being a member of [a] famous or prominent family and being a famous person*" in their community, holding senior positions in a number of charitable

organisations. Complaint was made that the First Defendant had married the Claimant at the ceremony on 24 January 2004 despite knowing of his marriage to the Claimant's wife and that "*in the presence of her relatives, friends and [others]… [the First Defendant] has overtly expressed… [her] adulterous relationship with the [Claimant]*." The Claimant's wife complained that the Claimant had given substantial sums from the marital estate to the First Defendant and she sought to reclaim these sums from the First Defendant.

16. The Thai Claim Form also included what appears to be a claim by the Claimant's wife for damage to her reputation. The document (in translation) stated:

> "The way the [First Defendant] had overtly expressed herself in public to show she has an affair with the [Claimant] in adulterous affairs caused damage to the [Claimant's wife's] fame, prestige and very much humiliation among [her] society because the [Claimant's wife] had been elected to hold high positions in various organisations… After the members of these organisations [discovered] the adulterous affairs between [the Claimant and the First Defendant] that caused humiliation to [the Claimant's wife] because the other members saw the [Claimant's wife] defective in performance of the wife's duty that the husband [had an affair] with another woman. From such humiliation, the [Claimant's wife] had to resign from many charity organisations in order to prevent these organisations from [suffering] detriment from the story…"

17. For this "*humiliation*", the Claimant's wife sought damages from the First Defendant of 100 million baht (equivalent of around £2 million). The Claimant's wife's claim was dismissed. A translation of a judgment dated 17 November 2015 dismissing the claim has been provided. All the parties are named. There are two matters of significance from these proceedings:

    i) on the evidence submitted in support of the Second Thai Proceedings, the fact of the Claimant's affair with the First Defendant had, by January 2011, become known to (at least) some in the Claimant's wife's circle of contacts and had allegedly led to her having to resign from various charitable organisations due to the embarrassment (appearing to cast doubt upon the alleged maintenance of secrecy – see paragraph 13 above); and

    ii) the evidence suggests that the Thai Claim Form and judgment are also generally available for public inspection.

    I was told at the hearing that the Second Thai Proceedings are not yet concluded; an appeal is apparently still pending.

Enforcement of the Child Support Order: the US Proceedings

18. I infer that the Claimant did not fully comply with the Child Support Order. This led to the First Defendant commencing proceedings in the US to register and enforce the Child Support Order. The "*Petition to enrol foreign money judgment confirming father and children's relationship…*" was filed in a court in Illinois on 27 June 2011 ("the US Proceedings"). One of the issues raised by the Claimant in the US Proceedings was whether, under Illinois law, the biological father of children conceived by artificial insemination could be required to make maintenance payments in respect of those children ([19] below). The First Defendant has exhibited over

500 pages representing some of the documentation from the US proceedings, including substantial interim applications. The Claimant says that it represents "*selected documents*", but he has not sought to introduce any others. Both parties are named in the Court documents which (as might be expected) recite, in great detail, the history of the Claimant and the First Defendant's relationship. The evidence establishes that these documents are also open to public inspection.

19. Ultimately, the First Defendant was successful in the US Proceedings when, on 2 December 2016, the Appellate Court of Illinois dismissed an appeal from the first instance court's decision to register and enforce the Child Support Order. In its public judgment ("the Appeal Judgment") the Court identified the Claimant by his first name and the first initial of his surname and the First Defendant by her first name. A copy of the Appeal Judgment has been exhibited to the witness statement of the First Defendant, but it is available online to any user of the Internet. It is convenient to take the summary of the First Thai Proceedings and US Proceedings from the Appeal Judgment.

> [7] Harlow held an economics PhD and went to Thailand to work as an economic analyst between 2001 and 2009. Harlow began a personal relationship with Wipaporn in 2001 that continued for several years. Harlow was a citizen of the United States and already married to an American woman. In January 2004, Wipaporn and Harlow participated in a traditional wedding ceremony ritual in Thailand, but they were not registered as being legally married. They were not able to conceive children naturally and agreed that Wipaporn would undergo a GIFT [gamete intrafallopian transfer] procedure using Harlow's sperm. Harlow consented to this procedure in writing and signed the consent form on the line designated "husband." The procedure was successful, and their three sons were born on November 5, 2008.
>
> [8] Harlow financially supported Wipaporn and their three sons until September 2009. Thereafter, Wipaporn filed a civil suit against Harlow in Thailand to establish his paternity and obtain child and educational support. Harlow was represented in the matter by counsel, who filed an appearance, entered exhibits, and submitted a legal memorandum arguing that Illinois law prevented the imposition of a finding of paternity and child support obligations on him. Harlow chose not to personally appear at the trial for reasons of legal strategy.
>
> [9] According to the record, Harlow argued at the trial level in the Thai court that he and his American wife were married and living together for 19 years, the three boys were not his children, he did not have sexual intercourse with Wipaporn during her fertile period, and he never underwent fertility medical treatment to have children with Wipaporn. He also averred in his answer that Wipaporn had gone through a fertility medical treatment with another person and deceived Harlow by telling him that the three boys were Harlow's children. Wipaporn presented photographic evidence of her and Harlow's 2004 wedding ceremony and reception, documentation that Harlow consented to the GIFT procedure and allowed the doctor to take his sperm to use in such treatment, and DNA test results that established Harlow was the biological father of the three boys. Harlow submitted a testimonial statement to the Thai court, but

the statement was inadmissible because he would not submit to cross-examination.

[10] In December 2010, the Thai court entered an order that adjudicated Harlow to be the legal father of the triplets and awarded Wipaporn child and educational support in gradually increasing amounts. This decision was affirmed by Thailand's appellate court in June 2013. In a judgment dated both July 6, 2015, and January 18, 2016, Thailand's supreme court affirmed the judgment but amended it to require Harlow to provide educational support for his three sons only until they reached the age of majority. On February 5, 2016, the Thai court issued a certificate of case finality in this matter. This court takes judicial notice of the proceedings and final judgment of the Thai court…

[11] Meanwhile, in June 2011, Wipaporn filed in the Circuit Court of Cook County her initial petition to, *inter alia*, enroll the Thai judgment, establish Harlow's child support obligations, recognize and enforce the Thai judgment based on comity, and increase the award of child support. Later, Wipaporn filed a four count amended petition, seeking (1) recognition and enrollment of the Thai judgment under principles of comity, (2) modification of the Thai judgment, (3) a *de novo* child support calculation, and (4) damages for breach of contract.

[12] In August 2012, Harlow moved to dismiss the amended petition, arguing the Thai judgment was not entitled to comity. Specifically, Harlow argued that because he was never married to Wipaporn, the Thai judgment was contrary to Illinois public policy as expressed in a statutory provision that prevented the donor of semen used in the artificial insemination of a woman other than the donor's wife from being treated in law as if he were the natural father of the resulting child. In March 2013, the circuit court denied Harlow's motion to dismiss the amended petition with respect only to count I, which requested the extension of comity to the Thai judgment; the circuit court did not rule on the other three counts. Thereafter, the circuit court denied Harlow's motion to reconsider.

[13] In July 2013, Harlow filed an answer and affirmative defenses, asserting, *inter alia*, that comity could not be extended to the Thai judgment because Wipaporn obtained it by fraud and Harlow was denied a full and fair hearing in Thailand. In his answer, Harlow admitted he was the known sperm donor but alleged Wipaporn had concealed from him her relationship with another man, with whom she was cohabiting. Harlow alleged Wipaporn intended him to be merely a sperm donor, had used his money to support her partner, and wanted to use Harlow's wealth to secure permanent financial support for herself and her partner. According to Harlow, Wipaporn made misrepresentations to Harlow to induce him to participate in the GIFT procedures. Harlow asserted that he did not learn about the partner's involvement until after the Thai trial court issued the judgment in 2010 and thus was unable to prepare a full defense at the trial in Thailand.

[14] Wipaporn moved to strike and dismiss Harlow's answer and affirmative defenses. She argued that the circuit court's denial of Harlow's motion to dismiss count I of the amended petition resolved the only legal issue

> between the parties and *res judicata* barred Harlow's pleading. On August 22, 2013, the circuit court struck and dismissed Harlow's answer with prejudice, granted count I of the amended petition by enrolling, based on comity, the Thai judgment as an Illinois judgment, and held that there was no just reason to delay enforcement or appeal of its order. Thereafter, the circuit court denied Harlow's motion to reconsider.
>
> [15] Harlow timely appealed, contending that (1) the Thai judgment was not entitled to comity because it directly contradicted Illinois public policy, which prevents sperm donors in certain situations from being legally treated as the natural fathers of children conceived by artificial insemination; and (2) the application of *res judicata* and dismissal of Harlow's answer was improper because Wipaporn obtained the Thai judgment by fraud, Harlow was denied an opportunity to fully litigate his defenses in Thailand, and his appeal of the Thai judgment rendered the extension of comity to that judgment premature.

