

JERSEY / JUDGMENT

Cole v States of Jersey Police

[2007] JRC 240 (13 December 2007)

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judgment

the commissioner: 1. Harry Royston Cole, the Plaintiff, brings a claim for breach of confidence or misuse of private information against the Chief Officer of the States of Jersey Police, the Defendant, arising out of the disclosure in November 2001 by the Defendant to Jersey Post of the Plaintiff's record of past convictions. It is accepted by the Defendant that this information was confidential and that it was disclosed. Accordingly, the issue before the Court was whether the Plaintiff consented to that disclosure and, if not, whether its disclosure was justified in any event in the public interest. 2. The Plaintiff's path to this Court has not been an easy one. His original Order of Justice which brought claims under the Data Protection Jersey Law 1987, the Rehabilitation of Offenders Act 1974, The European Convention on Human Rights and in Negligence was struck out by the Master on the grounds that it was frivolous or vexatious and an abuse of process. The decision of the Master was upheld by the Royal Court on 4 th September, 2003, (

[2003] JRC 152). That decision was in turn upheld by the Court of Appeal on 14 th May, 2004, (

[2004] JCA 087) but it gave leave to the Plaintiff to amend his Order of Justice to formulate a claim for breach of confidence or misuse of private information. The Plaintiff reformulated his Order of Justice to include a claim for breach of confidence but still retained the various claims which were not admissible following the decision of the Royal Court and the Court of Appeal. His Order of Justice was again struck out by the Royal Court on 9 th November, 2005 (

[2005] JCA 157), on the ground, in relation to the breach of confidence claim, that it could see no possibility of success. The Plaintiff appealed again to the Court of Appeal which on 9 th November, 2005, (

[2005] JCA 157) allowed the appeal in relation to the claim for breach of confidence. In relation to the issue of damages, it considered the proper basis for such a claim was not for loss of reputation but for injury to feelings. 3. The hearing before this Court took place on 13 th, 14 th, and 15 th November 2007 when judgment was reserved. The Plaintiff, who is now 70 years of age, did not, as urged by the Court of Appeal, seek legal representation. We heard

two witnesses of fact, namely the Plaintiff and Theresa Lamy, who had been the director of Human Resources at Jersey Post at the relevant time. There was also filed with the Court an affidavit of Allyson Edwards, who had been the manager of the Criminal Justice Unit at the States of Jersey Police force at the relevant time but who was not available to give evidence before us. The Plaintiff also subpoenaed Mrs Emma Martins, the Data Protection Commissioner, Mr John Pinel, the Chief Executive Officer of Jersey Post, Mr Graham Power, the Chief Officer of the States of Jersey Police (the Defendant) and Senator Wendy Kinnard, the Minister for Home Affairs. It would be fair to say that the Plaintiff saw these proceedings as an opportunity to address deficiencies he perceived in the current system in relation to spent records and his main purpose in calling these further witnesses was to explore those issues. The Court was not prepared to allow the hearing to turn into a public enquiry and this gave rise to some considerable frustration on the part of the Plaintiff, although he did in due course and with good grace accept that our task was limited to the disclosure in November 2001 of which he complained. To the extent that we fail to make reference to the evidence of these further witnesses, it is only because, through no fault on their part, it was not relevant to the issue before us. The facts 4. Very few of the facts of this case are in contention and can be stated as follows: (i) Every year Jersey Post employs casual labour to cover the busy Christmas period. Because of the number of applications involved it had to have a quick means of processing them and one of the criteria set was that no one with a criminal record would be employed. (ii) Jennifer Callaghan was the member of the Human Resources Department at Jersey Post in charge of the project for 2001 and in accordance with standard practice she liaised with Allyson Edwards of the States of Jersey Police to ensure that all necessary steps were taken to fulfill the requirements of the Data Protection Law and the proper Police procedures for the security checks to be carried out. (iii) Allyson Edwards kept a note of the discussion points raised in her conversation with Jennifer Callaghan held in October 2001, the following parts of which are relevant to this case:- "(i) Applicants must be aware that the Rehabilitation of Offender Act does not apply in Jersey (Act to rehabilitate offenders who have not been re-convicted of any serious offence for periods of years). (ii) Applicant must provide consent for a check to be made with the police". (iv) The advertisement placed by Jersey Post in the Jersey Evening Post, which was headed "Christmas casual staff £6.65 per hour", sought staff to help ease the pressure over the period from 3rd December 2001 to 22nd December 2001 and invited applicants to pick up an application form from the Post Shop in the main Post Office in Broad Street. Accompanying each form was a letter which contained the following sentence " Please note that it is standard practice for all references to be checked and for all applicants to undergo a security check before commencing employment" . (v) The Plaintiff described himself as a registered business consultant and licensing practitioner specialising in the protection, development and marketing of intellectual property on behalf of inventors and business entrepreneurs and a part-time lecturer at Highlands College teaching adults in the subject of business entrepreneurship and intellectual property. In 1992 he published a book on the subject and has been invited to officiate as a judge at a number of UK invention shows/

