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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **27/01/2025 and 20/02/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY CASE STATED FROM THE COUNTY COURT FOR THE DIVISION OF BELFAST

BETWEEN:

MATTHEW CAVAN

Plaintiff/Respondent:

and

JOLENE BUNTING

Defendant/Appellant:

Karen Quinlivan KC and Melanie Rice KC (instructed by Phoenix Law Solicitors) for the Plaintiff/Respondent
Ronan Lavery KC and Richard McLean (instructed by Brentnall Legal) for the Defendant/Appellant

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Before: McCloskey LJ and McAlinden J

McCLOSKEY LJ (*delivering the judgment of the court*)

The county court proceedings

[1] By its order dated 22 May 2023 a deputy judge of Belfast County Court acceded to an application by civil bill by Matthew Cavan (the "plaintiff") for, inter alia, injunctive relief. The initial, interim injunctive order of the deputy county court judge is dated 9 August 2022 and is labelled "Order for an injunction before the issue of a civil bill." It enshrined undertakings regarding service and other related matters. The Order is styled an "Interim injunction." Consistent with this, the costs of the motion were "reserved to the trial judge" and the order, finally, directed a further review some six weeks thereafter, on 21 September 2022.

[2] There is a signed and dated civil bill of the same date (see undertaking No 2). There is also an affidavit apparently sworn by the plaintiff (undertaking No 3).

Furthermore, there is an affidavit of service of the order and proceedings, sworn on 12 August 2022. The Plaintiff's solicitor clearly acted assiduously and these procedural aspects of the proceedings at first instance all appear regular. As will become apparent this court raised concerns about what transpired procedurally thereafter.

[3] By a separate order dated 12 September 2022 the defendant was found to have been in contempt of the initial order. By further order dated 3 October 2022 the interim injunction order was extended "until further order."

[4] The final order of the County Court restrained the defendant from engaging in a series of specified types of conduct and also had a mandatory element (infra). It is described as a "protection from harassment injunction" and has a lifespan of five years. On its face, this order was made in the absence of the defendant, albeit reciting, *inter alia,* that counsel for both parties were in attendance and:

> "The judge heard the application and read the affidavits listed in Schedule 1 and accepted the undertakings in Schedule 2 …."

There is no indication of what "heard the application" entailed. (This is relevant to our analysis of the case stated infra*).* The final injunction appears to duplicate the preliminary injunction.

[5] A delay of some 14 months then materialised. Only the parties' legal representatives can account – to this court and their respective clients - for this disturbing and embarrassing fact. There was occasional judicial involvement but no effective judicial control during this period. This hiatus eventually came to an end on 20 September 2024 when the deputy county court judge signed the case stated related to the second of the aforementioned orders, with transmission to the Court of Appeal following on 24th September 2024. The period of 14 months delay must be set against the period envisaged by the relevant procedural rules (infra) which, cumulatively, contemplate a period of four to five months. This egregious delay is manifestly antithetical to common law principles, the overriding objective and, insofar as applicable, Article 6 ECHR (via s6 of the Human Rights Act).

The case stated saga

[6] Article 61(1) of the County Courts (NI) Order 1980 provides:

> "Except where any statutory provision provides that the decision of the county court shall be final, any party dissatisfied with the decision of a county court judge upon any point of law may question that decision by applying to the judge to state a case for the opinion of the Court of

> Appeal on the point of law involved and, subject to this Article, it shall be the duty of the judge to state the case."

Any application to state a case must be made in writing, and served on the other parties, within 14 days of the final decision of the court. This is an inflexible statutory time limit.

[7] The main elements of the procedure thereafter are the following. Where the judge accedes to the initial application, the requisitioning party must within one month provide the draft case stated to the other party; the latter party must reply within three weeks; the requisitioning party shall, within two months from the day on which the judge directed the case to be stated (or longer as the judge may allow), submit it to the judge for approval and settlement (CCR Order 32, rule 6(1)); the application to state a case is deemed to be withdrawn if there is non-observance of this requirement: CCR Order 32, rule 6(6); the judge shall within two months of receipt of a draft case stated approve and settle its terms and transmit it to the chief clerk: CCR Order 32, rule 6(3); where a county court judge refuses or fails to state a case within the time prescribed by CCR Order 32, rule 6, the moving party may apply to a judge of the Court of Appeal for an appropriate order: Article 61(6) and RCJ Order 61, Rule 4. (See, generally, Valentine, Civil Proceedings in the County Court, paras 20.28/29/30/31). The time limits applicable to the process in the county court are capable of extension: per Order 43, rule 10.