20. As noted above, the Claimant's appeal was dismissed. Consequently, both the First Thai Proceedings and the US Proceedings are now at an end. Notwithstanding that courts in these two jurisdictions have held (at first instance and on appeal) that he is the biological father of the children, the Claimant states in his witness statement in these proceedings: "*there is still insufficient information to determine whether I am [the father]…*". I cannot resolve whether this is intransigence or self-delusion, but it does not matter. For the purposes of these proceedings and between the Claimant and First Defendant, the issue of parentage has been authoritatively determined; the triplets are the Claimant's sons. Even allowing for the souring of relations following the breakdown of a relationship, it is not easy to reconcile the Claimant's determined resistance of the First Defendant's claim (and his denial of paternity) with his professed pride in being the triplets' father; his readiness to "*accept whatever are the consequences*"; or his assurances that he was "*not shirking from this responsibility*" and that he would "*always be there*" for the First Defendant (see email of 4 January 2009 – [11] above).

21. The US Proceedings have been reported or have attracted publicity in the US. On 8 December 2016, the *Chicago Daily Law Bulletin* published a front-page article reporting the Appeal Judgment with the headline: "*Sperm donor or dad? Thai ruling stands*". The article is still available online. Consistent with the Appeal Judgment, the Claimant was identified only by his first name and the first initial of his surname. The article, which reported on the First Defendant's success, at first-instance, included the following:

> "Harlow – a US citizen who was married to an American woman – worked in Thailand as an economic analyst from 2001 to 2006. He and Wipaporn began a personal relationship in 2001, and the two participated in a traditional Thai wedding ceremony in 2004. The two never legally registered their marriage.
>
> After encountering conception issues, Harlow and Wipaporn agreed to try conception through gamete intrafallopian transfer using his sperm. Harlow consented to this procedure and signed a consent form on the line marked 'husband'.

> The successful procedure led to the birth of three sons in November 2008. Harlow supported the mother and children financially until September 2009…"

The Appeal Judgment has also appeared in the Illinois Official Reports and been the subject of commentary in an article appearing on the website of a firm of attorneys.

The Facebook Profile

22. During the currency of the US Proceedings, in February 2014, the First Defendant created a Facebook profile ("the Facebook Profile"). It is the First Defendant's evidence that she had decided to set up a Facebook page for her sons to keep a record of their childhood, their family and details of their father. She said that she thought that a sort of electronic scrap-book would be a good way of ensuring that important information about their childhood would not be lost. The Claimant contends that the Facebook Profile was, in fact, designed by the First Defendant to appear as a profile of *him* and intended to embarrass him and to pressurise him in the US Proceedings. The posting of this Facebook Profile ultimately became the subject matter of these proceedings.

23. The contents of the Facebook Profile do lend support to the Claimant's contentions. The profile is set up in the name that is shared by the Claimant and one of his sons. That fact is equally consistent with the First Defendant's account. However, in a column on the left under the heading "*About*", the details that are given all related to the Claimant (employment, education, place of birth and current residence). A brief timeline also appears on the profile. Included in that are entries: (1) "*Got married*" in 1991; (2) "*In a complicated relationship*" in April 1991; (3) "*Had a child*" in November 2008; and (4) erroneously, ascribing the birthdates of the three (named) triplets to 11 May 2008. This narrative timeline consists of events (or alleged events) from the life of the Claimant. In light of these facts, I cannot accept the First Defendant's claim that the Facebook Profile was of (or for) one of the triplets. Objectively judged, it would have appeared to any reader to be a profile of the Claimant and, presumably, such a reader would readily have inferred it had been posted by him.

24. Appearing prominently on the Facebook Profile – posted twice in its own right and also appearing as the 'profile picture' – was a photograph of the Claimant and First Defendant sitting with the triplets on their lap. In itself, it is an unremarkable and typical family photograph. However, in the current proceedings, the Claimant contends that his relationship with the First Defendant was conducted: "*on the express understanding that their relationship would at all times be kept secret from the Claimant's family (in particular the Claimant's wife), friends and business associates*". On that basis, he contends that the publication of the Facebook Profile was a breach of confidence or misuse of private information because it expressly or impliedly disclosed his private and/or confidential information. I will return to the claim in these proceedings in more detail below.

25. The Claimant contends that the Second Defendant participated in the creation of the Facebook Profile as part of a "*common design*" and that he is therefore jointly liable with the First Defendant for its publication. The evidence to support his participation is that the email account used for the Facebook Profile was created by someone who

gave the Second Defendant's date of birth. From that, apparently, the Claimant at trial would invite the inference that the Second Defendant participated in the publication of the Facebook Profile.

26. The Claimant became aware of the Facebook Profile only when it was brought to his attention, on or around 27 July 2014, by one of his attorneys in the US Proceedings. The Claimant is only aware of three other people having seen the Facebook Profile; all three were other attorneys instructed by him. There is no evidence of any wider publication or of the Claimant ever having been asked about the Facebook Profile by anyone else. The Claimant's US attorneys were successful in getting Facebook to remove the Facebook Profile and it was taken down shortly after 28 July 2014.

27. The Claimant complained about the Facebook Profile in the US Proceedings and it became the subject of evidence (including a description of its contents) and various motions (most - if not all - of which are available for public inspection). There was a hearing on 19 February 2015 (apparently in open court), concerning subpoenas that had been issued by the Claimant and served on Yahoo to obtain information relating to the Facebook Profile. A transcript of the hearing has been provided. The Judge was clearly unimpressed by the use of subpoenas when she had no pending issue before her for determination and the subject of the subpoenas had nothing to do with enforcement of the Child Support Order.

The English Proceedings

28. As noted above, the Claimant complains that the publication of the Facebook Profile was a misuse of private information, breach of confidence and/or a breach of the Data Protection Act 1998. The letter before claim had been sent on 7 August 2015, over a year before the issue of proceedings. It was sent together with a draft Claim Form and Particulars of Claim. It sought damages and an injunction. The Claimant gave the Defendants a deadline of 4 September 2015 for response and, in default, threatened to issue proceedings without further notice.

29. A substantive response was sent by solicitors for the Defendants on 29 September 2015. It was a long letter, but I need only note the following:

    i) it suggested that even if the claim had any substance (which was denied), as the Facebook Profile was unlikely to have been viewed by anything other than a handful of people, the damages that the Claimant was likely to achieve would be wholly disproportionate to the costs;

    ii) the Facebook Profile had been taken down over a year ago and that "*[the Defendants] have no intention of reinstating the page or anything similar*"; and

    iii) it raised the evidence from the Second Thai Proceedings in which the Claimant's wife had complained that she had suffered "*much humiliation among [their] social and/or professional circle*" as a result of the Claimant's adultery having become known ([15]-[17] above).

30. The correspondence meandered – without any urgency - through 2016. On 8 March 2016, the Claimant's solicitors stated:

> "… it is abundantly clear that [the Defendants'] motivation for bringing the US case is purely financial and unrelated to the needs of the children. [The Claimant] is of the view that exactly the same motivation lay behind the fake Facebook page. This was clearly not set up for only 'family members' to view… It was self-evidently set up to somehow try and bolster [the Defendants'] position in the litigation that was then ongoing in Thailand and the USA…"

31. The Defendants' solicitors responded on 11 March 2016. Nothing further was sent until, on 9 December 2016 (shortly after the Appeal Judgment), the Claimant's solicitors sent a letter stating that they were "*now instructed by [the Claimant] to issue the proceedings previously referred to in the pre-action correspondence*".

32. As noted above ([2]), the English Proceedings were finally commenced on 14 December 2016. The Particulars of Claim, verified by a statement of truth signed by the Claimant, included the following:

> 4.1 On or about 6 February 2014, the First and/or Second Defendant created and published a false Facebook profile in the name of the Claimant… the [Facebook Profile] included the following information:
>
> (a) The Claimant's first name and surname
>
> (b) A photograph of the Claimant which showed the Claimant sitting on a sofa in a domestic setting with his arm around the First Defendant and with the boys sitting on their laps.
>
> (c) That the Claimant got married in 1991.
>
> (d) That the Claimant was "in a Complicated Relationship" from April 1991.
>
> (e) That the boys, who were each referred to by first name and surname, the surname being that of the Claimant, were born on 11 May 2008.
>
> (f) That the Claimant had a child on 5 November 2008.
>
> (g) The further information set out in the Confidential Schedule hereto [the Claimant's current and past employment history, his qualifications and the educational establishments he had attended, where he lived, where he was from and that he had "liked" various Facebook profiles].
>
> 4.2 The clear inferences to be drawn by any person viewing the [Facebook Profile] were that:
>
> (a) It had been created by the Claimant himself.
>
> (b) The Claimant was legally married to the First Defendant and had been so since 1991.
>
> (c) The Claimant was the father of the boys.