conventions. However, when money was in short supply he was not too proud to seek any kind of part time or casual work to supplement his income, and he saw this advertisement as a good opportunity to earn extra income and to get him out of his office environment and get more exercise. Although the hourly rate was low, he calculated that with double/triple shifts he could earn £1,800 or more over the short period involved. He collected the application form from the Post Office, completed it and then delivered it to Jersey Post with a covering letter dated 30 th October 2001. In earlier proceedings he stated that he could not remember receiving the letter which accompanied the form but in cross-examination he accepted that it was a possibility that the letter was attached. (vi) In the form there was a question in relation to convictions as follows: "Convictions Have you ever been convicted or found guilty of any offence in a Court of Law (including Honorary Police enquiries, Juvenile Court or Court Martial) or is any case pending?" Mr Cole answered "no" to this question. We will deal below with his explanation as to why he answered this question in this way. The form also contained a declaration in the following terms: " Declaration "I declare that I have answered these questions truthfully and accurately and that I understand the conditions of employment. I understand that the particulars given by me might be checked and that if they are found to be false within my own knowledge I may be regarded as ineligible for recruitment or dismissed after appointment". The form did not address the two matters raised by Allyson Edwards in that it made no reference to the Rehabilitation of Offenders Act not applying in Jersey and did not provide for specific consent for a check to be made with the police. (vii) On 31 st October, 2001, Jennifer Callaghan wrote to the Plaintiff in the following terms: "Thank you for your application for Christmas casual employment. I confirm that you have provisionally been allocated a position with Jersey Post over the Christmas period, subject to satisfactory police checks. I will write to you again during the last two weeks of November 2001, to confirm your duties and your commencement date. If you have any queries or if your plans change in the meantime, please do not hesitate to contact me directly" (viii) In early November 2001 the completed application forms were forwarded by Jennifer Callaghan to Allyson Edwards who on the 5 th November 2001 contacted Jennifer Callaghan expressing her concern that the forms did not provide for the specific consent of the applicant for a police check to be conducted. According to her affidavit she did not raise with Jennifer Callaghan the absence in the application form of a warning in relation to the non- application of the Rehabilitation of Offenders Act in Jersey. Jennifer Callaghan confirmed to her that all applicants were aware that a police check was carried out as a matter of course and had been advised of this in the letter which accompanied the application form a copy of which was sent to Allyson Edwards who was then satisfied that this sufficed by way of consent. The applications were processed and the relevant records of the applicants including that of the Plaintiff disclosed to Jersey Post. (ix) As well as one minor speeding conviction in 1980, the Plaintiff had 3 convictions for the period 1982 to 1984 some 17 to 19 years before the application was submitted. (x) In accordance with the criteria set by Jersey Post, the fact of the existence of this record barred the Plaintiff from employment and accordingly Jennifer Callahan wrote to him on

