THE HIGH COURT

[2016 No. 4637 P.]

BETWEEN

FRED MUWEMA

PLAINTIFF

AND

FACEBOOK IRELAND LIMITED

DEFENDANT

(No. 2)

JUDGMENT of Mr. Justice Binchy delivered on the 8th day of February , 2017.

1. This decision is supplementary to a decision previously delivered by me in these proceedings on 29th July 2016, the subject of a written judgment dated 23rd August 2016, in which I refused the plaintiff certain orders which would have had the effect of requiring the defendant to take down certain postings concerning the plaintiff, posted by an anonymous source on the defendant's internet service. One of the reliefs sought by the plaintiff included an order directing the defendant to provide the plaintiff with any details which it holds relating to the identities and location of the person or persons operating a Facebook page under the name "Tom Voltaire Okwalinga ("TVO")", on whose Facebook page the postings were made. In other words the plaintiff applied for a "Norwich Pharmacal" order with the intent of identifying the name of the person responsible for the postings concerning the plaintiff.

2. The defendant choose not to oppose the making of a "Norwich Pharmacal Order" for reasons that I refer to below. For this reason therefore, although refusing the other reliefs applied for by the plaintiff, I indicated in my judgment of 29th July that I would make such an order, and reflected that in my written decision of 23rd August, 2016 However, before that order could be perfected the defendant sought the leave of the Court to introduce new evidence with a view to opposing the making of a "Norwich Pharmacal Order", notwithstanding that the interlocutory hearing had concluded. That application came before the court on 21st December 2016. It was opposed by the plaintiff.

The New Evidence

3. The new evidence sought to be admitted is set out in an affidavit of Mr. Jack Gilbert, Lead Litigation Counsel of the defendant dated 19th August 2016. In this affidavit, Mr. Gilbert avers that:-

"in my role as lead litigation counsel for Facebook … I receive and review hundreds of legal claims each year, which comprise dozens of requests for Norwich Pharmacal relief or basic subscriber information ("BSI"). Because Facebook is not a publisher of content, its general position is that any complaints regarding content should be directed at the relevant user that posted the content. To that end Facebook generally does not take any position with respect to requests for limited Norwich Pharmacal Order relief. In remaining neutral, Facebook assumes that (1) the content for which BSI is requested is to identify by specific uniform resource locator ("URL") which is the "address" a person enters into a web browser to locate content on the internet; (2) the requester has made out a prima facie case against the user, evidencing his right to Norwich Pharmacal relief; and (3) the requester follows generally applicable principles of non-party discovery; and (4) that the court is the appropriate arbiter as to whether or not the application is meritorious; a role Facebook is not in a position to fulfil"

4. Mr. Gilbert goes on to explain that when he received the plaintiff's proceedings herein, he treated with them in the usual way and assumed that Facebook would not have any difficulty in providing such information as is had, relating to the identity and location of the person operating the TVO Facebook page, or the individual hosters thereon. However, after I indicated in 29th July that I was disposed to grant the plaintiff Norwich Pharmacal relief, Mr. Gilbert avers that he informed his colleagues as to the impending requirement to disclose the BSI of the posts referred to in the notice of motion. He was then informed by his colleagues that TVO is a political activist who has been "marked for arrest" by the Ugandan Government. He states that TVO's Facebook profile appears to have as many as 80,051 followers as of 17th August 2016.

5. He goes on to state that TVO is the author of the posts referred to in the body of the notice of motion herein, but the position is complicated by the fact that the URLs provided by the plaintiff in the schedule to the notice of motion, together with other posts exhibited at exhibit "FM2" to the plaintiff's affidavit, related to an entirely different Facebook page which also goes by the name of "Tom Voltaire Okwalinga". On 17th August 2016, that Facebook page had 14,403 followers. He describes this page as the "fake TVO page" as he thinks it likely (although he is not certain) that it is a fake or copycat of the more established TVO profile. Some commentators on the fake TVO page made comments suggesting that this is so. Accordingly, he says, the plaintiff has intermingled the more established TVO profile with the fake TVO page.

6. He goes on to say that he has been informed by Facebook's head of public policy for Africa, Ms. Okobi that Facebook has in the past "received multiple requests" from Ugandan Government actors and others affiliated with Uganda's President Museveni to take down contents from TVO's page, to shut down the page and/or to reveal TVO's personally identifiable information. He says he is also informed by Ms. Okobi that TVO had been the subject of a number of previous attempts by the Ugandan Government both to censor TVO and to obtain information that would lead to his identification and that attempts have been made to call Facebook before Uganda's Parliament to compel Facebook to produce the information that would facilitate the arrest of the person or persons behind the account. During the course of a phone conversation between Ms. Okobi and a Mr. Godfrey Mutabazi, the Executive Director of Uganda's Communications Commission, it is alleged that Mr. Mutabazi stated that "*TVO was a threat to the Ugandan State and must be turned over and stopped*" and Facebook was made aware of the Government's interest in arresting TVO.