(d) The Claimant and the First Defendant were living together with the boys as a family unit.

4.3 The information and inferences referred to at paragraphs 4.1 and 4.2 above shall be referred to collectively hereafter as "the Private Information"…

4.6 The privacy settings on the [Facebook Profile] were set to "Public" with the results that:

(a) The entirety of the [Facebook Profile] was available to be viewed by any person with a Facebook account and in particular by any person who clicked on the link to the [Facebook Profile] through [various features of Facebook linking individuals and Facebook accounts]

(b) A link to the [Facebook Profile] was returned on an internet search against the Claimant's name. The [Facebook Profile] was thereby accessible to anyone with a Facebook account and the name and the identifying photograph were available to anyone with access to the internet…

4.8 … the [Facebook Profile] was created without the knowledge or consent of the Claimant and in direct contravention of the agreement between the Claimant and the First Defendant that the fact of their relationship and his paternity of the boys would be kept secret from the Claimant's family, friends and business associates.

4.9 The [Facebook Profile] remained on Facebook until shortly after 28 July 2014 when its existence was notified to the Claimant by an associate at … a firm of US attorneys retained by the Claimant. Shortly thereafter, Facebook deleted the [Facebook Profile], at the request of [the firm] on behalf of the Claimant…

4.11 In the circumstances set out above, it is to be inferred that the First and/or Second Defendant created the [Facebook Profile] with the intention of causing harm, distress and embarrassment to the Claimant and/or for the nefarious purpose of placing collateral pressure on the Claimant to settle the legal claims against him.

[Paragraph 5 sets out the Claimant's data protection claim]

6.1 The parts of the Private Information relating to the Claimant's relationship with the First Defendant and his paternity of the boys was and is information confidential to the Claimant and in relation to which the Claimant had a reasonable expectation of privacy. The Claimant will rely upon the following:

(a) The self-evidently personal and private nature of the information, which fall within the core aspects of private life protected by Article 8.

(b) The fact that the First Defendant was at all material times on express notice that the Claimant wished to keep those parts of the Private

Information confidential and the First Defendant had agreed to the same…

6.2 The creation and/or publication from 4 February 2014 to 28 July 2014 of the [Facebook Profile] constituted an unjustified infringement of the Claimant's right to privacy, a misuse of the Claimant's private information and/or a breach of confidence by the First and/or Second Defendant.

6.3 The Claimant will rely in particular on the facts that these acts were carried out without the Claimant's knowledge or consent and in direct contravention of the agreement between the Claimant and the First Defendant.

6.4 Further, and without prejudice to the burden of proof (which falls upon the Defendants in this regard), there was no justification in all the circumstances for the publication of the Private Information:

(a) Section 4 of Facebook's terms of service, entitled Statement of Rights and Responsibilities, states: "… You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission".

(b) [The First Defendant falsely stated in an affidavit in the US Proceedings that the Facebook Profile was not a profile of the Claimant but a profile of one of her sons ("the False Affidavit")].

(c) For these reasons, the Claimant will contend that his Article 8 rights outweigh the Defendants' Article 8 or 10 rights, if any, in the Private Information as disclosed.

7.1 By reason of [the acts complained of] the Claimant's Article 8 rights have been seriously infringed and he has suffered damage to his personal dignity, autonomy, and integrity, and has been caused anxiety and distress. Accordingly the Claimant claims compensation pursuant to section 13 of the [Data Protection Act 1998] and/or damages.

7.2 In support of his claims for compensation and/or damages the Claimant will rely upon the following:

(a) [the False Affidavit].

(b) The Claimant learned of the [Facebook Profile] at the end of July 2014 shortly after his US attorney had found it during a search of social media and the attorney's own Facebook account. This caused him great concern and anxiety as he had, as set out above, always been careful to ensure that these matters were kept private and did not find their way into the public domain. In particular, the Claimant was extremely worried that his family, friends and business associates would see the [Facebook Profile].

7.3 Unless restrained by this Honourable Court, the First and/or Second Defendant will further misuse and/or publish the Claimant's Private Information in breach of confidence…

AND the Claimant claims

(1) Compensation pursuant to section 13 of the DPA and/or damages, including aggravated damages, for misuse of private information.

(2) Interest…

(3) An injunction to restrain the First and/or Second Defendants whether acting by themselves, their servants or agents or otherwise howsoever from further publishing or causing to be published the Claimant's Private Information.

33. The Defendants did not file a defence. Instead, they issued an Application Notice on 17 March 2017 seeking (a) to strike out the claim under CPR Part 3.4 as an abuse of process; and/or (b) summary judgment against the Claimant on the breach of confidence and misuse of private information claims.

34. The Defendants filed evidence in support of their application.

i) In her witness statement, dated 17 March 2017, the First Defendant set out a brief history of the Thai and US Proceedings. Under a heading, "*Abusive nature of these proceedings*", she said:

> "42. The children were less than 2 years old when proceedings for child support commenced. They are now approaching 9 years of age. Their childhood has therefore been lost to them largely, as they have had little in the way of support in any sense from their father during their formative years.
>
> 43. It has been distressing and at times humiliating for me to raise three children without their biological father's involvement. It has been very difficult for my husband and I to make ends meet financially. We spend almost every penny of our disposable income on funding legal fees to defend the children's position in Thailand and the US. We are now having to waste what little money we have left in contesting these proceedings in England.
>
> 44. The Claimant has access to virtually unlimited resources due to his family wealth and his high level of income from his work. This disparity in resources between the Claimant and the Defendants could not be much greater.
>
> 45. I am certain that the issue of these proceedings is just another action intended by the Claimant to bully me into submission. I have been bullied for years in this way. The US Court was well aware of BWK's continuous attempts to do this in the US litigation. See for example the remark from the Illinois Circuit Court in an order made in June 2014 that the Claimant had generated 'needless delay' in the US proceedings, and that it was 'clear that [BWK] has used his rather extraordinary resources to attempt to exhaust [my] legal representation.'…"

Referring to the Claimant's anonymisation of only himself in the proceedings she stated:

> 51. The Court will also note that the Claimant took no steps to shield my identity from public view, or that of my husband (and therefore the children). If BWK was genuinely concerned to prevent the so-called private information being identified, given what is already in the public domain… he also should have asked that my name be anonymised too…

Finally, in relation to the allegation that she threatened to republish the allegedly private information of the Claimant, she stated, unequivocally, "*The Facebook [Profile] pages were shut down over two and a half years ago. I have never republished those pages, and have never indicated to BWK that I would do so. Nor do I have any intention of now doing so.*"

ii) In his witness statement, also dated 17 March 2017, the Second Defendant stated, unequivocally, "*I played no part in setting up the Facebook [Profile] which forms the subject matter of this action.*" He stated that he had sold almost all his possessions and assets to help pay the legal fees the First Defendant has incurred in relation to the Child Support Order. "*Financially I have been ruined by three sets of legal proceedings, and have had to borrow significant sums of money from my parents at times.*" As for the First Defendant, "*almost everything [she] owned at one point has had to be sold, including jewellery and other items of sentimental value.*"

35. In answer, the Claimant filed a 7-page witness statement dated 27 June 2017. He complained that the Defendants were using the US Proceedings "*effectively to seek to increase (the term used is to 'modify') the level of maintenance payments for the children from that which has already ordered by the Thai Court*". He accepted that the US Court had criticised "*the robust way in which my defense case has been run*". Given its importance, I should set out, in full, what the Claimant said in his evidence about the Facebook Profile:

> 13. When viewed in the context of the US litigation, the motive of the Defendants in publishing the false Facebook profile of me becomes clear. It was a continuing effort to embarrass me personally and to try and bolster their case in the US litigation that I had publicly held the children out as my own. I believe that the false Facebook page was therefore published with the aim of securing financial advantage for the Defendants in the US litigation. It was nothing whatsoever to do with creating a personal scrapbook for one of the children, as the Defendants claim in their evidence. This is plainly false, as is evident from the words chosen by the Defendants to describe my relationship 'status' on Facebook, namely, 'in a Complicated Relationship'. The latter description clearly was not intended to describe a child.
>
> 14. I believe that I first looked at the false Faceboook profile on the internet in late July 2014, when it was pointed out to me by Mr Matthew D. Elster, an associate working at the law firm that I have retained in the USA, Beermann Pritikin Mirabelli Swerdlove LLP. I am informed by Mr Elster that he first saw the offending Facebook profile on the internet on his personal computer at work on or about 27 July 2014. Mr Elster has

> informed me that he brought the profile to the attention of 1 other lawyer in his firm, Mr Enrico Mirabelli. In addition, I am aware that 2 representatives of another US law firm retained by me, McDermott Will & Emery, saw the Facebook profile before it was removed, as well as several other attorneys and other employees of First Defendant's US law firm. I should stress that I have never used Facebook, except to look at the profile of me that was published by the Defendants on the internet during 2014.
>
> 15. As far as the Defendants' allegations about my motivations for bringing these proceedings are concerned, they are wrong. There was nothing else that I could do to stop the Defendants from publishing further private information about me on the internet, including private photographs that were never intended to be made public. Whilst I had hoped to try and resolve this case through correspondence between the solicitors, it eventually became clear that the Defendants were taking a belligerent position. No undertakings have been offered by either Defendant to the effect that there would be no repetition of their behaviour, perhaps using other photographs of me, on other forms of social media. They refused to pay any compensation. The Defendants refused to budge, denying my claim and implying (for example in [a passage from a letter from their solicitors]) that I should use my personal wealth to meet their extortionate demands.
>
> 16. In the end, I had no choice but to issue this claim against them here in the UK for compensation and an order from the court to prevent the Defendants from repeating their actions.