13 th November 2001 in the following terms: "I regret to inform you that we are withdrawing our provisional offer of employment to you. The recruitment of Christmas casuals is subject to security clearance from the police, and unfortunately we have reviewed your record and under the circumstances we can no longer offer you employment over the Christmas period." The Law 5. The Plaintiff did not cite any authority in support of his claim for breach of confidence relying understandably on the leave given to him by the Court of Appeal to bring such a claim as ample authority in itself. Mr Benest for the Defendant submitted that the tort of "misuse of private information" as developed by the English courts should be applied in Jersey. There is no relevant Jersey authority on the existence of such a claim and it is the case that from the 1970's the English concept of tort has governed Jersey legal thinking (see the Origin and Development of Jersey Law and Outline Guide by Stéphanie Nicolle, Q. C. paragraphs 15.23 and 15.24). He submitted that the Plaintiff's claim in law was based upon the modern form of the known equitable wrong of breach of confidence which Lord Nicholls described in *Campbell -v- MGN*

[2004] 2 WLR 1232 (HL) at p.225 as " misuse of private information ". This tort is the means by which English Law now seeks to give limited protection to a so called "privacy" right in circumstances where the House of Lords has made it clear that English law does not recognise a cause of action for invasion of privacy. It is worth setting out in full the relevant part of the judgment of Lord Nicholls: "Breach of confidence: misuse of private information 11. In this country, unlike the United States of America, there is no over-arching, all-embracing cause of action for "invasion of privacy": see *Wainwright -v- Home Office*

[2003] 3WLR 1137 . But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of appeal of New Zealand in *Hosking -v- Runtig* [2004]NZCA 34 is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998 . 12. The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see *La Forest J in R -v- Dymment*

[1988] 2 SCR 417, 426. 13. The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is

misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances "importing an obligation of confidence" even though no contract of non-disclosure existed: see the classic exposition by Megarry J in *Coco -v- A N Clark (Engineering) Ltd*

[1969] RPC 41, 47 - 48. The confidence referred to in the phrase "breach of confidence" was the confidence arising out of a confidential relationship. 14. This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *Attorney General -v- Guardian Newspapers Ltd (No 2)*

[1990] 1 AC 109 , 281. Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called "confidential". The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information. In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, that is, the wrongful publication by the "Mirror" of private information ." 6. Lord Nicholls goes on to explain how the values enshrined in Articles 8 (right to respect for private and family life) and 10 (freedom of expression) of the Convention for Protection of Human Rights and Fundamental Freedoms ("the Convention") have been absorbed into and now form part of the cause of action for breach of confidence. The more recent English cases have been concerned with balancing the freedom of the press protected by Article 10 of the Convention against the Article 8 rights of a party to maintain confidentiality. In the present case we are not concerned with the freedom of the press. Furthermore, in 2001 when the events with which we are concerned took place, the Convention had not been brought into our domestic law - the Human Rights (Jersey) Law 2000 having come into effect on the 10 th December 2006. 7. However it is clear from the decision of the House of Lords in *Attorney General -v- Guardian Newspapers and Ors (No 2)* [1988] 3 WLR 776 (HL) that the Plaintiff's claim could have been brought under English law prior to the absorption of these Convention rights. In that case it was held that a third

party in possession of information known to be confidential was bound by a duty of confidence unless the duty was extinguished by the information becoming available to the general public, or the duty was outweighed by counter failing public interest requiring disclosure of the information. Lord Goff expanded upon the limiting principles at page 806 as follows: "To this broad general principle, there are three limiting principles to which I wish to refer. The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. I shall be reverting to this limiting principle at a later stage. The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point. The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence. against a countervailing public interest favouring disclosure." 8. Some doubt has been expressed under earlier English Law as to whether information of this kind in the hands of the police can be the subject of a duty of confidence giving rights in private law (see *R v Chief Constable of North Wales Police and Others ex parte AB and Another*

[1997] QB 691 at pages 698 and 701) but Mr Benest submitted that, applying *Campbell-v-MGN*, a duty of confidence would be imposed upon the Defendant in relation to information which was "confidential". 9. There has been no adversarial argument before us but we agree with Mr Benest that the tort of "breach of confidence" or now "misuse of private information" as developed under English law is recognised by and should be applied in Jersey Law. Mr Benest submitted that there are three elements which fall for our determination: (i) The Plaintiff must show that the relevant information was "confidential". (ii) The Plaintiff must show that there has been an unauthorised disclosure. (iii) The Court must consider whether the disclosure was justified in the public interest. We do not accept that the third element applies on the facts of this case but we take them in turn. Confidential 10. As observed by Lord Nicholls in *Campbell* a pre-existing confidential relationship is not necessary because a duty of confidentiality can arise when a party is in a situation where he knows or ought to know that the claimant can reasonably expect his privacy to be protected. The test of confidentiality was explained by Lord Hope in *Campbell* at page 1254 as follows; "92. The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was

private and not public. There must be some interest of a private nature that the claimant wishes to protect: A -v- B Ltd