7. Mr. Gilbert further avers that the Ugandan Government has previously arrested and detained at least one person, an information security expert by the name of Mr. Robert Shaka, who was incorrectly presumed to be TVO. He says that the defendant is unaware whether or not there is any immediate threat to the life or liberty of the author of the fake TVO page, but he notes that the content published on that page is also critical of the Ugandan Government and is similar in substance to that of the genuine TVO profile. He surmises therefore, that aside from any indirect threat which may arise due to the apparent association with the genuine TVO profile, the content of the fake TVO page may also have attracted the interest of the Ugandan Government and the author of the fake TVO page may be at risk of arrest and subsequent persecution in his or her own right.

8. He also says that as of September 2015, there were 172 registered complaints of human rights violations by Police Officers with the Ugandan Police Force Professional Standards Unit. He says that Freedom House in its 2015 report ranked Uganda as "not free"

due to increased violations of human rights and infringements of the rights to freedom of expression, assembly and association. He exhibits a copy of the 2015 Freedom House report in this regard.

9. He also exhibits a copy of the 2015 US Department of State Human Rights Report on Uganda, in which it is reported that the three most serious human rights problems in Uganda include: lack of respect for the integrity of the person, as demonstrated by unlawful killings, torture, and other abuse of suspects and detainees; restrictions on civil liberties such as freedoms of assembly, expression, the media and association; and violence and discrimination against marginalised groups. The report confirms the existence of "credible" reports that security forces tortured and beat suspects and that the use of excessive force and torture during arrests and other law enforcement operations resulted in casualties. In short, Mr. Gilbert expresses concern that if the defendant is directed to furnish the plaintiff with the BSI of TVO, whether that of the genuine TVO profile or the fake TVO page, this may lead to the identification of the authors of the TVO profile and/or the fake TVO profile (if they are in fact different) and that if their identities are revealed, the life, bodily integrity and liberty of those persons would be placed in jeopardy. Mr. Gilbert acknowledges that it is difficult to evaluate the extent of this threat but says that he now has what he believes to be a well founded fear that the threat is real.

10. The plaintiff originally chose to not reply to this affidavit of Mr. Gilbert on the grounds that it is substantially based on hearsay contained in the exhibits comprising the Freedom House and U.S. Department of State Human Rights Reports of 2015. I indicated however, that I felt it would be better for the plaintiff to reply to the affidavit and adjourned the application to enable the plaintiff to do so, and, if required, to enable the defendant to reply further. That resulted in the delivery of two further affidavits, an affidavit of the plaintiff of 16th January 2017, and an affidavit of a Mr. Nicholas Opiyo, a Ugandan based human rights advocate and lawyer sworn on 18th January. The plaintiff disputes that revealing the identity of TVO will subject him to risks of the kind described by Mr. Gilbert. The plaintiff argues that Ugandans who have taken to Facebook, Twitter and other social media platforms to criticise the Ugandan government have had their rights respected. He identifies a number of individuals of whom he is aware (four in total) who have been openly critical of the government in Uganda and who are all on bail even though they are facing serious charges relating to their activities. He also takes issue with the suggestion in the reports exhibited by Mr. Gilbert that the judiciary are not independent in Uganda. He gives examples of cases involving press and media freedom in which the Ugandan government has been unsuccessful. He also argues that the reports exhibited by Mr. Gilbert are out of date and says that the justice, law and order sector annual performance report of 2015/16 records that the number of reported human rights violations in Uganda reduced by 41% during this period.

11. While accepting that Uganda has challenges relating to the observance of human rights, he says that it is alarmist to paint a picture of unmitigated violations of human rights and lawlessness in Uganda as portrayed by Mr. Gilbert. He says that he has suffered at the hands of the defamatory posts of TVO and that he requires redress whether in Uganda or Ireland, which will be denied to him, unless the defendant is directed to reveal the identity of TVO. He also says that any need to protect TVO against prosecution for his alleged crimes are, first, unmerited and secondly, cannot be done at the expense of the plaintiff.