At Court of Appeal level

[8] The transmission of the case stated to the Court of Appeal did not materialise until 20 September 2024 ie 16 months following the final orders of the County Court. In its management of this appeal this court became alert to the issues of acute delay and the procedural validity of the case stated. A further issue, one of substantial concern, identified by the court was that of the manifest differences between the parties' schedule of agreed material facts (on the one hand) and the content of the case stated (on the other). These concerns stimulated a tailor-made case management order and written submissions from both parties.

[9] There were clear illustrations of a fallacious approach before this court. This was evident, firstly, in the inclusion in the appeal hearing bundle of a transcript of the first instance hearing (totalling 61 pages). A transcript of this kind properly belongs to the exercise to be conducted at first instance namely the application to state a case for the opinion of the Northern Ireland Court of Appeal, the processing of such application and the determination thereof. This court is concerned only with the facts either agreed at first instance or, insofar as contentious, as found by the court or tribunal concerned – <u>all contained within the case stated</u>. In the absence of any special case management direction at this level compatible with established principle, or other demonstrated justification, this court has no function in reviewing or assessing the <u>evidence</u> underpinning either agreed facts or facts as found on contentious issues.

[10] Another illustration is provided by the inclusion in the appeal hearing bundle of the parties' skeleton arguments at first instance. This has become a regular occurrence in the Court of Appeal. In the abstract, if the parties to an appeal by case stated wish to adopt fully their first instance skeleton arguments, without new skeleton arguments, they are of course at liberty to do so. That, however, is not this case. This court has received new skeleton arguments totalling some 50 pages. These new skeleton arguments establish no connection whatsoever with the first instance skeleton arguments. In the absence of some specific reason, fully explained during the case management phase or in the new appeal skeleton arguments and absent a specific case management direction from this court the first instance skeleton arguments have no function at this level, they are a cause of bulk and obfuscation and a mere distraction. They should not have been included.

Appeals By Case Stated: General

[11] Order 32, Rule 5(6) of the County Court Rules (NI) 1981 states that:

> "(6) Every case stated shall be divided into paragraphs numbered consecutively and shall concisely state such facts and refer to such documents as may be necessary to enable the Court of Appeal to decide any question raised thereby."

[12] There is in the jurisprudence of the Northern Ireland Court of Appeal ample guidance on the appropriate form and content of a case stated. First, in *Emerson v Hearty* [1946] NI 35:

> "The Case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the Judge.
>
> The Case should set out clearly the Judge's findings of fact and should also set out any inferences or conclusions of fact which he drew from those findings. The task of findings the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the Judge. It does not fall within the province of this Court. Accordingly, it is not legitimate by setting out the evidence in the Case Stated and omitting any findings of fact to attempt to pass the task of finding the facts on to the Court of Appeal. What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it

> will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did."

[13] More recently, in *James P Corey Transport Limited and Owen Jacobson v Belfast Harbour Commissioners* [2021] NICA 6. At paras [20]-[21] this court provided the following extensive guidance:

> "The guidance to be derived from previous decisions of this court includes the following. It is not enough to state the issue as "whether the court was correct in law in deciding that ...": *R (Townsend) v McKee* [1982] 17 NIJB at 6-8. If the application is delivered in time, the Court of Appeal can hear the appeal though the point of law has not been properly stated, but it should be cured by amendment to insert a proper statement of the point of law, within a reasonable time …
>
> Each paragraph should deal with a single portion of the subject-matter: firstly the facts and inferred facts, then the contentions of each party, then the judge's findings, and finally the precise point of law: *Emerson v Hearty* [1946] NI 35. All these matters should be entirely contained in the text of the case stated itself, not in any annexed document …
>
> The duty to state the findings of fact is not met by merely appending the judge's written judgment … **or by a recital or annexation of a transcript of evidence** which the judge says he accepted as true; "evidence remains evidence even where it has been accepted": *Michelstown Co-op v Commr for Valuation* [1989] IR 210. Authorities cited in argument before the judge should be listed.
> …
>
> **The case should state the findings of the material facts in a discrete form,** separate from any statement of the evidence: *Clinton v Zdenkovic* [1997] NIJB 234. If an inferred fact is disputed between the parties, the judge should state both the primary facts and the inferred fact drawn from it: *Emerson v Hearty; Reid v Hall* [1975] NI 171; and evidence should be detailed if it elucidates the material facts found or the point of law involves the question whether there is any or sufficient evidence to support a finding of fact:

> *Schofield v Hall* [1975] NI 12 (i.e. an *Edwards v Bairstow* challenge). …
>
> In stating a case the judge can include facts and conclusions not expressly stated in his judgment, provided that they do not materially change the reasons for the decision*: Hughes v European Components* [1990] 2 NIJB 29, at 40-2."
> [our emphasis]

[14] It is both timely and appropriate to draw attention to the following with some emphasis. In every instance, a case stated should specify with precision (a) uncontested material facts and (b) the findings of fact of the court or tribunal in question in respect of all material contentious factual issues. The adjudication of an appeal by case stated involves the appellate court's consideration of the case stated by the court or tribunal concerned, the parties' arguments, any material statutory provisions and any authority (as correctly understood). The appellate court does not have jurisdiction to include within its adjudicative matrix any factual material which does not belong to the case stated.

[15] The following cannot be emphasised with sufficient force. The specification of the material facts as found is a fundamental requirement of every case stated. The material facts can take the form of agreed facts and/or uncontested facts and/or facts found by the first instance court or tribunal, or a combination of all. We have emphasised the word "material" for good reason. Furthermore, recitations of evidence do not constitute findings of fact. The intellectual discipline of separating evidence from the judicial exercise of finding facts is crucial. With the limited exception of the *Edwards v Bairstow* scenario – see above – in an appeal by case stated there is no place for recitations of evidence. Furthermore, it is the frequent experience of this court that first instance courts and tribunals employ the language of "findings." This is often a recipe for error. Disciplined concentration on **findings of fact** is a constant requirement. Lengthy recitations of evidence, an engrained trait of the decisions of certain tribunals in particular, is frequently unnecessary and a contributor to a failure to state clearly the material findings of fact of the court or tribunal concerned. In every case stated (as in many judgments) the appropriate sequence and taxonomy are: identification of material contentious factual issues; findings of fact; followed by governing legal rules/principles; next (where required) conclusions on the law; and, finally, decision.

This case stated analysed

[16] By the terms of the case stated the deputy county court judge has formulated for the determination of this court the following questions:

(a) Was I correct in law in deciding there was material before the court which amounted to conduct which was oppressive and unreasonable as per *King v Sunday Newspapers* [2011] NICA 8?

(b) Was I correct in law to strictly construe and restrict the Article 10 convention rights of the defendant in respect of the material she published?

(c) In light of the plaintiff declining to issue defamation proceedings, was I correct in law to determine the defendant's conduct amounted to conduct which can be described as 'torment' which would sustain criminal liability as per *King v Sunday Newspapers*?

[17] The first section of the case stated is entitled "Facts and Inferred Facts." In the seven paragraphs which follow, five are devoted to the procedural history of the case, the sixth rehearses the outcome and the seventh records the defendant's requisition to state a case for the opinion of this court. In short, there is a fundamental mismatch between the chapter heading and the ensuing content. It contains no "facts" or "inferred facts."

[18] The next section of the case stated is entitled "Contention of Appellant/Defendant." This consists of 21 subparagraphs. Of these, 20 comprise a recitation of aspects of the plaintiff's oral testimony, while the 21st records the defendant's submission that there was insufficient evidence "… to satisfy the requirement that the conduct of the defendant was oppressive and unreasonable … [and] … amount to torment that would sustain criminal liability." Once again, a radical mismatch is unmistakable.