[2003] QB 195 , 206 para 11 (vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities". 11. Mr Benest accepted that the Plaintiff's past record was confidential or private. Unauthorised disclosure 12. It is not disputed that the Defendant has disclosed the Plaintiff's record to Jersey Post. The issue here is whether the Plaintiff consented to that disclosure. 13. In his evidence the Plaintiff told us that he answered "no" to the question in relation to convictions because he was entitled to do so under the Rehabilitation of Offenders Act 1974 which he thought applied in Jersey and because of what he described as his "human rights". He thought his record was "spent" or had been "expunged". It was clear, certainly from the letter of the 31 st October 2001, that the Post Office would carry out police checks but the Plaintiff was not worried as his record was "spent". We understand that under the provisions of the Rehabilitation of Offenders Act , he would have been entitled to answer this question in the negative, and that is certainly the case under our own Rehabilitation of Offenders (Jersey) Law , which came into force on 21 st December 2002. Indeed that is one of the main purposes of this legislation. 14. We find that the Plaintiff did answer this question in the negative in the honest belief that his record was "spent" and for that reason he was not concerned with police checks being carried out. We also find that he knew that such checks were to be carried out to which he raised no objection because of his belief that his record was spent. 15. In signing and submitting the application form in the knowledge that the Post Office would be carrying out police checks and not then or subsequently objecting to those checks, did the Plaintiff's conduct constitute consent to the Defendant disclosing his record of past convictions to the Post Office? 16. Mr Benest submitted and we agree that the issue of consent is a matter of fact to be decided on the evidence before us. He argued that the combined effect of the accompanying letter and the Plaintiff's declaration on the form strongly suggest that he did consent. Furthermore the offer of employment was explicitly made subject to "satisfactory police checks". The reality is that the Plaintiff, who should be presumed to know the law, did consent but wrongly believed the result of the check would be negative because his convictions were spent. His misunderstanding as to the law did not affect the quality of that consent. 17. Mr Benest accepted that where we place the evidential bar will depend upon the sensitivity of the information being disclosed and the extent and purpose of that disclosure In relation to the sensitivity of the information disclosed in this case it seems to us manifest that a past conviction is sensitive. This view is consistent with that expressed by the European Parliament and Council as set out in directive 95/46/EC on the protection of individuals with regard to the processing of personal data and of the free movement of such data issued in 1995 which makes reference to the processing of data which is capable by its