12. As I indicated above, the affidavit of the plaintiff was responded to by Mr. Nicholas Opiyo by way of affidavit of 18th January 2017. Having regard to the content of this affidavit, both as to the credentials of Mr. Opiyo and as regards the opinion expressed by him in the affidavit, and the reasons for that opinion, it is desirable to set out in full the contents of his affidavit:-

"1. I am the Executive Director of Chapter Four Uganda, a human rights organisation that has been documenting and litigating human rights issues in Uganda for six years. I am also a practicing advocate of the courts of judicature of ten years standing and I have litigated and continue to litigate several high profile human rights cases before the courts in Uganda. Notably, I was the lead attorney (sic) case of Oloka-Onyango & 9 Ors v Attorney General (CONSTITUTIONAL PETITION NO. 08 OF 2014.) [2014] UGCC 14 (1 August 2014)(available at http://www.ulii.org/ug/judgment/constitutional-court/2014/14/). The case successfully challenged before the Constitutional court of Uganda, the Anti-Homosexuality Act, 2014. I was also c-counsel in the case of Karuhanga v Attorney General (CONSTITUTIONAL PETITION NUMBER 0039 OF 2013) [2014] UGCC 13 (4 August 2014) (available at http://uloo.org/ug/judgment/constitutional-court/2014/13/) that successfully challenged the reappointment Uganda Chief justice upon attaining retirement age.

2. I served as Secretary General of the Uganda Law Society (the national bar association) from 2013-2014 and prior to which I was a two term chair (2012 and 2013) of the Uganda Society human right committee, the Committeee in charge of leading the Uganda Law Society's human rights work.

3. I was the recipient of the prestigious Human Rights Watch 2015 Recipient of the Alison Des Forges Award for Extraordinary Activism an award that celebrates the valour of individuals who put their lives on the line to protect the dignity and rights of others. Human Rights Watch collaborates with these courageous activists create a world in which people live free of violence, discrimination, and oppression.

4. I am an inaugural European Union Sakhavrov Fellow (2016-2017) and I also served as a Visiting Scholar at the Centre for African Studies, Stanford University, California, United States of America, where (sic.) led human rights classes for the undergraduate and post graduate cohort in 2015.

5. I am therefore qualified and have the necessary experience (as an award winning human rights lawyer, activist and advocate) and the knowledge of the facts about the treatment of people critical of the government online or who are suspected of being Tom Okwainga Voltaire (TVO).

6. I have been furnished with a copy of the affidavit sworn by Fred Muwema on 16 January 2017. I have carefully read and understood the contents of the affidavit and make this Affidavit in order to respond to the Affidavit of Mr. Muwema, the content of which I materially disagree with, from facts within my own knowledge.

7. I have defended and continue to defend Shaka Robert, a Uganda online activists registered on Facebook as 'Maverick Blutaski' and a former employee of the US Embassy in Uganda, who was on June 8, 2015 accused, arrested and charged on suspicion of being Tom Okwalinga Voltaire (TVO). I say that Shaka Robert was waylaid in the early hours of the morning and under the cover of darkness abducted by non-uniformed security officials. Mr. Robert was driven to the Special Investigations Unit (SIU) of the Uganda Police Force in Kireka, West of Kampala city. I further say that the SIU is a detention facility which is notorious for torture and the cruel and inhumane treatment of suspects. A detailed report of the use of torture in the facility is contained in the Human Rights Watch World Report (available at: https://www.hrw.org/world-report/2013/country-chapters/uganda. I beg to refer to a copy of the said report, upon which, marked with the letters "NO1" I have sworn my name prior to the swearing hereof.

8. I say that the arresting officers did not identify themselves, refused to disclose the reason for the arrest in violation of the provision of the constitution of the Republic of Uganda which requires them to do so. They also denied Mr. Robert access to his

family and friends in violation of the provisions of the Constitution of the Republic of Uganda. Upon his arrest, Mr. Robert was stripped of his cell phones and detained incommunicado for more than the constitutionality allowable 48 hours.

9. I was compelled to challenge the incommunicado detention of Mr. Robert before the Nakawa Magistrates Court for being in violation of his rights and the law and the court issued an order for his unconditional release. I further say that the orders of the court were served upon all relevant authorities but they refused to comply with the order. They violated the orders of the court and instead charged Mr. Robert before another court in central Kampala (the Buganda Chief Magistrates Court) of 'disguising himself as Tom Voltaire Okwalinga (TVO), between 2011 and 2015, wilfully and repeatedly using a computer, with no purpose of legitimate communication, disturbed the right of privacy of President Museveni by posting statements as regards to his health condition on social media, to wit, Facebook'.

10. Mr. Robert applied for bail but was remanded to the Central Prison for a week and afterwards released on a court bail. When he attempted to travel for holidays in December of 2015, he was violently arrested at the Entebbe International Airport and accused of theft, a charge he had never been informed about or summoned over. He was later released in the deep of the night.

