Publication of any report as to the subject matter of these proceedings or the identity of the Claimants is limited to what is contained in this judgment

Case No: HQ10X02718

Neutral Citation Number: [2010] EWHC 3308 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SITTING IN PRIVATE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2010

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

(1) CDE
(2) FGH **Claimants**

- and -

(1) MGN Ltd
(2) LMN **Defendants**

- -
- -

Desmond Browne QC (instructed by **David Price Solicitors & Advocates**) for the **Claimants**
James Price QC for the **Defendants**

Hearing dates: 28 - 29 July 2010

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Judgment

Publication of any report as to the subject matter of these proceedings or the identity of the Claimants is limited to what is contained in this judgment

Mr Justice Eady :

1. On 28 and 29 July 2010 I heard an application on the Claimants' behalf to continue an interim injunction originally granted on 16 July. Further submissions in writing were received in August, September and October from both sides. Then in November there was yet further evidence submitted and even a request for another oral hearing. Eventually, by the first week in December the parties decided that this was unnecessary but that I should receive more written submissions (on the maintenance of anonymity). The last were received on 13 December. This accounts for the considerable delay in delivering the judgment. It has led to regrettable additional anxiety and stress for those immediately concerned.

2. The claim is based upon apprehended infringements of rights of confidence and/or privacy under Article 8 of the European Convention on Human Rights and Fundamental Freedoms. This is a jurisdiction in which the decisions to be made are rarely straightforward. By contrast with the suggestion made by Lord Woolf CJ in the Court of Appeal in *A v B Plc* [2003] QB 195, it has proved, following the House of Lords' decisions in *Campbell v MGN Ltd* [2004] 2 AC 457 and in *Re S (A Child)* [2005] 1 AC 593, that the answer in most cases is far from obvious. Nevertheless, Parliament has clearly imposed upon judges, through s.12(3) of the Human Rights Act 1998, the burden of determining at this preliminary stage, almost always on incomplete or partial evidence, whether an injunction is likely to be granted at trial. Guidance has been given by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, but that does not make it any easier. There are no hard and fast rules. It is a question of weighing up competing Convention rights and forming a judgment on the unique facts of each case.

3. As is so often required in these cases, I shall need to tread a careful path, so as to make my reasons comprehensible to any interested reader while, at the same time, trying not to include material that would be unnecessarily intrusive or embarrassing to the parties.

4. The First Claimant often appears on television and is married to the Second Claimant. They have always guarded their private lives closely and have never sought publicity. They have teenage children whose interests they are also concerned to safeguard. The application is intended to protect them all, so far as possible, against the inevitable intrusion a newspaper publication would make into their private and family lives.

5. The Second Defendant is a single mother in receipt of disability benefit. It seems from the evidence that she had suffered from time to time with mental health problems. She has only ever met the First Claimant face to face on two occasions, in April 2009, when he made brief visits to her home. She nevertheless conducted a kind of quasi-relationship with him "on and off" between about March 2009 and February 2010 by means of telephone, texts, emails and tweets. Intimate and personal thoughts were exchanged and there was also a good deal of flirtation and sexual innuendo. She now wishes to sell her story to the *Sunday Mirror*, although it is said

that she is not motivated by money. A "confidential agreement" has already been entered into with the paper. The publisher of the newspaper has been joined to these proceedings as the First Defendant.

6. Any such publication is likely to prove distressing to the Claimants, and almost certainly to their children also, and the proceedings are brought in an attempt to avoid that. Although there can be little doubt that the coverage contemplated would be intrusive upon the Claimants' family life and bring bewilderment and distress to their children, it is correspondingly true also of the Second Defendant's family. She too has a young daughter (and another who is now an adult). I have no doubt that these are all persons whose Article 8 rights are currently engaged: see now *Donald v Ntuli* [2010] EWCA Civ 1276 at [24]. It is also the case that the Defendants' Article 10 rights are in issue and have to be weighed alongside.

7. There is evidence before me as to the likely impact upon the Second Claimant's health and as to parental concerns about the impact upon the children in the school environment. As I understand the attitude of the newspaper, it is simply that a married man cannot be accorded greater rights or consideration by the court than a single man and, in so far as there may be any impact on his family, that is too bad. Yet it is now well established that the first question a court has to address on applications of this kind is whether Article 8 rights are engaged. As to that, the threatened publication would undoubtedly engage the Article 8 rights of all the persons I have identified. The fact that the First Claimant has a wife and children simply means that there are more persons whose rights have to be taken into account. They cannot simply be ignored on the basis of traditional arguments along the lines of who has a cause of action and who does not. Since they would at least potentially be affected by the exercise of the Defendants' Article 10 rights, their Article 8 rights have to be weighed in the balance.