Explaining the delay in progressing the claim, the Claimant stated:

> 18. Insofar as the question of any delay is concerned, I wanted to wait until the litigation in Thailand had ended, before initiating another claim here in the UK, because I did not want to have to fund multiple cases in 3 different countries… Furthermore, I understand that before proceedings in the English courts are issued, it is necessary to try and explore matters in correspondence, to see whether the issues in the case can be narrowed. As can be seen from some of the letters between the respective solicitors, such correspondence and discussions did take place during 2016, following the Thai Court's decision, but they failed to produce a resolution of this dispute.
>
> 19. I understand that the case that I am putting forward to the English court is complicated and that it involves a relatively new area of law, in terms of the claim for damages under the Data Protection Act 1998. I have therefore adopted a cautious approach to the issue of proceedings and I have prepared my claim thoroughly with my legal advisers. I have not delayed the issue of proceedings for ulterior purposes as the Defendants contend in their evidence.

36. I set out my conclusions on this evidence below ([64]), but I simply note here:

i) The Claimant says nothing about the impact upon him of the Facebook Profile. He does not claim that it has upset him or that it has caused any damage to his

personal dignity, integrity or autonomy. His evidence concentrates, exclusively, on his claim that the Facebook Profile was published "*with the aim of securing financial advantage for the Defendants in the US litigation*". I do not understand how publication of the Facebook Profile was likely to achieve this and this conclusion is not explained in the Claimant's witness statement or submissions made on his behalf.

ii) There is no answer to the evidence of the Second Defendant that he had nothing to do with the publication of the Facebook Profile.

iii) There is no further evidence of any threat by the Defendants to republish the Facebook Profile or anything similar. The suggestion in his witness statement (§15) that "*there was nothing else that [he] could do to stop the Defendants from publishing further private information about me on the internet*" falls to be measured against the fact that, by the date of this witness statement, nothing had been published for nearly three years.

iv) The Claimant did not respond to the First Defendant's complaint that he had not anonymised the Defendants in the proceedings. The Claimant's solicitor, Duncan Curley, has filed a witness statement explaining why he considered that it was appropriate to make a without notice application for the anonymity order. It does not deal with the substance of the criticism and nowhere in the evidence is there a satisfactory explanation for the decision not to anonymise the Defendants.

v) Despite the evidence that the information had become known in the Claimant's circle of acquaintances ([17(i)] above) and the fact that the issue had been raised specifically in the Defendants' solicitors letter of 29 September 2015 ([29(iii)] above), the Claimant's evidence is completely silent on the extent to which the information in the Facebook Profile was/is known already to his family, friends and business associates.

vi) The explanation for the delay in issuing the Claim Form is difficult to accept. A draft Claim Form and Particulars of Claim had already been provided with the letter of claim on 7 August 2015 ([28] above). Even allowing for a "*cautious approach*", I cannot see what more by way of "*thorough preparation*" was required before the Claim Form could be issued. I do not accept that resources played any (or any substantial) part in the decision to delay issuing proceedings until December 2016.

37. The Application came before Master Yoxall on 6 July 2017. In a careful judgment, the Master recounted some of the history set out above. He held:

i) that the Defendants had not shown that the Claimant had no real prospect of success in demonstrating that the publication of the Facebook Profile was a misuse of private information; but

ii) that the claim was an abuse of process (a) as brought for a collateral purpose; and (b) within the principle of ***Jameel -v- Dow Jones & Co* [2005] QB 946**.

He therefore struck out the entire claim.

38. The Claimant appeals against the decision in (ii). Following grant of permission to appeal, the Defendants filed a Respondents' Notice seeking to uphold the striking out/dismissal of the Claimant's claim on the further basis that the Master should have found that the Claimant's claims for breach of confidence and misuse of private information had no real prospect of success.

39. As his findings are challenged in this appeal, I should set out the Master's reasoning:

Summary Judgment

[23] … I am not persuaded that the Claimant has no real prospect of establishing that the publication of the Facebook profile was a misuse of private information or was a breach of confidence by the Defendants. On the Claimant's case, putting it crudely, he was living a double life. His life in Thailand was to be kept separate from his life in the USA. Judged objectively, the Claimant has a real prospect of successfully arguing that his life in Thailand was to be kept secret. Of course, I accept that the misuse of *public* information cannot found a claim. However, just because the relationship of the Claimant and the First Defendant was public knowledge in Thailand (or part of Thailand) does not mean that it was sufficient common knowledge so as to prevent a claim airing. The relationship was not public knowledge in the part of the world which mattered to the Claimant.

[24] Privacy has many layers. Thus, it has been said that there might be a difference between information as to 'the bare fact of a relationship' and information as to the contents or details of that relationship; see ***Hutcheson -v- News Group Newspapers*** **[2012] EMLR 2**. The Defendants submit that the Facebook publication simply relates to the bare fact of a relationship or parentage so that a reasonable expectation of privacy does not arise. In my judgment, the issue of whether or not there has been a misuse of private information or if there is a reasonable expectation of privacy is fact sensitive. It is not only the relationship which is revealed in the Facebook posting; there is the parentage of the children, the photograph of the Claimant and the children; and the suggestion thereby that the relationship between the Claimant, the First Defendant and the children was continuing. It seems to me that this is more than mere 'bare fact'.

[25] There has to be a balance between Article 8 and Article 10 ECHR in such cases, but I cannot say on this application that the Defendants' rights under Article 10 are such that the claim has no real prospect of success.

[26] I should add that the Defendants' case is that the Second Defendant had nothing to do with setting up the profile and that the First Defendant only ever intended the profile to be private. I cannot resolve such issues on this application.

Strike Out

[27] As stated above, I consider that the Claimant's claim for misuse of private information or breach of confidence has a real prospect of success. As far as a claim under the DPA is concerned, the Defendants accept that the publication of the Facebook profile constitutes the processing of personal

data and that the current legal position may allow a claim to be brought. Against this, the Defendants submit that the claim should be struck out as an abuse of process … on the basis set out in ***Jameel -v- Dow Jones & Co***…

[28] As far as the DPA is concerned, the Defendants make the point that the processing of the data was very minor given the trivial nature of the data and the length of time it was published for. The information was not sensitive personal data within the meaning of s.2 of the Act… Finally, the Defendants submit that the likely award of damages under the DPA is likely to be very limited. I was referred to ***Halliday -v- Creation Consumer Finance Ltd* [2013] 3 CMLR 4**, which involved an award of £750 for distress and £1 nominal damages for financial loss; and to ***TLT -v- SSHD* [2016] EWHC 2217 (QB)**; in which the highest award was £12,500 for processing which involved much more serious information that in the present claim.

[29] I accept the Defendants' submissions in respect of the DPA claim.

[30] As far as the claim for misuse of private information or breach of confidential information is concerned, the claim for injunctive relief is academic. There is no evidence that the Defendants have any intention of repeating the publication. I bear in mind a number of factors: (1) that the Facebook publication was from 6 February 2014 to 28 July 2014; (2) that there is no evidence that it was seen or acted upon by anyone other than someone on the Claimant's legal team; (3) that the Facebook publication has been fully ventilated in the US proceedings; (4) that the overwhelming probability is that these proceedings were prompted by the Claimant's failures in the ongoing USA litigation; [and] (5) that the Claimant has no links to this jurisdiction and there is no evidence of any publication to anyone here.

[31] The Defendants contend that the Claimant has brought these proceedings in order to put pressure on them and to force them to come to a settlement of the claim. This is a reasonable inference on the facts. I note the finding of the Appellate Court of Illinois dated 20 January 2017 that the Claimant appeared in the court in Thailand through counsel but chose not to personally appear for reasons of legal strategy. The Claimant denied parentage of the boys and denied undergoing fertility treatment contrary to documentary and other evidence. It certainly appears that the Claimant has taken a combative and unreasonable stance in the Thai and US court proceedings. The Circuit Court has stated that the Claimant 'has used his rather extraordinary resources to attempt the exhaust' the First Defendant's representation. That court has commented that the Claimant's lawyers' pleadings 'often appear to be their attempt to "pacify" their client, rather than focusing on the legal issues at hand.' The court has also referred to numerous 'delays and obfuscation' by the Claimant.