11. Mr. Robert continued to live under fear and received several anonymous threats to his life by phone and has lived in hiding since then. He has issued proceedings challenging his trial, entitled "SHAKA ROBERT AND ANDREW KARAMAGI VS. AG Constitutional Petition No….of 2016" before the Constitutional Court of Uganda and it is yet to be heard.

12. I know that the Ugandan Police have been looking for TVO for a very long time and, as demonstrated by the case of Mr. Robert, when they arrest anyone on suspicion of being TVO, the arrested persons are subject to extrme abuse of their rights by the police, often in violation of the orders of the court.

13. *I have also observed the use of trumped up charges to intimidate those critical of the person of the President of Uganda. For instance, Rtd. Col. Dr. Kizza Besigye, the main rival to the President has been arrested and charged in court over one hundred (100) times of trumped up charges. He has been charged with rape, treason and subjected to public humiliation and beating by the security agents. He spends most of his time traversing the country to answer a litany of charges. He has not been convicted of any of the charges. In describing charges of rape against him, a Hih Court Judge noted in the case of Uganda v Kizza Besigye that* 'the evidence before this court is inadequate even to prove a debt, impotent to deprive of a civil right, ridiculous for convicting of the pettiest offence scandalous if brought forward to support a charge of any grave character, monstrous if to ruin the honour of a man who has offered him as a candidate for the highest office of this country'. *A transcribed copy of the judgment is available at* http://www.newvisison.co.ug/new *vision/news/1153065/katusi-acquits-besigye. I beg to refer to a copy of the said report, upon which, marked with the letters "NO2" I have sworn my name prior to the swearing hereof.*

14. I say and believe that if the identity of TVO if disclosed, he or she will be subjected to similar or worse abuse by the security agents in Uganda. He is likely t suffer torture, cruel, inhumane treatment in the hands of the security agents in the manner or worse that Mr. Robert has suffered. I further say that, as demonstrated in the case cited above, the criminal justice system has been used to abuse the rights of people critical of the state.

15. I say that such abuse of the criminal justice system is more nuanced than initiation of cases and their results. To fully appreciate the abuse in the justice system, one must look at the entire process from the manner/conduct of investigation, the motivations of such investigations and the prosecution of the cases. It is clear to my mind that taken as a whole, the justice system is manipulated and used to abuse rights in cases of those most critical of the President of Uganda…"

Submissions of the Defendant on the application to admit new evidence

13. In applying to the court to introduce new evidence, the defendant relied upon the decision of Clarke J. in the matter of *McInerney Homes Limited* [2011] IEHC 25. In that case Clarke J. said at paragraph 3.12:

"However, where the basis for seeking that the court revisit its judgment is to be found in the proposed presentation of additional evidence or materials, then it seems to me that it would be inappropriate for the court to go down that road without applying, at least in general terms, a test similar to that which an appellate court would apply in deciding whether to admit new evidence at an appeal. In those circumstances it seems to me that the new materials must be such that same would probably have an important influence on the result of the case, even if not decisive, and be credible. In addition, such new evidence will not ordinarily be permitted to be relied on if the relevant evidence could, with reasonable diligence, have been put before the court at the trial."

14. Earlier in the same decision, at paragraph 3.1 Clarke J. stressed the importance of the timing of an application of this kind:

"It is important to commence a review of the court's jurisdiction by noting that the timing of an application which is designed to seek to go behind a ruling of the court is a matter of some considerable importance. Where proceedings have come to their natural conclusion, whether in a court of first instance or, in the event of an appeal, as a result of a determination of the court which has the final appellate role in the circumstances of the case, then it can, at least in litigation involving the rights and obligations of parties, be said that the ruling of the courts is a final ruling which can only be displaced in very limited circumstances …

However, the situation is not quite the same when the proceedings are still alive in the sense that a valid appeal remains before an appellate court and has not yet been finally determined. In those circumstances the courts have recognised a jurisdiction to admit additional or new evidence subject to stringent conditions which have been the subject of definitive judicial ruling. See, for example, the cases of Lynagh v Mackin [1970] I.R. 180 and Murphy v. Minister for Defence [1991] 2 I.R. 161. The appellate court also has a discretion, to be exercised sparingly, to allow new arguments to be raised."

15. In *McInerney*, Clarke J. was being asked to revisit his decision to refuse to approve a scheme of arrangement proposed by the examiner appointed to the affairs of the applicant. However, he decided against making any formal order on the date on which he delivered his judgment in order to allow counsel to make submissions as to any further or other orders or measures that might be required in the circumstances of the case, and accordingly he adjourned the matter for such purpose for a period of one week. When the matter came back before him one week later, the applicant invited the court to revisit its judgment on the basis of circumstances which had not been drawn to the attention of the court and which the applicant said it was unaware of at the time of the hearing of the application. In the event, Clarke J. found that there was a reasonable possibility that the matters, which had not been drawn to the attention of the court could have been material to the court's consideration of the application and that both parties bore some responsibility for that state of affairs. He found however that there was at least a basis for the applicant not bringing forward information before the court and that in those circumstances the balance of justice required that the matter be re-opened.