8. There can be little doubt of the likely impact of publication on the First Claimant's life. It was articulated by the Second Defendant herself who told a *Sunday Mirror* journalist, in their initial conversation on 6 July, "I just don't want it to wreck his life, because he doesn't deserve it … we all make mistakes, don't we, and I don't think we should crucify him for it". It was hardly an exaggeration on her part to suggest that the lives of the Claimants and their family would be "wrecked" – at least for a significant time. Their counsel, Mr Desmond Browne QC, has laid emphasis on the protection afforded by Article 8, specifically, to family life and on the plea contained in the Second Claimant's evidence to be given the opportunity to rebuild their marriage in private. She herself has apparently lost a stone in weight.

9. The attitude of the Second Defendant was fairly consistent for several days at the beginning of July, in that she too regarded all this material as private and she herself then had no wish to see it exposed in the media. She first had an inkling of press interest when she was apparently door-stepped at the end of June by a female journalist representing the *News of the World*. She spoke of a "tip" that the Second Defendant and the First Claimant had had an affair and that he had left his wife. This was clearly inaccurate in that no "affair" in the conventional sense of that term had taken place. In so far as there was any such relationship, it could only be characterised as "virtual". Moreover, the First Claimant had only "left" the Second Claimant, for a few days in April 2009, in what has been described (by the Second

Defendant) as a marital "blip". It was so fleeting a separation that their children were not even aware of it.

10. The *News of the World* journalist had gone on to use what Mr Browne called "the standard journalistic ploy" to secure co-operation from an unwilling source. In the Second Defendant's words, "She told me that the story was going to get out, and so I should give my side of it – so that I would have some kind of control over it". She was naturally anxious about it and spoke to the First Claimant. He was also concerned and feared that "his life was going to collapse". That conversation took place on the morning of 30 June, after he rang in response to a text message from her of the night before.

11. It seems, however, from the evidence of the Second Defendant's [public relations adviser, Mr X], that she had already seen him by this time. He claims that they first met on 29 June and there is no reason to doubt it. She says that she made contact with him on the recommendation and introduction of a Facebook "friend" (a journalist who wishes to remain anonymous). She told Mr X at the first meeting that she wanted the story stopped if possible. That seems to have been her purpose in consulting him. He gave some degree of encouragement to her on 2 July, stating that he thought that it would not get out. Unfortunately, rumours had already begun to appear on various websites. How this story leaked out is not known, but there is clearly a limited range of possible sources.

12. The Second Defendant texted the First Claimant that evening: "Bloody papers. My worst nightmare". She was still concerned about the story appearing in the media because of the impact on herself and her family; in particular, because she did not want to be portrayed as a person who had supposedly had an affair.

13. The next day, 2 July, as she informed the First Claimant, she felt that she was "being pushed from all angles by everyone". She feared that she would be made to look like a "marriage wrecker". She again used the phrase "worst nightmare". Sadly, when she had been in a clinic in 2003 receiving treatment for mental health problems, she had been assaulted and abused by a male nurse – who has subsequently been convicted of a criminal offence. She received a large sum by way of compensation. He took advantage of her, it seems, while she was under the influence of prescribed drugs which he administered to her. She had then been suffering from anorexia and she was concerned that a photograph of her taken at that time, which showed her in an emaciated condition, might be resurrected and published in a newspaper. She had even been told by the *News of the World* journalist that *she* had such a photograph in her possession. She was especially afraid about media coverage because her assailant might read all about it and recognise her. The evidence suggests that the Second Defendant is, at least in some respects, still a fragile and vulnerable person and that she has found this experience extremely distressing.

14. During the afternoon of 2 July, she spoke to Mr David Price, the solicitor advocate who was giving advice to the First Claimant at that time. She told him that she had been to Mr X to try to stop the story coming out. She said that she just wanted to be left alone by everybody and not to be mentioned in the press. She reassured Mr Price about her own intentions, when she said that she that she would not "do" a story and added: "It goes against my morals. The only time I would ever talk about anything is if I was ripped to pieces and slagged off". She also told him that she had been

"friends" with the First Claimant and that she was "furthest from the kiss and tell type". It thus seemed to Mr Price at that time, not unreasonably, that there was a community of interest between her and his client. They both wished to avoid exposure in the press.