[32] I take the point that the claimant is not to be deprived of pursuing a legitimate cause of action because he has a grievance or an ulterior motive. However, it is an abuse of process to pursue a claim for an improper purpose. It seems to me that this claim is part of the Claimant's continuing battle with the First Defendant and that it is harassing in nature.

> [33] In any event, the claim must be 'worth the candle'.
>
> [34] I also take the point that this is not a defamation claim. That said, although ***Jameel*** itself (and many other cases following it) is a defamation claim – its principles are not confined to defamation. In my judgment, if the Claimant is successful in these claims the costs will be out of all proportion to what the Claimant is likely to recover. I bear in mind that the Claimant's costs of resisting this application are about £17,000 and the Defendant's costs are put at about £65,000. This is an indication of the substantial level of costs which are likely to be involved if this case is allowed to proceed.
>
> [35] It is highly significant that the principal issue of the Facebook publication has been ventilated and argued over in the US proceedings. The position is that the parties have been litigating on two continents. I do not consider that the claim should be permitted to proceed on a third.
>
> [36] In the circumstances, I shall strike out the case in its entirety as an abuse of process.

Grounds of Appeal

40. Seven grounds of appeal are advanced by the Claimant. In summary:

i) The Master's finding (§32) that the claim was an abuse of process on the grounds of collateral purpose was flawed. The law imposes a high hurdle before claims can be struck out on this basis. The Master failed to consider these authorities.

ii) The Master's error in respect of collateral purpose abuse (Ground 1) was compounded by his reliance upon his findings in that respect to inform his application of ***Jameel***.

iii) The Master erred in principle in extending the ***Jameel*** jurisdiction to Data Protection Act 1998 claims.

iv) Even if the Master had been right that ***Jameel*** could extend to DPA claims, at §28, the Master made a number of errors in his assessment as to the value of the DPA claim and the likely award of damages.

v) The Master erred in finding that the misuse of private information claim/breach of confidence claims were 'not worth the candle'; particularly, the Master failed to consider the importance of the claims in vindicating the Claimant's Article 8 rights; the likelihood of the Claimant being awarded substantial damages; and he gave too much weight to the costs of the proceedings and failed to consider whether the claim could be resolved proportionately.

vi) The Master wrongly concluded that the claim for injunctive relief was academic.

vii) At §35 the Master wrongly took into account that the parties had been litigating over two continents in relation to the Facebook Profile. No claim had

in fact been brought in either of the other jurisdictions over the Facebook Profile.

Submissions

Collateral purpose abuse

41. There is no real dispute between Miss Skinner and Ms Strong about the legal principles that apply.

    i) Court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist (***JSC BTA Bank -v- Ablyazov (No.6)*** **[2011] 1 WLR 2996** [3] quoting Lord Evershed MR in ***In re Marjory; ex p The Debtor -v- FA Dumont Ltd*** **[1955] Ch 600, 623-624**);

    ii) Legal process is used properly when it is invoked for the vindication of a person's rights or the enforcement of just claims. It is abused when it is diverted from its true course so as to serve extortion or oppression: or to exert pressure so as to achieve an improper end (***Ablyazov*** [4]; ***Goldsmith -v- Sperrings Ltd*** **[1977] 1 WLR 478**, **489** *per* Lord Denning MR).

    iii) A claimant's motive and intention as such are irrelevant: the fact that a party who asserts a legal right is activated by feelings of personal animosity, vindictiveness or general antagonism towards his opponent is nothing to the point: ***Ablyazov*** [10]; ***Broxton -v- McClelland*** **[1995] EMLR 485, 497-498** *per* Simon Brown LJ;

    iv) Accordingly, the institution of proceedings with an ulterior motive is not of itself enough to constitute an abuse: an action is only that if the court's processes are being misused to achieve something not properly available to the plaintiff in the course of properly conducted proceedings: ***Broxton -v- McClelland***, *supra*.

    v) The cases appear to suggest two distinct categories of such misuse of process:

        a) achievement of a collateral advantage beyond the proper scope of the action. In such cases, the difficulty is deciding where precisely falls the boundary of such impermissible collateral advantage (see Bridge LJ's judgment in ***Goldsmith -v- Sperrings Ltd*** (at p.503D-H)); and/or

        b) conduct of the proceedings themselves, not to vindicate a right, but to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered during properly conducted litigation (c.f. ***Wallis -v- Valentine*** **[2003] EMLR 8** [28] and [34] *per* Sir Murray Stuart-Smith.

    Broxton -v- McClelland, *supra.*

    vi) The test of the claimant's motive is objective: ***Wallis -v- Valentine*** [32] *per* Sir Murray Stuart-Smith;

vii) The merits of the claims sought to be brought are relevant where it is suggested that a claim is brought for mixed purposes. A good arguable claim may indicate that the proceedings were brought, at least in part, for a legitimate purpose: ***Ablyazov*** [24].

viii) Only in the most clear and obvious case will it be appropriate, upon preliminary application, to strike out proceedings as an abuse of process so as to prevent a claimant from bringing an apparently proper cause of action to trial: ***Broxton -v- McClelland***, *supra.*

42. Based on those authorities, Miss Skinner submitted that Master Yoxall was wrong to find that the Claimant had brought (and was pursuing) the claim for the collateral purpose of harassing the Defendants. There was no evidence that the Claimant was using the proceedings for any other purpose than vindicating his rights. The Master had found that his claim for misuse of private information had a real prospect of success. The evidence did not pass the high threshold for striking out the proceedings as an abuse of process.

43. For the Defendants, Ms Strong submitted:

i) contrary to the Master's finding, the Claimant had no real prospect of success with his misuse of private information and/or breach of confidence claims;

ii) the Claimant's claims were not genuine and there was no real and substantial tort: there was no damage, the publication complained of was extremely limited, there had been no repetition and the Master was right to conclude that the claim for an injunction was academic, any award of damages would be very small and the delay in progressing the claim showed that he had no real interest in vindicating his legal rights; and

iii) the Master had been fully entitled, on this basis and upon the evidence of the Thai and US Proceedings, to conclude that the Claimant had brought the proceedings for the improper collateral purpose of harassing the Defendants (the type of collateral abuse identified in [41(v)(b)] above).

Jameel abuse

44. Again, there is not much dispute as to the legal principles to be applied:

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, 319** *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.

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.

45. By ground 3, the Claimant contends that the Master was wrong to extend the *Jameel* abuse jurisdiction to Data Protection Act claims. No authority has been cited for that proposition and I am satisfied that it is not correct: see ***Vidal-Hall*** [134]-[136] (itself a data protection claim) and ***Sullivan -v- Bristol Films***, *supra.*

46. Ms Strong relies largely on the same grounds she did to support the collateral purpose abuse argument. The Master was correct to strike out the claim as *Jameel* abusive. This is a case where it is obvious that the claim has very little prospect of success. The Claimant's claim discloses no real and substantial tort and, even if a technical claim could be demonstrated, the scale of the costs would be out of all proportion to the likely award of damages. There is, Ms Strong submits, a further unusual element in this claim. Given the Claimant's choice not to anonymise the Defendants in these proceedings, any tangible or legitimate benefit that might have been obtained will be likely to be destroyed by the proceedings themselves: there is a very clear risk that the Claimant will secure greater publicity for the matters he is trying to protect as 'private' than the actions of the Defendants about which he complains.