[19] The third section of the case stated bears the title "Judge's Findings." There are four paragraphs in this compartment of the case stated, which invite the following analysis:

(a) The first contains no findings of fact.

(b) The second contains four findings of fact, namely the defendant made postings on social media on more than two occasions (the number being unspecified), the plaintiff was the target of two of the defendant's postings, the defendant encouraged that one of these (a video) be shared and the defendant's conduct (unspecified) caused the plaintiff alarm and distress (with certain particulars thereof).

(c) There is a separate "finding" "I found the way the video was edited was oppressive and unacceptable." This is not a finding of fact. It is, rather, the judge's conclusion, having applied a legal test ("oppressive and unacceptable") to a factual scenario (concerning the editing of a video) but without specifying any findings of fact.

(d) This section of the case stated is interspersed with the purely discursive.

(e) There are several recitations of certain evidence given at the hearing.

(f) This section also contains the court's evaluation of the purely legal issues of Article 10 ECHR and Articles 3 and 5 of the Protection from Harassment (NI) Order 1997.

[20] Summarising, this section conflates, combines and confuses the following: some findings of fact, discussion, the recitation of certain evidence, the evaluation of legal issues and conclusions on the law. This is wholly inappropriate. A paradigm illustration of the conflation of a finding of fact (or the rehearsal of an uncontentious fact – which of the two possibilities not being specified) with a conclusion on the law is the following:

> "The defendant posted on social media on more than two occasions *which satisfy the statutory requirement for a course of conduct*."

The italicised words (our device) give expression to a legal conclusion, whereas the preceding words purport to express a finding of fact (unparticularised).

[21] By the foregoing route one arrives at the "Questions for the Court of Appeal." The first of these is:

> "Was I correct in law in deciding that there was material before the court which amounted to conduct which was oppressive and unreasonable as per *King v Sunday Newspapers Limited* [2011] NICA 8?"

The phraseology "material before the court" poses a fundamental difficulty. To begin with, it is devoid of specificity. Furthermore, it is not the language of findings of fact or conclusions on the law. It is intrinsically flawed. The terminology should properly have been "… in deciding that based on my findings of fact that [XX, YY, ZZ] there was conduct by the defendant which amounted to …"

[22] In the abstract, in some cases stated the question (or one of the questions) of law for the appellate court might be whether, having regard to the uncontentious facts and/or facts as found by the court or tribunal at first instance – each clearly rehearsed - the conclusions made and/or final decision are/is such that no court or tribunal could reasonably made: the classic *Edwards v Bairstow* test (see above). That, however, is unrelated to the question posed here.

[23] There is a further difficulty. Whereas this question purports to rehearse a legal test ("oppressive and unreasonable"), the only two sentences in the "Judge's Findings" to which it might conceivably be related employ the language "oppressive and unacceptable." The legal test to be applied in a case of alleged harassment is whether the conduct was "oppressive and unreasonable": *King,* para [36], considered

in tandem with Article 3(3)(c) of the Protection from Harassment (NI) Order 1997. This is not mere pedantry. The applicable legal test has not been correctly formulated.

[24] The second question posed in the case stated is:

> "Was I correct in law to strictly construe and restrict the Article 10 Convention rights of the defendant in respect of the material she published?"

The only passage in the case stated addressing the defendant's rights under Article 10 ECHR (via section 6 of the Human Rights Act 1998) is para 16(e). This passage does not specify the acts of freedom of expression in play. By implication they would appear to be the two acts comprising (a) publication of a tweet and (b) publication of the video noted in para 16(c) of the case stated.

[25] In common with the "material before the court" phraseology examined above, the "interference" mentioned in this passage is unparticularised. Furthermore, it is not related to either the interim injunction or the final injunction ordered by the court dated 9 August 2022. When one examines the terms of the final injunction, the problems caused by this lack of particularity are stark. By this injunction the defendant is restrained from engaging in six specified types of conduct. Of these only the sixth ("communicating with or about the plaintiff ...") could conceivably interfere with the defendant's right to freedom of expression under Article 10 ECHR.