nature of infringing privacy being subject to explicit consent (preamble 33 and Articles 7 and 8). That directive has been given effect in this jurisdiction through the Data Protection (Jersey) Law 2005 which categorises a data subject's record as "sensitive personal data" (Article 2) the processing of which requires the data subject's "explicit consent" (First Principle: condition 1). As a matter of ordinary English "explicit" means clear and detailed with no room for confusion or doubt (see The Concise Oxford English Dictionary, Third Edition). We accept that the extent of the disclosure was limited to Jersey Post but its purpose was of importance as it related to the Plaintiff's potential employment. 18. We regard it as significant that one of the requirements of the Defendant in relation to the form was the need to warn the applicant that the Rehabilitation of Offenders Act did not apply in Jersey, which warning, contrary to this requirement, was not contained in the form prepared by Jersey Post. Allyson Edwards was not available for examination but it is reasonable for us to assume that it was felt important to include this warning because there had previously been confusion as to whether or not the Act applied. That there should be confusion within the potential work force is easily understandable bearing in mind the close connection between the two jurisdictions. 19. We note that shortly after this episode, and probably as a result of it, the application form used by Jersey Post was amended so that the relevant parts read as follows: "Convictions Have you ever been convicted or found guilty of an offence in a Court of Law (including Honorary Police Enquiries, Juvenile Court or Court Martial) or is a case pending? Please note that the UK Rehabilitation of Offenders Act does not apply in Jersey. All the convictions over ten years must be declared. All details will be checked via the Police Declaration I declare that I have answered these questions truthfully and accurately and I understand the conditions for employment. I give my consent to undergo a police security check and understand that if any particulars given in this form are found to be false I may be regarded as ineligible for recruitment or dismissed after appointment". The form thus amended leaves little room for confusion or doubt. 20. We are concerned here with the position of the Defendant and whether the Defendant had the consent of the Plaintiff to disclose his record to Jersey Post. In our view the disclosure of the Plaintiff's record, taking account of its sensitivity and the purpose of its disclosure, required his explicit consent by which we mean a clear consent with no room for confusion. By making the inclusion of a warning as to the inapplicability of the Rehabilitation of Offenders Act a requirement for the form, the Defendant acknowledged that there could be confusion without it. Even if the Plaintiff's conduct constituted consent, which in our view it does not, it was not a clear consent with no room for confusion. There was room for confusion. He was confused. He thought the Act applied. 21. We doubt whether the public policy doctrine that ignorance of the law is no excuse, upon which the presumption that a person is presumed to know the law is based, can have any application to the facts of this case. The rationale behind the policy is that, if ignorance of the law were an excuse, persons could avoid criminal or civil liability. But if it does apply and the Plaintiff is presumed to have known that the Act did not apply in Jersey, then does his conduct, in the light of that presumed knowledge, constitute his explicit consent to the Defendant to disclose his record to Jersey Post? 22. In

her affidavit Allyson Edwards states that she regarded Jersey Post as having discharged its responsibilities in relation to obtaining the consent of the applicants by ensuring that applicants were aware of and had the opportunity to object to a police security check being carried out which in our view falls well short of her initial advice that "that each applicant must provide consent for a check to be made with the police" (our emphasis). It also falls well short of the giving of the explicit consent which we have found the Defendant needed before the Defendant was authorised to make disclosure. Knowing that Jersey Post will be carrying out police checks or not objecting to such checks may imply consent on the part of the Plaintiff but it is not a clear consent. Allyson Edwards was in error in accepting the explanations given by Jennifer Callaghan; consistent with her earlier advice she should have insisted that the applicants "provide consent" in the same explicit way as is provided for in the revised form. 23. In our view, in the circumstances of this case and on the evidence we have heard, we find that the Plaintiff did not consent to the disclosure of his record. Public Interest 24. Even if the Plaintiff did not consent to the disclosure of his record, Mr Benest argued that disclosure was justified in the public interest. In our view public interest has no part to play in the process that had been agreed between the Defendant and Jersey Post. That process involved the Defendant acting essentially as a conduit for the provision to Jersey Post of the criminal records of prospective employees who consented to those records being disclosed. The whole operation was premised upon consent and indeed Alison Edwards made it clear in her Affidavit that "had Mr Cole objected to the police check being carried out I would have expected Jersey Post to have made me aware of any such objections. Under those circumstances I would not have been prepared to proceed to disclose details of Mr Cole's previous record." There is no reference here to the possibility of the police disclosing the Plaintiff's record in any event on grounds of public interest. 25. It is clear from the evidence that at no stage did anyone on behalf of the Defendant give consideration to the individual records processed on behalf of Jersey Post so as to assess whether, irrespective of consent, they should be disclosed. There is no evidence that anyone on behalf of the Defendant ever considered the record of the Plaintiff and whether, irrespective of consent, it should be disclosed. It seems to us that if public policy has a role to play then it would have to be applied as a blanket policy to the whole of the process agreed between the Defendant and Jersey Post justifying the disclosure of all of the records of the applicants. This would belie the essentially consensual nature of the agreed process and would run counter to the objections expressed in *R v Chief Constable ex parte AB* where Lord Bingham said at page 699:- "It would plainly be objectionable if a police force were to adopt a blanket policy of disseminating information about previous offenders regardless of the facts of the individual case or the nature of the previous offending or the risk of further offending." 26. In the premises it is clear that there was no assessment of the Plaintiff's individual record in this case and that a blanket policy of disclosing records of applicants would be objectionable. We conclude that public interest had no part to play in the disclosure of the Plaintiff's record. 27. If we are wrong in reaching this conclusion then we have gone on to consider whether in our view, in the individual case of the