47. In answer, Miss Skinner submits:

i) The Claimant has viable causes of action. If the misuse of private information claim is successful, then the Claimant should be entitled to an award of substantial damages (in the sense of being more than minimal or nominal). ***Gulati -v- MGN Ltd* [2017] QB 149** demonstrates that quantum will be influenced by (a) the nature of the information; (b) the nature, extent and purpose of the misuse; and (c) the effect of the misuse on the Claimant. The Claimant's case is that the facts revealed in the Facebook Profile were facts which he and the First Defendant had expressly agreed would be kept secret from his family, friends and associates. It was created and made available to the public at large in direct contravention of that agreement. Further, the Defendants took steps to try to ensure that the Facebook Profile would come to the attention of the Claimant's family, friends and associates by including links to the pages of institutions with which he had an association.

ii) The Master wrongly failed to take any account of the likely award to vindicate the Claimant's Article 8 rights, in the sense of compensating him for the loss of privacy or autonomy as such arising out of the infringement, including a sum to compensate for damage to dignity or standing (***Gulati -v- MGN* [2016] FSR 12**).

iii) Focus upon the minimal publication of the Facebook Profile led the Master into the error of equating minimal publication with minimal harm. Misuse of private information claims are very different from defamation claims. The latter are primarily about vindication of reputation. A reputation can only be damaged where there has been publication to one or more individuals. The same principle does not apply to misuse of private information cases: ***Imerman -v- Tchenguiz* [2011] Fam 116** [69]. Extent of publication is but one small part of the picture.

iv) When considering what tangible benefit could be achieved from the proceedings, the Master had been wrong to characterise the claim for an injunction as "*academic*" (§30). He found that there was no evidence that the Defendants have any intention of repeating the publication. However, the Master failed to consider the fact that the First Defendant had denied, and had continued to deny, the conduct alleged. When challenged about the Facebook Profile, the First Defendant claimed she had intended it to be a profile for one of her children, who bore the same name as the Claimant. The Master had rightly rejected this as obviously hopeless. Denial of the conduct alleged was one of two factors cited in support of the need for a permanent injunction in ***SKA -v- CRH* [2012] EWHC 2236** [65] *per* Nicola Davies J. Further, in light of the Master's rejection of her explanation, the denial fell to be seen as dishonest. In the circumstances, little, if any, reliance could be placed on statements by the First Defendant as to her intentions and future conduct.

v) The Master wrongly found, and thereafter took into account, that the parties had been litigating over two continents in respect of the Facebook Profile (§35). The creation and publication of the Facebook Profile was not the subject of any claim in any other jurisdiction. The mere fact that it had been referred to in evidence in family proceedings in the US was not a sufficient basis, still less a "*highly significant*" matter, as the Master so found, for making the determinations made on abuse of process.

Decision

48. In ***Hunter -v- Chief Constable of the West Midlands Police* [1982] AC 529, 536**, Lord Diplock said:

> "… this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied… It would… be most unwise … to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the words discretion) to exercise this salutary power."

49. I have reached the very clear view, in agreement with the Master, that this claim is an abuse of process. Indeed, the claim also has a total absence of reality (***Three Rivers DC -v- Bank of England (No.3)* [2003] 2 AC 1** [158] *per* Lord

Hobhouse) and its continued litigation would bring the administration of justice into disrepute. I would also dismiss the breach of confidence and misuse of private information claims under CPR Part 24 as having no real prospect of success, but the fanciful nature of these claims is also an integral part of my conclusion that it is an abuse of process. The appeal will therefore be dismissed. I will explain my reasons.

50. This claim is about the Facebook Profile. Objectively judged, it is anodyne and inoffensive. Its publication may have been mischievous, and the First Defendant's explanation for it lacking in credibility, but, stripped of the strained and artificial construction put upon it by the Claimant, it was just a family photograph: a mother and a father and their three children. It is said that every photograph tells a story. But the story in this photograph is one the Claimant did not want told. He wanted to keep secret the fact that he had a separate family in Thailand. He contends that the 8-year relationship with the First Defendant was undertaken on "*the express understanding that their relationship would at all times be kept secret from the Claimant's family (in particular the Claimant's wife), friends and business associates.*" This is perhaps where the unreality begins. Most rational people would recognise that the chances of keeping secret the existence of a second "wife" and three children were slim to non-existent. It is plain, however, that the Claimant was confident that he could do so, perhaps relying on the fact that they were over 8,000 miles away from his first wife and life back in Illinois. That confidence was misplaced, as the Claimant was later to find.

51. The Facebook Profile was available to be viewed from February 2014. On the Claimant's evidence, it was viewed by four people. They were attorneys instructed by him in the US who must have been fully aware of the Claimant's relationship with the First Defendant and the existence of the triplets. To that extent, the Facebook Profile told them nothing that they did not already know. As a testament of the effectiveness of the Claimant's legal team, the Facebook profile was taken down 1 day after it was found by his attorneys. In terms of publication, that is the full extent of the alleged wrongdoing by the First Defendant. It is true that the Facebook Profile was online from February, but there is no evidence that it was seen by anyone else and, in particular, anyone who knew the Claimant.

52. The pleaded case is that the publication of the Facebook Profile has "*seriously infringed*" his Article 8 rights and that the Claimant has "*suffered damage to his personal dignity, autonomy, and integrity and has been caused anxiety and distress*" (§7.1 Particulars of Claim see [32] above). Considering just the terms of the Facebook Profile, it is difficult to take this contention seriously. In light of the failure of the Claimant's witness statement to provide any evidence to support this pleaded case ([36(i)] above) the pleading is nothing more than formulaic assertion.

53. Miss Skinner's argument that publication is only one part of the wrongdoing in a misuse of private information case might have resonance in a different case, but here it is hollow. The whole premise of the claim is that, by posting the Facebook Profile, the First Defendant had made public what she had agreed to keep secret: her and the triplets' existence and their relationship to the Claimant. When it comes to the alleged 'loss of control' of this information (about which the Claimant fails to make any complaint in his witness statement), the entire claim parts company with reality. The plain fact is that the Claimant has totally lost control of the information:

i) by February 2014, when the Facebook Profile was posted online:

a) the Claimant and the First Defendant had got "married" at a well-attended ceremony in January 2004 ([7] above);

b) following the birth of the triplets in November 2008, the First Defendant (and the triplets) had featured on television in Thailand ([10] above);

c) the Claimant had already told his wife of his relationship with the First Defendant and his paternity of the triplets ([13] above);

d) the First and Second Thai Proceedings and the US Proceedings had all been commenced and were proceeding (in public) through the appellate levels in the respective legal systems of two countries; and

e) the Claimant's affair had apparently become so widely known in the Claimant's wife's circle of friends and contacts that she had been forced to resign from various organisations because of the humiliation it had caused ([16] above);

ii) by August 2015, when the Claimant got around to sending a letter before action, the Thai Supreme Court had, on 6 July 2015, issued a public ruling in the First Thai Proceedings upholding the Child Support Order; and

iii) by December 2016, when the Claim Form was issued, the Appellate Court of Illinois in a public judgment had dismissed the Claimant's appeal against the recognition and enforcement of the Child Support Order.

54. The fact that the First Thai Proceedings and the US Proceedings took so long, and extended over so many hearings, was because the Claimant appears to have appealed every significant order made against him. That was, of course, his right. But the consequence of this tenacious public litigation is that, as an exercise of personal autonomy, he has chosen to place *all* the supposedly private information in the Facebook Profile into the public domain and much more besides. Miss Skinner has suggested that the Court should ignore this and concentrate solely on the extent that the information has *actually* come to the attention of the Claimant's family, friends and business associates. She draws an analogy with the position in ***PJS -v- News Group Newspapers Ltd*** **[2016] AC 1081** where there had been substantial publicity in foreign and Scottish media of the private information the Claimant sought to protect. Reinstating an injunction, the Supreme Court held that a key aspect of the privacy right was intrusion and to refuse the interim injunction would involve significant additional intrusion into the privacy of the claimant, his partner and their children, notwithstanding the substantial publicity that there had been already.

55. I cannot accept that argument for two reasons.

i) First, ***PJS*** was a very different case. The claimant had made *no* disclosure of the information. He had exercised control to protect its privacy and sought, by injunction, to maintain that position. Here, control of the information was deliberately ceded by the Claimant long before the acts complained of by the

First Defendant. Further, the evidence is very unsatisfactory as to the extent to which the information was already known by the "*family, friends and business associates*" of the Claimant well before the publication of the Facebook Profile. The Claimant's evidence is silent on this point ([36(v)] above), but what is clear is that the disclosure of the information had reached such a level that the Claimant's wife felt forced to resign from various organisations because of the public embarrassment caused to her by the Claimant's adultery ([15]-[17] above).

ii) Second, on the authorities, there is an almost invariable rule that once information is disclosed in open court, it cannot thereafter be considered confidential, even if there is no evidence that anyone else has become aware of it (***Commissioners for HM Revenue & Customs*** **[2009] EWHC 1229 (Ch)** [38] *per* Henderson J; ***Crossley -v- Newsquest (Midlands South) Ltd*** **[2008] EWHC 3054 (QB)** [58]-[59] *per* Eady J; see also discussion in *The Law of Privacy and the Media* (§§4.97-4.102, 3rd edition, OUP, 2016). That rule applies with equal force to misuse of private information (***Crossley,*** *supra*; ***PNM -v- Times Newspapers*** **[2017] 3 WLR 351**; **[2017] EMLR 29** [34(1)] *per* Lord Sumption). The test for a misuse of private information claim is whether the claimant has a reasonable expectation of privacy in the relevant information (***Campbell -v- MGN Ltd*** **[2004] 2 AC 457** [21] *per* Lord Nicholls). In my judgment (and on this point, in respectful disagreement with the Master), the Claimant has no real prospect of establishing that he had a reasonable expectation of privacy in the information in the Facebook Profile. Even were it to be assumed that, as a matter of fact, the information could be kept private from any remaining "*family, friends and business associates*" who did not already know it, the expectation that it would remain so would not be reasonable. On the contrary, for the reasons stated above, it would be wholly unreasonable and unreal.