15. Her attitude at that time appeared to be that the whole relationship had been private. In her words, "It's all private. Me knowing [the First Claimant] is private. What happened between us is private. It's all private, but so is my illness". She told Mr Price, "I just want to be left alone as much as he does". She had no criticism to make of the First Claimant, saying that "[he] hasn't done anything really: neither of us have".

16. Three days later, on Monday 5 July, the Second Defendant requested Mr Price's telephone number in a text message to the First Claimant and spoke to him, for the second time, at 16.45 that day. Meanwhile, at 16.32, she had texted the First Claimant and reported that:

> "X insisted that I told him everything or he couldn't help me. I don't think I've had good advice and I've screwed myself."

17. By the time she spoke to David Price, she was describing herself as "completely stressed out". She asked at that stage, clearly still seeing no reason to distrust *him*, how trustworthy X was. He replied, "If you don't want a story to go in, the solution is not to meet X". She made clear that she had not signed any deal with him and was not intending to publish her story. This was not what she wanted. She recognised that newspaper coverage would not be helpful to the Claimants' marriage and that, equally, she did not want to be "out in the nation as some 'bit' of stuff of [the First Claimant's]". She would be "ridiculed as a tart".

18. The same evening, the Second Defendant texted the First Claimant and recognised that she had "screwed up". She added, "Fell foul of a very nice journo and an expert agent". She added:

> "I completely panicked. Oh hell. Damn i said ages ago i didn't want any of this! My worst nightmare. Say something arrr! Help with this can you!
>
> My God if i'd wanted to do a kiss and tell don't you think i'd have wanted money for it?! I just know this is coming out. It'll ruin my life. My youngest will get teased at school. I'll be ridiculed as a tart. Shit shit shit. Hate you right now!"

The reference to her own daughter serves as a reminder, if any were needed, that the Article 8 rights of her own family are very much in point. A few minutes later, she texted again:

> "I know she spun me a line and played me good and proper. What am i to do?"

19. The following day, on Tuesday 6 July, there was a meeting at Mr X's offices at 3.30 p.m., at which the Second Defendant was interviewed by a journalist from the *Sunday*

Mirror called [Ms K], who described herself in evidence as having a "distinguished" reputation. Mr James Price QC, appearing for the Defendants, said that her interview was impeccably and professionally carried out. Whether that is so or not, it is necessary for me to consider the content of it and how it impacted on the Second Defendant and her perception of her own best interests.

20. I have seen what appears to be a full transcript of this interview, at which Mr X's assistant [Ms D] was also present. The Second Defendant's attitude appears to have undergone a significant change at some point thereafter. In particular, she became suspicious of Mr David Price. Why this happened is not entirely clear, but it may have been partly because of the denigration of him by Ms K. She had described him at the interview, for example, as a "slippery lawyer". She had also asked the Second Defendant if he had offered her money to keep quiet, which she firmly denied.

21. Ms K was clearly determined to undermine David Price because, two days later, in a text timed at 22.31 on 8 July, she told her:

> " … remember your name will go round in a memo from [David] Price who is being paid to protect [the First Claimant], not you. Sleep on it and see what you think in the morning".

She was trying to suggest, for no good reason that I can imagine, that David Price would be circulating her name around the media in any event. This was plainly calculated to alarm her. The Second Defendant, being rather naïve and having no reason to disbelieve what she had been told by the journalist, begged Mr Price, "Please don't send a memo round with my name in it". She added that Ms K made this prediction about Mr Price "in response to my telling her i'm not doing a story". In other words, according to the Second Defendant, Ms K was seeking to overcome her reluctance to sell her story by further attacking David Price and by telling her, falsely, that he would send a memo round with her name in it whether or not she co-operated.

22. Ms K also grumbled to the Second Defendant, when she refused to sign a statement, that she had wasted her (Ms K's) week. It is important to have in mind the potential impact of these various statements upon the Second Defendant's vulnerable personality.

23. It is necessary to return to the initial interview conducted on 6 July. Mr Browne points out that it contained a certain amount of "buttering up" of the Second Defendant. She was told how attractive she was (and, in effect, more attractive than the First Claimant deserved). She was also asked whether she had appeared on television doing modelling. When she said that she was embarrassed about being asked whether she had "had sex" with the First Claimant, Ms K replied "The things I've seen in this office" and Ms D added "We've had some laughs". All this was no doubt intended to put her at ease and persuade her to "spill the beans". In point of fact, however, it is common ground that they had not "had sex".