Plaintiff, the disclosure of his record was justified in the public interest. 28. Mr Benest referred us to the passage of the judgment of Lord Goff in *AG v Guardian Newspapers* and Ors referred to in paragraph 7 above. He submitted that disclosure was in any event justifiable in the public interest which required Jersey Post to have knowledge of a prospective employee's convictions given the nature of the employment. Such disclosure, he submitted, was necessary and proportionate as a means of protecting the public interest given the responsible nature of the employment. 29. Despite strenuous protests from the Plaintiff, the Court admitted the Plaintiff's record into evidence and gave leave to Mr Benest to cross examine the Plaintiff on it, as it was relevant to the Defendant's defence that disclosure was justified in any event in the public interest and indeed for the purpose of considering that submission we make reference to the Plaintiff's record below. To have done otherwise would have been unjust in that it would have effectively denied the Defendant the ability to pursue a perfectly proper defence and it is clear that the Court has the power to do so under Article 8(3) of the Rehabilitation of Offenders (Jersey) Law 2001, notwithstanding the Plaintiff's record now being spent under the general provisions of that law. The possibility of the Plaintiff's record coming under open scrutiny in this way was an inevitable risk of the proceedings he instituted. 30. We heard evidence from Mr Pinel as to the role of post office employees and the concern of Jersey Post in relation to potential risk to the public. He referred by way of example to two particular concerns:- (a) If an applicant had drug related convictions because Jersey Post was an ideal conduit for drugs. (b) If a person had a record of violence or dishonesty as that would be relevant to the unique access employees of Jersey Post have to properties and indeed to persons. He accepted it was a question of balance and each case had to be judged on its merits. 31. In *R v Chief Constable ex parte AB* it was held that:- "As a general rule of good public administration, the police should not disclose information acquired in the course of performing their public duties, in relation to a member of the public, which was not generally available and was potentially damaging to that person if disclosed. However where the police considered in the exercise of a careful and bone fide judgment that it was desirable or necessary in the public interest to make disclosure for the purpose of preventing crime or alerting members of the public to an apprehended danger, they were entitled to make such limited disclosure as was judged necessary to achieve that purpose." Adopting the same approach, it is clear that the disclosure of the Plaintiff's record in the context of his application for employment and in the light of the criteria set by Jersey Post, would be damaging to the Plaintiff as indeed it was. Was it necessary or desirable in the public interest? In our view it was not for the following reasons:- (i) Apart from the speeding offence in 1980 for which he was fined £37 there were three convictions. Any explanations by the Plaintiff would not of course have been available to the police had they considered his individual record but discounting the Plaintiff's explanations it is clear from the sentences imposed that they were at the lower end of the scale in terms of seriousness. (ii) The offences were committed 17-19 years before the application to Jersey Post. That is a very substantial period of time by any account, very considerably in excess of the periods laid down for spent convictions of this kind in both the Rehabilitation of