16. It is submitted by Mr. Fanning S.C. on behalf of the defendant that the evidence now brought forward by Mr. Gilbert is important, credible and may influence the outcome of the application for Norwich Pharmacal Relief. It is acknowledged that the information set out in the affidavit of Mr. Gilbert was available to the defendant at all times up to and including the date on which the plaintiff's application for interlocutory relief was heard, but at that time Mr. Gilbert had no reason to believe that the defendant would do anything other than follow its normal procedures in such applications i.e. that it would not oppose an application for a Norwich Pharmacal Order and would comply with the same if directed by the court to do so. It was only when Mr. Gilbert went to do just that in anticipation of a perfected court order directing him to do so, that he became aware from one of his colleagues of the possibility that the revelation of the identity of TVO could pose a serious risk to his/her safety. Having become aware of this, the defendant considered that it should apply to the Court to introduce this new evidence before any order is perfected.

Submissions of plaintiff on the application to admit new evidence

17. Mr. Walker, B.L., on behalf of the plaintiff agreed that the test for admitting new evidence is that set out by Clarke J. in *McInerney*. He submitted however, that the evidence which the defendant now wishes to bring before the Court has at all times been in the possession of the defendant, and this was not so in *McInerney*. He submitted that the only reason that this material was not previously brought before the Court was inadvertence on the part of the defendant. He says that while Mr. Gilbert claims that it was only when he received my written judgment of 23rd August 2016, that he realised, following consultation with his colleagues, the implications that a Norwich Pharmacal order would have in this case, the fact is that he was aware of the decision of the Court from 29th July and moreover, the defendant had in principle agreed to the granting of a Norwich Pharmacal order by not opposing the application for the same in the first place. Counsel for the plaintiff also explained that the plaintiff did not put in a replying affidavit to Mr. Gilbert's affidavit because to a large extent Mr. Gilbert's affidavit is taken up with hearsay evidence concerning, in particular, the human rights record of Uganda.

18. Mr. Walker further submits that had the defendant disclosed that it was previously aware of the activities of TVO, by reason of the requests received from the Ugandan Government, then the defendant might not have been able to resist successfully the application for interlocutory relief on the grounds that it did i.e. s. 27 of the Defamation Act 2009. Had the defendant disclosed its awareness of the activities of TVO at the hearing of the original application, the plaintiff would have argued that the defendant did not act with reasonable care and this would have influenced the Court in its attitude towards the plaintiff's application for take down orders.

Decision on application to admit new evidence.

19. It can hardly be disputed that the evidence the subject of this application could have had an important influence on the outcome of an application for Norwich Pharmacal Relief. Notwithstanding the plaintiff's submissions that much of what was said by Mr. Gilbert is grounded upon hearsay, it is sufficient to raise serious concerns about the possible impact of a Norwich Pharmacal Order upon the safety and welfare of TVO, if identified. Any shortcomings in the application arising by reason of the hearsay nature of much of what Mr. Gilbert had to say have been squarely addressed through the affidavit of Mr. Opiyo. The application itself was made as quickly as possible by the defendant as soon as it became aware of the potential for the threat to the safety of TVO, and before the perfection of any court order, and therefore even before the possibility of appeal arises.

20. The decision that I delivered on 29th July if it remains unchanged, remains open to appeal and as in *McInerney* the application to admit new evidence in this case is made even earlier in the process than at appellate stage. The proceedings are not the subject of an appeal because the final order of this court has not yet been perfected, as was also the case in *McInerney*.

21. The only aspect of the test articulated by Clarke J. in *McInerney* Homes that the defendant does not meet on this application, is that the new evidence was always available to the defendant and could have been brought before the Court at the time the plaintiff's application for interlocutory relief was heard. Mr. Gilbert has given a perfectly credible explanation as to how this occurred. It may be observed that the mere fact that an applicant to admit new evidence did not identify the evidence sought to be adduced because it was following its normal administrative procedures would be unlikely to be accepted by a court as a good reason for not identifying the evidence sooner. In this case, however, it is the nature of the new evidence and the possible consequences of refusing to admit it into evidence that requires a different approach. Where an arguable case has been made out that failure to admit new evidence could result in a threat to the life and limb of any person, it would in my view be unconscionable for the Court not to receive that evidence and give it consideration simply because the party seeking to have it admitted could have done so sooner. Indeed, I think that the defendant is to be commended for taking the trouble that it has to bring this evidence to the attention of the Court, given that it has no vested interest in doing so. I will therefore allow the defendant's application to receive the new evidence.