[26] Turning to the seventh component of the injunction, the first difficulty posed is one of interpretation:

> "The court does order as follows …
>
> … an injunction to restrain the defendant whether acting on her own or as part of a group of persons on her behalf or on her instructions or with her encouragement from …
>
> (g) Immediately remove and refrain from posting a video entitled …"

It is at once evident that the syntax has gone badly awry. Whereas the first and six subparagraphs are of the "injunctive restraint" variety, the seventh was presumably designed to have the character of a restraint and mandatory order. Quite apart from this inappropriate conflation, there is a manifest lack of coherence.

[27] The next problematic feature of this question is that the case stated nowhere contains a conventional Article 10 analysis/exercise. One particular consequence of this is that there is no identification of the limitation/s in Article 10(2) invoked by the County Court. It is only by a process of interpretation and deduction that the conclusion that the court might have had in mind the limitation of "… the protection

of the reputation or rights of others ..." might be appropriate. Even if this is correct, it is clear that the court failed to observe the two requirements specified in section 12 of the Human Rights Act 1998 of relevance to the proceedings, namely:

(i) By section 12(3), this having been an application for a pre-action injunction (until the final order was made):

> "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

(ii) Second, and more pertinently, by section 12(4):

> "The court must have particular regard to the importance of the Convention right to freedom of expression …."

[28] The third, and final, question posed in the case stated is:

> "In light of the plaintiff declining to institute defamation proceedings, was I correct in law **to determine** the defendant's conduct amounted to conduct which can be described as 'torment' which would sustain criminal liability as per [King]"?
> [emphasis added]

Our assessment of this question is as follows. First, the fact that the plaintiff had not initiated defamation proceedings against the defendant is not properly rehearsed in the case stated as either an agreed fact or a finding of fact by the court on a factually contentious issue. Rather, this is mentioned, inappropriately, under the umbrella of "Contention of appellant/defendant."

[29] Of greater concern is the following. The terminology of this question at once invites the reader to search in the case stated for the **determination** to which the question relates. This search is unyielding. Furthermore, neither the formulation nor the application of any legal test relating to conduct tantamount to "torment" is anywhere to be found. Second, the phrase "criminal liability" appears in a single sentence only, in para 10(c):

> "The defendant's conduct was oppressive and unacceptable and of an order which would sustain criminal liability."

If and insofar as this purports to be the formulation of a legal test, its genesis is nowhere specified. Of equal concern is the failure to explain and particularise the "conduct … of an order which would sustain criminal liability." In particular, there

is no identification of (a) the criminal offence contemplated, (b) the ingredients of such offence or (c) how guilt beyond reasonable doubt would, or might, be established.

Conclusions

[30] Two questions must be addressed. First, what is the effect of the several analyses undertaken in the body of this judgment, bearing in mind section 38(1)(f) of the Judicature (NI) Act 1978? This provides that this court **may**:

> "… where the appeal is by case stated, amend the case stated or remit it, with such declarations or directions as the court may think proper, for hearing and determination by the original court or for re-statement or amendment or for a supplemental case to be stated thereon."

Second, we are of the opinion that there has been a failure to prosecute this appeal with reasonable expedition since the filing of the requisition to state a case in June 2023. What consequences should follow?

[31] The parties' submissions on these questions will be considered.

Postscript and Order

Having considered the parties' further written submissions, this court is satisfied that the substantial delay in prosecuting this appeal arose out of a multiplicity of factors, some of them beyond the appellant's control. No-one emerges with any glory. An order of dismiss for want of prosecution is therefore not warranted. This court further considers that the appropriate course is to remit this case to the deputy judge pursuant to s 38 (1) (b), (c) and (f) of the Judicature (NI) Act 1978. This step will require the formulation of an entirely new case stated, duly guided by this judgment. The court trusts that the deputy judge will receive considerably greater assistance from the parties' legal representatives than previously. The appellant's legal representatives will provide the deputy judge and the respondent's legal representatives with an entirely new draft case stated, within 14 days of the final order of this court. The respondent shall reply within a further 14 days. The deputy judge will finalize the new case stated within a further period of 14 days. This case, regrettably, has been plagued by unacceptable and avoidable delay. The backstop date anticipated by this court is 11 April 2025.