Offenders Act and the Rehabilitation of Offender (Jersey) Law 2001 . (iii) The disclosure was in relation to an application for casual work covering a three week period at most. (iv) Whilst it is the case that in the Home Office circular 45/1986(2) (to which the Court of Appeal in this case made reference at paragraph 11 of its judgment of the 9 th November, 2005), casual post office work was one of the exceptions to the general principle that police information should not be disclosed, under our own Rehabilitation of Offenders (Exceptions)(Jersey) Regulations 2002 , post office employees whether casual or permanent are not within the classes of employment exempt from the provisions of the main law. In other words if the Plaintiff had applied to Jersey Post for casual work after the law came into force (1 st December 2002) his convictions would have been spent and would not therefore have been disclosable to Jersey Post. These regulations were approved by the States of Jersey shortly after the events with which we are concerned in this case and constitute a surer guide to the issue of whether disclosure of criminal records of potential employees to Jersey Post was in the public interest in Jersey at the material time. Damages 32. The Plaintiff has thus succeeded before us in establishing liability on the part of the Defendant so we now turn to the issue of damages. The Plaintiff claims that he has suffered damage to his feelings and loss of potential earnings. 33. In relation to potential earnings the Plaintiff claimed £75,000-£100,000 but was unable to explain how he arrived at these figures and produced no evidence in support of them. He claimed that representing himself in this case over the last 4-5 years had substantially delayed the launch of his new website "www.ideasprotected.com" aimed at inventors, innovators, designers, engineers and business entrepreneurs and which had been launched some 17 days before the hearing. He invited the Court to view the website and assess its potential. We declined to do so as this would have to be the subject of expert evidence. As it is, the potential of this website and the earnings he might have achieved, but for the time he has had to devote to this action, is a matter of pure conjecture and not something which can form the basis of any award against the Defendant. 34. In order to assist the Plaintiff, the Court enquired as to whether he could adduce evidence of his earnings in the years prior to 2001, which by comparison to his earnings in the subsequent years may give an indication of the earnings he had lost as a result of his involvement in this case. Mr Benest submitted that if the claim for loss of potential earnings was to be maintained then the Defendant was entitled to have it properly formulated and to have disclosure of the evidence in support. The Court was willing to give the Plaintiff time to consider his position and would have been amenable to a delay in order for those documents to be produced, but the Plaintiff was clearly unwilling to produce any documentation in support of this part of his claim and he formally withdrew it. 35. Damages for and injury to feelings awarded by the English Courts, have been modest. A useful summary of the authorities cited to us by Mr Benest is set out in McGregor on Damages 3 rd supplement to the 17 th Edition (up to date to the beginning of August 2006):- "Damages for non-pecuniary loss by way of injured feelings resulting from breach of personal or individual confidence, rather than a breach of commercial confidence, have started to appear in recent years. The cases tend to involve breaches by

the media, perpetrated against those who are currently referred to as personalities. Thus in *Campbell v MGN Limited*

- [2002] EMLR 30 , p.617 the claimant was a well-known fashion model who recovered £2,500 for injured feelings from the publication of unattractive details of her life together with aggravated damages of £1,000; the Court of Appeal reversed on liability and the House of Lords in turn reversed the Court of Appeal stating unanimously that the judge's order be restored. In *Douglas v Hello! Ltd* the claimants who were film stars about to get married and have a very grand wedding were held entitled to damages for distress at the publication of unauthorised photographs but not to aggravated damages: *Douglas v Hello! Ltd* (No.3)
- [2003] 3 All E R 996 at para 275; the damages were assessed at £3,750 each: *Douglas v Hello! Ltd* (No.6)
- [2004] EMLR 2 , p.13 at paras 56 and 57 (not challenged in the CA: see *Douglas v Hello! Ltd* (No.3
- [2006] QB 125 , CA at para 110). None of the hearings in the Court of Appeal in this extended litigation, now running to eight reported hearings in all, concerned damages other than the last (and then in respect of damages other than the distress damages; see *Douglas v Hello! Ltd* (No.3)
- [2006] QB 125 , CA at paras 6-039, n.40a, and 40-025, n.45, above). The earlier case of *Cornelius v de Taranto*
- [2001] EMLR 12 , p.329 did not involve a personality claimant but a teacher who was awarded £3,000 in damages for injured feelings, again for an unauthorised publication and again not appealed on this issue; and *Archer v Williams*
- [2003] EMLR 38 , p.869 did not involve a media defendant but the claimant's secretary and personal assistant against whom there was awarded for her revelations to the press £2,500." Apart from the case of *Cornelius v de Taranto*
- [2001] EMLR 12 to which we refer below, the cases summarised all involved wide publication of private information and none of them attracted damages of more than £5,000. 36. The Plaintiff sought damages for injury to his feelings of £75,000 which he accepted was difficult to quantify. He produced a number of news reports from a BBC website of awards for injury to hurt feelings made in the UK for race and sex discrimination. Mr Benest pointed out that these were grossly distinguishable as they were made under a particular statutory regime and that in any event they did not constitute authority. We agree that we cannot have regard to them and that the only authorities we have before us are those cited by Mr Benest. 37. The Plaintiff spoke eloquently of how he and his wife had suffered from a number of innuendos in what is a small island. He said he had been humiliated with the indignity of having the fact of his past convictions bandied around the Island. He has stood for politics on many occasions and on one occasion (after 2001) whilst standing for Senator a member of the public shouted out aloud "Hi Harry - they let you out!" His