56. As for breach of confidence, it is an essential ingredient of the cause of action that the information has the necessary degree of confidence (***Coco -v- A.N. Clark (Engineers) Limited*** **[1968] FSR 415**, **419** *per* Megarry J). In my judgment, any confidence in the information in the Facebook Profile had been comprehensively exhausted by the Thai and US litigation. Paradoxically, as a result of the Claimant's choice not to anonymise the Defendants, the proceedings themselves undermine yet further any claim to confidentiality.

57. When asked what tangible benefit the Claimant hoped to achieve by these proceedings, Miss Skinner identified damages and an injunction. I will analyse the claim for damages below ([59]-[62]), but I am satisfied at this stage that the prospect of the Court granting an injunction against the First Defendant is close to nil. The injunction sought in the Claim Form (and prayer of the Particulars of Claim) is: "*to restrain the First and Second Defendants… from further publishing or causing to be published the Claimant's Private Information*": the Private Information being defined in Paragraphs 4.1 to 4.3 of the Particulars of Claim ([32] above).

58. Pressed as to whether an injunction in such terms could be justified or likely to be granted (given that it would, on its face, for example prevent the Defendants from stating to anyone that the Claimant was the father of the triplets), Miss Skinner retreated from the wide terms of the suggested injunction and advanced a more

limited form of order directed at preventing the First Defendant from disclosing the information to the Claimant's "*family, friends and business associates*". Leaving aside the difficulty of defining that category of people, there are a host reasons why, as a matter of principle, the Court would not grant even that limited form of injunction.

i) *Lack of threat of publication*

The chronology speaks for itself. The Facebook Profile was taken down on 28 July 2014. There was no further publication of that or anything similar in the 12 months it took for the Claimant to send a letter before action. There was no publication in the further 15 months before the Claim Form was issued. In their solicitors' letter of 29 September 2015, the Defendants stated that they had no intention of reinstating the Facebook Profile or anything similar ([28] above). In her witness statement, the First Defendant again denied an intention to republish ([34(i)] above); evidence that went unanswered and unaddressed in the Claimant's evidence ([36(iii)] above). Miss Skinner suggests that, at trial, the Court would be invited to disbelieve the First Defendant's denial that she threatens or intends further publication ([47(iv)] above). The prospects of that are completely fanciful. On the evidence as it stands, and ignoring the period since issue of the Claim Form, the First Defendant had published nothing further for 27 months. If that remained the state of the evidence, the Claimant would simply fail to demonstrate any sufficient threat to justify an injunction. There would be no credible case requiring any answer from the First Defendant at all. I have real doubts whether the Claimant had any proper evidential basis on which to verify, as true, the statement in the Particulars of Claim that "*unless restrained… the First and/or Second Defendant will further misuse and/or publish the Claimant's Private Information…*". At the time he confirmed that statement on 12 December 2016, the First Defendant had published *nothing* since late July 2014.

ii) *The extent to which the information is available in the public domain (through, at least, the various court proceedings)*

Most non-disclosure orders contain public domain exceptions; if one were included in this case, it would almost certainly have the effect of entirely negativing the injunction. I do not doubt that with skill and ingenuity it might be possible to produce a modified form of public domain exception that did not have this consequence, but that just serves to demonstrate the artificiality of the claim.

iii) *The practical effect of the injunction and Convention Rights*

Although the Claimant has now abandoned his claim for an injunction in the wide terms of his pleaded case, there are real issues as to whether even a narrower order could be justified.

a) If the First Defendant were, for example, minded to write and publish a book (or be interviewed for a newspaper article) about her relationship with the Claimant, the birth of the triplets and her battle on two continents for financial support for them, would the injunction prevent

her from doing so? I suspect the Claimant would argue that, because the publication might come to the attention of the "*family, friends and business associates"*, it would be prohibited. Unhesitatingly, if that were argued to be the effect of even this narrowed form of order, I would refuse an injunction altogether.

b) Leaving aside the litigation with the Claimant in the US and Thailand, the Claimant's wife had *sued* the First Defendant in the Second Thai Proceedings for some £2m for causing damage to her "*fame [and] prestige*". The entire premise of this (found to be meritless) claim was the First Defendant's "*adulterous affair*" with the Claimant. It is not easy to imagine circumstances – whatever the ultimate finding about the "understanding" between the parties that their relationship would be kept secret – in which the Court would, by injunction, prevent the First Defendant from telling anyone she chose about the whole saga.

c) The First Defendant has had to fight doggedly for ongoing financial support for the triplets through the legal systems of two countries, opposed at every stage by the Claimant who, at one point, denied that he was their father and even claimed that the First Defendant had gone through the fertility treatment with sperm donated by another person. In terms of the exercise of both her Article 8 rights of autonomy and dignity and her Article 10 rights of freedom of expression, it might be thought that she was entitled to publish a great deal more than she did in the Facebook Profile. In my judgment, if she were minded to do so, it is very unlikely that a court in this jurisdiction would stop her. The fact that she has not done so may reflect an understandable concern of the potential effect of such publicity on the triplets. In the future, the Defendants, as an exercise of parental responsibility, will have to decide what they should tell the triplets about the Claimant. The natural wish to choose the right time to make such disclosures to the children militates against putting material into the public domain which the triplets might see before the time was judged right to tell them.

d) The triplets will be celebrating their 10th birthday later this year. Looked at from their position, the claim for an injunction looks even more ludicrous. It cannot remotely be suggested that *they* are not able – as an exercise of their Article 8 rights of autonomy and dignity – to identify their father to whomever they choose and to share with anyone they wish the circumstances of their birth and the Claimant's role (or lack of it) in their upbringing. Aged 10, it may be unlikely that they will be exercising those rights in the near future, but within 3-4 years they may well have the maturity to make those decisions for themselves. One only has to think about the triplets' rights to see how impossible (even offensive) it is for the Claimant to arrogate to himself the purported right – as an exercise of *his* 'autonomy' - to decide who knows the information. If he ever had the right to do so, it is beyond dispute he no longer has the right to control the information.

59. As to damages, even were it to be assumed that the Claimant would succeed on liability, the prospects of his being awarded a large sum by way of damages are remote indeed. The information in the Facebook Profile is anodyne, it was published to a handful of people, there is no evidence of any harm and, beyond formulaic assertion in a pleading, the Claimant himself does not even say that he is upset by its publication.

60. The Master referred in his judgment to the sort of awards made for breaches of the Data Protection Act 1998 (see §28 [39] above). There are relatively few cases in which the Court has assessed damages for misuse of private information. A recent example is ***Ali -v- Channel 5 Broadcast Ltd*** **[2018] EMLR 17**, in which two claimants were awarded £10,000 each for misuse of private information arising from a television broadcast which included footage of them being evicted from their home. The programme had been repeated on many occasions and had reached an estimated total audience of 9.65 million [1]. Applying ***Gulati -v- MGN Ltd*** **[2017] QB 149**, Arnold J found that, in principle, the Claimants were entitled to claim three heads of damage: (i) compensation for the misuse of the private information; (ii) damages for distress; and (iii) aggravated damages for distress caused by those actions of the defendant which is not caused directly by the wrongdoing e.g. by the way the claim has been litigated [212]. Under the first head, the Judge noted [215]:

> "… the Claimants do not contend that the Programme caused them any particular loss or damage other than distress... Nevertheless, the Programme did involve the disclosure of their private information to 9.65 million viewers. While the information in question was not of the highest degree of sensitivity, it was fairly sensitive. Moreover, the Programme had a voyeuristic quality."

He accepted that the Claimants had been distressed, particularly Mrs Aslam [216], and made a modest upward adjustment for an element of aggravation arising from the conduct of the litigation by the defendant [219].

61. It is never easy (and often it is not helpful) to compare awards in individual cases because so much depends upon the individual facts, but it is clearly strongly arguable that both in terms of the scale of the infringement and distress caused, ***Ali*** is a much worse case than the present one. Miss Skinner submits that the Court should take account of the importance of the claims in "*vindicating the Claimant's Article 8 rights and the serious nature of the alleged wrongdoing*". She also argues that the misuse in the Claimant's case amounted to "*a gross and deliberate betrayal of trust; in this case with the added aggravation that it was done for the specific purpose of embarrassing the Claimant and bringing pressure to bear on him in the US litigation*" and submits that there are parallels with ***Burrell -v- Clifford*** **[2017] EMLR 2**.