Submissions on significance of new evidence.

Submissions of defendant

22. Counsel submitted that there is a hierarchy of rights to be considered; the plaintiff's right to his good name as against the possible threat to the life and wellbeing of another. It is submitted that in *Foley v. Independent Newspapers* [2005] 1 I.R. 88. Kelly J. recognised that in appropriate cases where the court finds that there is a real likelihood that publication of material would infringe the right to life or bodily integrity of an individual, the court would grant interlocutory relief restraining publication. In that case Kelly J. said:-

> *"In this country we have a free press. The right to freedom of expression is provided for in Article 40 of the Constitution and Article 10 of the European Convention on Human Rights. It is an important right and one which the courts must be extremely circumspect about curtailing particularly at the interlocutory stage of a proceeding. Important as it is however, it cannot equal or be more important than the right to life. If therefore the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right. That appears to be the gist of what was said by Finlay C.J. in S.P.U.C. v. Grogan [1989] IR 753 at 765 where in the context of the facts of that case he said:-*
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> > *"With regard to the issue of the balance of convenience, I am satisfied that where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in the balance against the granting of such a protection would be another competing constitutional right"."*

23. The court in *Foley* did not grant injunctive relief restraining publication because it was not satisfied, on the evidence before it in that case, that it could be justified in restricting the constitutional right of the defendant between the date of the interlocutory hearing and the trial of the action, to continue publishing articles concerning the plaintiff not least because the information complained of in that case was already in the public domain. This latter factor was also present in this case and formed part of my rationale for declining the plaintiff "take down" orders.

24. However, counsel for the defendant argues that in the context of an application for a Norwich Pharmacal order, *Foley* is clear authority for the proposition that the courts will, where there is sufficient evidence of a threat to the life or bodily integrity of a person, grant appropriate injunctive relief to that person even though it may involve overriding a different constitutional right of another.

Submissions of plaintiff

25. Counsel for the plaintiff relied upon the Norwich Pharmacal decision itself i.e. *Norwich Pharmacal Co. and Ors. v. Commissioner of Customs and Excise* [1974] AC 133 and the judgment of Lord Reid who summarised the principle as follows:-

> *"…if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrong doers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should cooperate in righting the wrong if he unwittingly facilitated its perpetration."*

26. It is submitted that this principle was endorsed in this jurisdiction by the Supreme Court in the case of Megaleasing UK Limited, *Megaleasing Holdings Limited and Quantum Data SA v. Vincent Barrett and Ors.* [1993] ILRM 497 which counsel submits is authority for the proposition that once a plaintiff establishes a prima facie case of wrongdoing, a duty arises on the part of the third party who was in possession of the relevant information, to assist. However, the court in fact resisted such a wide ranging application of the Norwich Pharmacal principle and Finlay C.J., with whom all other members of the Supreme Court agreed stated that:-

> *"I am, accordingly, driven to the conclusion that the existing authorities upon which the judgment of the High Court is largely based, which are authorities of the English courts, do in fact confine the remedy to cases where a very clear proof of wrongdoing exists, and possibly, so far as applies to an action for discovery alone prior to the institution of any other proceedings, to cases where what is really sought are the names and identity of the wrongdoers, rather than factual information concerning the commission of a wrong."*

27. In Megaleasing, the application was refused because the court considered that the facts of the case fell very far short of a clear establishment of a wrongdoing. The plaintiff submits that the wrongdoing in this case is clearly established and that the very business model of the defendant exposes it to Norwich Pharmacal type orders. Reliance is also placed upon the decision of Kelly J. in *EMI Records (Ireland) Limited v. Eircom Limited* [2005] 4 I.R. 148 wherein Kelly J. stated:-

> *"I am satisfied that whether the right to confidentiality arises by statute or by contract or at common law, it cannot be relied upon by a wrongdoer or a person against whom there is evidence of wrongdoing to protect his or her identity. The right to privacy or confidentiality of identity must give way where there is prima facie evidence of wrongdoing. There is such evidence here."*