mother became aware of his convictions through the publicity given to the case and he had the embarrassment of having to explain the position to her. 38. The difficulty for the Plaintiff is that the hurt feelings to which he gave eloquent testimony related to the period following the publication of his conviction in the press reports of the proceedings he had issued against the Defendant and others. Theresa Lamy in her evidence informed us that the Human Resources Department at Jersey Post in 2001 consisted of two or three persons and it was only Jennifer Callaghan who would have seen his record. If no complaint had been made then in accordance with the procedures agreed with the Defendant, the Plaintiff's application and his record would have been bundled up, locked away and then shredded. She pointed out that people working within the Human Resources Departments were used to dealing with confidential information and each of them had to sign a confidentiality agreement. The evidence of Mrs Lamy was not challenged and we find that the unauthorised disclosure of the Defendant had indeed been made to one person in a Human Resources Department of three at the most, all of whom were bound by obligations of confidentiality. There was no evidence that any of them knew the Plaintiff and he did not assert that they did. 39. It was the Plaintiff who brought the existence of his past convictions to a wider audience firstly by lodging complaints with the Data Protection Registrar, the Chief of Police and the Post Office and then by issuing proceedings. We were shown a copy of the Jersey Evening Post report of 25 th May 2002 which makes reference to his criminal convictions and to the Jersey Evening Post report of 12 th November 2007 which the Plaintiff accepted in cross-examination had been published at his instigation. 40. Mr Benest pointed out that the Plaintiff's first letter to Jersey Post dated 28 th November 2001 disclosed little evidence of someone whose feelings had been injured, constituting as it does a threat before action: "It would appear therefore, that your decision not to engage my services, which is clearly based on a "spent" criminal record is discriminatory, and a violation of my Human Rights. I will accordingly, therefore, unless you reconsider your draconian policy or offer me the chance of employment or compensation in lieu, I shall file an application to the Court of Human Rights seeking such compensation". 41. Mr Benest contrasted this letter with that written by Mrs Cornelius in the case of *Cornelius -v- de Taranto*

[2001] EMLR 12 protesting at her psychiatrist sending a copy of his report on her (which contained damaging and incriminating comments about her) to her own GP and to her solicitor. Without setting out the terms of that letter here it is clear that Mrs Cornelius was furious (in the words of Mantell LJ) at the fact of the publication of this very private information to her own solicitor and GP. She was awarded £3,000. However for obvious reasons no litigant can claim damages for hurt feelings suffered as a result of the publicity caused by his own proceedings. We accept the evidence of the Plaintiff as to the humiliation he has felt as a result of the existence of his past convictions being made known publicly in a small island, but that knowledge has come about entirely as a result of his decision to bring proceedings. In our view there was little evidence of his feelings being hurt by the initial disclosure to the Post Office. The evidence shows that his concern

then was the earnings he had lost as a result of his failing to secure casual work at the Post Office, for which he was demanding compensation. 42. In his skeleton argument, Mr Benest submitted that an award of £500-£1,000 would be more than adequate to compensate the Plaintiff for any hurt feelings he has suffered, but in closing he submitted that even these figures were too high. 43. We award the Plaintiff £750 damages for hurt feelings. Authorities Data Protection (Jersey) Law 1987. The Rehabilitation of Offenders Act 1974. Cole -v- Postal and Police

[2003] JRC 152 . Cole -v- Postal and Police

[2004] JCA 087 . Cole -v- Police

[2005] JCA 157 . Origin and Development of Jersey Law and Outline Guide. Campbell -v- MGN

[2004] 2 WLR 1232 (HL) at p.225. Human Rights (Jersey) Law 2000. Attorney General -v- Guardian Newspapers and Ors (No 2) [1988] 3 WLR 776 (HL). Cornelius -v- de Taranto

[2001] EMLR 12 . McGregor on Damages 17 th Edition. Douglas v Hello! Ltd (No.3)

[2003] 3 All E R 996 . Douglas v Hello! Ltd (No.6)

[2004] EMLR 2 . Archer v Williams

[2003] EMLR 38 . Page Last Updated: 20 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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