62. I deal below with whether the Claimant is really interested in vindicating his Article 8 rights, but I do not accept that, on any view, the Defendants' alleged wrongdoing is serious. There are perhaps some similarities with ***Burrell***: by the time of the action for misuse of private information, Mr Burrell had himself put the material he complained about into the public domain [153]; there was an element of betrayal - also alleged against the First Defendant - that increased Mr Burrell's distress; and the disclosure of the information was very limited (although more significant in the sense that it was to important people who did not already know the information). Mr Burrell was awarded £5,000 [165]. In my judgment, the Claimant's claim is, by comparison with ***Ali*** and

Burrell, trivial and technical and, even if successful, not likely to lead to an award of anything approaching these sums.

63. I turn finally to the Second Defendant. He did not seek the dismissal of the claim against him on the basis that the Claimant had no real prospect of proving that he had been involved in the publication of the Facebook Profile. Nevertheless, in the context of the argument over *Jameel* abuse, I would note the following matters:

    i) The pleaded case against the Second Defendant is that the Facebook Profile was registered to a person using a Yahoo email account who had given the Second Defendant's date of birth. From that single piece of evidence, it is "*averred*" that the Facebook Profile was set up as part of a "*common design*" of the First and Second Defendants ([25] above).

    ii) Notwithstanding denials of both Defendants in their witness statements that the Second Defendant played any role in the setting up and publication of the Facebook Profile, this claim is still maintained. The Claimant has offered no further evidence in support of his case of the Second Defendant's involvement.

    iii) In light of these matters, objectively judged, the claim against the Second Defendant appears to be weak and speculative. But, the question arises, why would a litigant pursue a weak and speculative claim against a secondary defendant?

64. Each of the factors that I have identified above combine to lead me to sure conclusion that this claim (a) is *Jameel* abusive; and (b) has been brought, not for any legitimate reason, but as an act of harassment or revenge against the Defendants. Bearing well in mind the authorities and principles I have set out in [41], I do not reach that latter conclusion lightly. My reasons are these:

    i) Objectively judged, this action serves no purpose and could provide no real or tangible benefit.

        a) The information the Claimant seeks to protect is so firmly embedded in the public domain as a result of both Thai and the US Proceedings that it is Canute-like to think that these proceedings could achieve anything of value.

        b) No rational individual could credibly expect to keep secret the fact that he had a second "wife" with whom had fathered triplets. It was information that, with increasing certainty as time went on, it would be impossible for the Claimant to control.

        c) There is almost no prospect, even if the claim were successful, that the Court would grant an injunction.

        d) The Court would not award a significant sum by way of damages and, measured against the wealth of the Claimant or the costs of the proceedings, it would be trifling.

    ii) There is no real harm or substantial wrong.

a) There is no evidence that anyone beyond the Claimant's attorneys saw the Facebook Profile. They were in the US. There has been no publication to anyone in the jurisdiction of the Court.

b) The Facebook Profile was taken down as long ago as 28 July 2014.

c) In his witness statement, the Claimant appears almost entirely untroubled by the publication of the Facebook Profile. His main complaint is that he considers that its publication was an effort by the Defendants to put pressure on him in the US Proceedings. I do not understand how it was expected to do so, but, as I read his evidence, it does not appear to have worked.

d) Even before publication of the Facebook Profile, the information appears already to have become known to at least some of the Claimant's circle of "*family, friends and business associates*".

iii) In light of (i) and (ii), no litigant who was sensitive to the costs of litigation would pursue the claim. The Claimant, however, appears to be unconcerned about the costs of this or any other litigation he has pursued against the Defendants: "*money [is] not that important and there's always plenty of it*" ([11] above). The utterly disproportionate expenditure of costs for no real gain may not trouble the Claimant, but it is a matter of very real concern to the Court (the limited resources of which are being wasted by the claim) and, on the evidence, to the Defendants upon whom the litigation costs of yet another claim are clearly a huge burden ([34] above). This is not a case in which the Court could remedy the disproportionality by costs budgets, or by attempting to fashion a way of resolving the dispute that reduced the costs. The costs that have already been expended on this litigation are already disproportionate to any tangible benefit.

iv) The conduct of the proceedings also shows that they are not being pursued by the Claimant for any legitimate purpose.

a) If the Claimant genuinely considered that the Facebook Profile amounted to "*serious wrongdoing*" on the part of the Defendants, or if he considered that there was the slightest risk of republication, he would not have waited a year before sending a letter of claim.

b) Equally, and for the same reasons, the further delay of 15 months in issuing the Claim Form is inconsistent with a desire or intention to pursue a legitimate claim. After this significant period of delay, the Claim Form was issued only days after the Appellant Court in Illinois had dismissed his appeal and, I am satisfied, demonstrates that the one event caused the other. The Claimant's explanation for the delay is entirely unconvincing and I reject it.

v) The Claimant has previously been found in the US Proceedings to have "*used his rather extraordinary resources to attempt to exhaust [the First Defendant's] legal representation*" (§45 of the First Defendant's witness statement – see [34(i)] above).

65. For all these reasons, in my judgment, Master Yoxall was entirely right to conclude that this claim was not "*worth the candle*" (§§33-34: see [39] above) and that the Claimant was pursuing it for the improper ulterior motive of his "*continuing battle with the First Defendant*" and that the claim was "*harassing in nature*" (§32). He was right to strike out the claim as an abuse of process on both grounds. I would also have dismissed the breach of confidence and misuse of private information claims under Part 24 as having no real prospect of success. The appeal is dismissed.

66. In many ways, this case is extraordinary. But it is also very sad. Caught in the cross-fire are three young children. It scarcely needs saying, but bringing this worthless claim against their parents carried the obvious risk of causing harm to those children.

Anonymity of the Claimant

67. As noted above, an order anonymising the Claimant was made on 14 December 2016 ([2] above).

68. The extent of the material available in the public domain (which I have identified above), and the fact that the Defendants had **not** been anonymised, led the Defendants to issue an Application Notice, dated 12 February 2018, seeking (albeit belatedly) the discharge of the anonymity order ("the Anonymity Application"). That Application was heard by me on 22 March 2018 at the commencement of the adjourned hearing of the appeal. Reluctantly, I refused to discharge the order. I gave my reasons at the time in an *extempore* judgment.

69. The principle in ***Cream Holdings -v- Banerjee*** **[2005] 1 AC 253** meant that discharging the anonymity order, at that stage, would have led to the Court itself destroying the private/confidential material that, by the proceedings, the Claimant was trying to protect. The parties in ***Cream Holdings*** were not anonymised. As a result, the Court omitted details of the confidential/private information that was the subject of the litigation. The injunction was discharged, and the newspaper was free to publish the information. Unless and until the newspaper had done so, the Court had to be careful not *itself* to destroy the confidence/privacy that the Claimant sought to protect by including the information in a public judgment. Lord Nicholls explained:

> [26] I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt the "Echo's" publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group may ultimately be found to have against the "Echo" or Ms Banerjee in respect of matters the Echo may decide to publish.

70. However, as a result of the anonymity order having been granted in this case, the route adopted in ***Cream Holdings*** **-** of identifying the parties and not including the information that the Claimant contends is private - was not available. Had this been

the first hearing of the claim, the position might have been capable of adjustment (i.e. to remove the anonymity and then limit the information in the public judgment). But this course was not available because all the information that the Claimant seeks to protect by this action had been included in the public judgment of Master Yoxall. If I had removed the anonymity at that stage, the effect would have been, retrospectively, to do what the House of Lords has held should not be done; i.e. the Court itself publishing the information.

71. The position is now different. Not only has the Court now dismissed the appeal, I have also found that the claims for breach of confidence and misuse of private information have no real prospect of success. The Claimant does not have a reasonable expectation of privacy in the information he was seeking to protect, and it is not confidential. As the justification for anonymity has therefore gone, ordinarily that would justify (and, consistent with the principle of open justice, require) the discharge of the anonymity order.

72. The only countervailing interest of any weight is the potential impact of reports of this litigation on the triplets. Once the order for anonymity is discharged, and the Claimant named in this judgment, reports of the proceedings naming the Claimant may well appear in this jurisdiction and beyond. It is not fanciful to suppose that at some point, maybe not immediately, this media coverage might come to the attention of the triplets. But the reality is that, even if I referred to the Claimant in this judgment as BWK, the overwhelming probability is that the Claimant's identity could be easily ascertained from the publicly available material and the same media reports could then appear.

73. If publicity potentially damaging to the triplets results from this judgment, then that is a regrettable further consequence of their being caught in the cross-fire of this misguided litigation. It is abundantly clear that, in seeking anonymity only for himself, the Claimant was motivated solely by self-interest. He could scarcely have considered the children at all in reaching that decision. Indeed, anyone remotely concerned for the welfare of the children would never have brought the proceedings at all. In ***Re S*** **[2005] 1 AC 593**, the likely effect on a child of reports of a criminal trial in which his mother was charged with murder was described as "*dreadfully painful*" [24] although that the impact on him was indirect [25]. These are civil not criminal proceedings, but the principle of open justice applies with equal force. I cannot maintain the order for anonymity as a matter of either principle or practicality. The order will be discharged.