28. The plaintiff further relies upon the decision of the High Court in England in the case of *Totalise PLC v. The Motley Fool Limited* [2001] E.M.L.R. 29. The plaintiff in the proceedings was an internet service provider and the defendants operated a website containing discussion boards on which members of the public were able to post material. An individual using the pseudonym "Zdust" had made numerous postings about the plaintiff on the defendants' discussion boards. These postings called into question the solvency of the plaintiff as well as the competence and integrity of its management. The plaintiff sought disclosure of the name and address of the Zdust and of all documents in the possession, custody or power of the defendants. The defendants removed the offending postings and barred Zdust from the using their sites but declined to consent to the disclosure requested on the grounds that the Data Protection Act in the United Kingdom and the defendant's own privacy policy precluded such disclosure. Owen J. considered it appropriate to make orders against the defendants requiring disclosure of the information sought. He stated:-

"I turn then to the exercise at my discretion to grant the reliefs sought. I am satisfied, first, that much of the content of the Zdust postings on both defendant's discussion boards is plainly defamatory. Defamation is a tort of strict liability. The claimant has demonstrated a strong prima facie case against Zdust. Secondly, the defamatory material is of a very serious nature, calling into question the claimant's solvency and the competence and integrity of its management and directors. Third, the concerted campaign waged by Zdust presents a very considerable threat to the claimant. The potential audience is vast. It has no geographical limit. The claimant, in my judgment, is at risk of serious damage. Fourth, Zdust is hiding behind the anonymity afforded by access to the defendant's discussion boards. Fifth, the claimant has not other practical means of identifying Zdust.

I am mindful of the fact that both defendants had a policy of confidentiality with regard to personal information relating to those using its websites and do not wish to deviate from that policy. But the claimant argues that it simply wants the author the Zdust postings to take responsibility for its actions, and that, when balancing the interests of the parties, the respect for and protection of the privacy of those who choose to air their views in the most public of fora must take second place to the obligation imposed upon those who become involved in the tortious acts of others to assist the party injured by those acts.

I have no hesitation in finding that the balance weighs heavily in favour of granting the reliefs sought. To find otherwise would be to give the clearest indication to those who wish to defame that they can do so with impunity behind the screen of anonymity made possible by the use of websites on the internet."

29. In the case of *the Rugby Football Union (respondent) v. Consolidated Information Services Limited (formerly via Go Go Limited) (in liquidation)* [2012] 1 W.L.R. 3333 the Supreme Court of the United Kingdom made orders in favour of the RFU the effect of which was to require the appellant to disclose the identities of those selling tickets for international rugby games, using the services of the appellant, in a manner contrary to the terms upon which the tickets were sold. The court identified the factors to be taken into account in the exercise of the discretion of the courts upon applications such as this:

"The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors. Various factors have been identified in the authorities as relevant. These include: (i) the strength of the possible cause of action contemplated by the applicant for the order … (ii) the strong public interest in allowing the applicant to vindicate his legal rights … (iii) whether the making of the order will deter similar wrong-doing in the future … (iv) whether the information could be obtained from another source … (v) whether the respondent to the application knew or ought to have known that he was facilitating arguable wrong-doing".

The court also identified five other factors that are not of relevance to these proceedings. Interestingly, the court considered that the standard to be met did not require clear proof of a wrong-doing, but rather something akin to a prima facie case – an "arguable"

wrong-doing. The court did sound a note of caution however:

"the particular circumstances affecting the individual whose personal data would be revealed on foot of a Norwich Pharmacal Order will always call for close consideration and these may, in some limited instances, displace the interests of the applicant for the disclosure of the information even where there is no immediately feasible alternative way in which the information can be obtained. (Emphasis added).But, in the present case, the impact that can reasonably be apprehended on the individuals whose personal data are sought is simply not of the type that could possibly offset the interests of the RFU in obtaining that information."

30. It was also argued on behalf of the plaintiff that the defendant is not an arbiter of fact and indeed that the defendant itself accepts this to be so; but notwithstanding that the defendant is now purporting to be an arbiter of fact insofar as it concerns possible threats to the safety and welfare of TVO if the reliefs sought by the plaintiff is granted. Counsel for the plaintiff submits that even on the defendant's case, press freedom appears to be good in Uganda. It is submitted that the Freedom House publication exhibited by the defendant indicates a free and open press stating as it does, "*The Constitution provides for freedom of expression and of the press*" and also states that "*Uganda has a vibrant media sector, with nearly 200 private radio stations and dozens of television stations and print outlets*." There is no reason to believe that TVO, if his identity is revealed, will suffer the same kind of persecution as is described in the exhibits as being meted out by the Ugandan establishment to minority groups.

31. Counsel for the plaintiff concluded by submitting that if the defendant's arguments are accepted, TVO will be enabled to continue publishing material defamatory of the plaintiff on the defendant's internet service.

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32. There is not the slightest doubt but that in the ordinary course of events this application would be granted and indeed it would not even be opposed by the defendant. Mr. Walker submits that the very nature of Norwich Pharmacal Orders exposes those to whom they relate to a degree of risk, since the application is always associated with an alleged wrongdoing. While that may be so, none of the authorities to which I have been referred involved any suggestion that a person whose identity would be revealed as a result of the making of the order could be subjected to harassment, torture or worse.

33. It is somewhat difficult for the Court to make an assessment as to the extent of the danger that would be posed to TVO if his identity is revealed. It is fair to say however that there is a consistency in the reports of Freedom House and the US Department of State Human Rights Report on Uganda exhibited by Mr. Gilbert as well as the report of Amnesty International on Uganda for the period 2015/2016, all of which express concern about violations of the rights to freedom of expression, assembly and association.

34. The U.S. Department of State Human Rights Report refers to unlawful killings and torture, and other abuses of detainees and suspects and cites instances of such conduct. It says there were numerous reports of torture and abuses in police detention facilities. As regards freedom of the press, it states that security forces assaulted, harassed and intimidated journalists. All of this is consistent with the Amnesty International Report for Uganda for the period 2015/2016 which states that:-

> *"Police brutality and restrictions of the right to freedom of peaceful assembly increased. Attacks against activists, journalists and other media workers continued with impunity. Opposition politicians seeking to participate in the national elections scheduled for early 2016 were arrested and detained, along with their supporters."*

35. It also gives specific instances of torture and other ill-treatment. The Freedom House Report referred to by to Mr. Gilbert, while noting that Uganda has a vibrant media sector, heavily qualifies that observation and also states inter alia:-

> *"Independent journalists and media outlets are often critical of the government, but in recent years they have faced substantial, escalating government restrictions and intimidation, encouraging self censorship. Journalists often faced harassment or physical attacks by police or ordinary citizens while covering the news."*

36. These reports find practical expression in the evidence put forward by Mr. Opiyo in his affidavit of 18th January, 2017. As an executive director of a human rights organisation in Uganda, namely Chapter Four Uganda, and as a practicing advocate who has litigated and continues to litigate human rights cases in Uganda, he is ideally positioned to advise the Court on the extent of the risks posed to TVO if his/her identity is revealed. The contents of his affidavit are self explanatory. In para. 14, he avers unambiguously that if the identity of TVO is disclosed, that person is likely to suffer torture, cruel and inhumane treatment in the hands of the security agents of the State. He also avers that in the past, the criminal justice system has been used to abuse the rights of people critical of the State and is clearly of the view that that is likely to happen to TVO, in the event, that his/her identity is revealed.

37. Mr. Opiyo is independent of the parties to this application and his credentials to express the opinion that he has is beyond reproach. Taking all of the above into account, I am of the view that if I grant the applicant the relief that he seeks, it is probable that TVO, whether the real TVO or the fake TVO, will suffer human rights abuses at the hands of the Ugandan authorities, ranging from unlawful detention and mistreatment in custody to torture. This application must be considered in light of that conclusion.

38. It is true to say that TVO placed himself/herself at risk of identification in posting comments about the plaintiff, not least by doing so on a Facebook page on which there is content critical of the Ugandan regime. To that extent, it might be argued that TVO is the author of his/her own misfortune, but that would scarcely be a reason for the Court to make an order that would expose TVO to human rights abuses.

39. On the other hand, I also have to give due consideration to the fact that I have already found that the postings concerning the plaintiff are defamatory of him, and if the identity of TVO is not revealed, then the plaintiff is left without any relief to vindicate his good name. If he is given the identity of TVO, then he will be able to issue such proceedings as are appropriate in Uganda. What is at issue, therefore, on this application is a weighing of the right of the plaintiff to vindicate his good name on the one hand and the right to life and bodily integrity of TVO on the other.

40. In *Foley*, Kelly J. clearly recognised that the right to freedom of expression would have to give way to the right to life in the event of a conflict. I think it must be correct to say that a person's right to his good name must take second place to the right to life and bodily integrity of another where the threat to bodily integrity is sufficiently serious, as I believe it to be here. I think the comment of Lord Kerr of the Supreme Court of the United Kingdom in *Rugby Football Union*, which I have cited in the concluding part of para. 31 above is apposite. That passage clearly envisages circumstances where a person seeking a Norwich Pharmacal order may be denied such an order even though it may have the effect of denying the applicant a relief to which he would otherwise be entitled.

41. For all of these reasons, I must refuse the application. But I will do so on a conditional basis; the defendant has the means to communicate with TVO. TVO should be notified that unless the offending postings are removed within fourteen days from the date of

delivery of this judgment, then the plaintiff will be entitled to renew his application for Norwich Pharmacal relief which will be duly granted. The defendant should notify TVO of this forthwith.