24. Further encouragement was offered by comments such as :

> Ms D: Don't worry. We have seen naughty videos of all kinds, haven't we, [K]?

> Ms K: We have. You wouldn't believe what we've seen.

When the Second Defendant produced an envelope containing email and other exchanges with the First Claimant, as Mr X had asked her to, she showed some embarrassment at what she described hesitantly as "a lot of horrible … erm" (i.e. a reference to the intimate nature of the exchanges). This was greeted by Ms D (acting on Mr X's behalf) with the request: "Let's have a look. It's OK, we're all girls. We're all ladies". This would all need to be taken into account in assessing Mr James Price's submission, in so far as it matters, that the interview was conducted "professionally".

25. It is fairly obvious that the Second Defendant was still showing reluctance for her private life to be exposed to the media. If driven to it, however, she wanted it to be expressly included in any such story that she felt that her hand had been "forced by the media". Ms K reacted unfavourably to this suggestion by saying, " … That makes it sound like we have held a gun to your head". She did not want anyone to have that impression and therefore came up with an alternative scenario, in the hope that it might fit in with the Second Defendant's intentions (while harking back to the *News of the World* journalist's "standard ploy"):

> "We can say you were worried it would all come out … When internet rumours started spreading, or something like that, she felt she had no other choice but to come forward. It makes it sound like 'I didn't want to do this, but it's the lesser of two evils'."

Ms K there seems to be recognising the Second Defendant's reluctance to be publicly exposed, but is putting forward ways of overcoming that and achieving her co-operation in a *Sunday Mirror* story. It is difficult to see it as a genuine reason, however, since nothing had so far come into the public domain to put the Second Defendant in a bad light; for example, as she had put it herself, by "ripping [her] to pieces", "slagging [her] off" or portraying her as a "marriage wrecker". Nor was there any evidence to indicate that it was about to happen. There is no reason to suppose, therefore, that any of Ms K's suggestions were truly intended to further the Second Defendant's best interests. She was concerned rather with "getting round" recent developments in the law, so as to publish a salacious story about a minor celebrity. That emerges clearly from what she said. There was no pretence about it.

26. One begins to see, therefore, in the course of the interview the genesis of some of the "public interest" arguments that were introduced before me in seeking to override the Claimants' (and incidentally the Second Defendant's) rights under Article 8. Ms K gave her understanding of the law and indicated that it would be necessary to come up with a public interest argument in order to overcome the protection nowadays afforded to personal and family privacy against media intrusion – especially, she made clear, in the case of someone like the First Claimant, who had always been a private person.

27. Ms K was clearly inclined to take a creative approach. She suggested that a "way you could get round it" was by showing inconsistency with the First Claimant's image as "the perfect family guy". She almost immediately recognised that this would be a

problem, however, for the very reason that he had never promoted such an image. She recognised that, "If you keep yourself quite private, you have got to say there is a good public interest to print the story".

28. Ms K therefore came up with a new idea – what she referred to as "the BBC side of things". She said:

> " … I am speaking from the top of my head. I would have to put everything to our lawyers and editors, but perhaps the fact that [the] BBC got involved is quite interesting because, as taxpayers, we pay … we fund the BBC essentially. So, if they are trying to cover up his private life, is that a good payment of taxpayers' money? Could we get around it that way? But I am just thinking on my feet here … sort of thing."

29. This appeared to originate in an account the Second Defendant had given Ms K of a brief telephone conversation between her and a member of a BBC production team, who was supposed to have suggested or implied that she might be offered protection by the BBC. I shall have to return to this subject later, since I now have evidence both from the Second Defendant herself and from the member of the production team who had been identified. It is interesting, however, that as late as 8 July the Second Defendant gave David Price an account of her discussion on this topic with Ms K and said that the BBC incident had been exaggerated; "nothing had actually happened". But Ms K had told her it was important "because it would look good in front of the judge". I shall need to come to a conclusion, in the light of those differing accounts, as to whether or not the Second Defendant's later account is "likely" to be accepted at trial (for the purposes of s.12(3) of the Human Rights Act 1998). If not, "the BBC side of things" would lack any factual foundation.

30. One can see also in the transcript the first faltering steps of what became the principal public interest argument when the application came before the court, namely that a powerful "celebrity" was supposed to have exploited a vulnerable "victim". Again, it originated with Ms K: "Do you think he kind of preyed on the vulnerable side of you?". This was immediately, however, dismissed by the Second Defendant: "No, I don't think he preyed".

31. It was Ms K also who raised the possible incentive of the Second Defendant receiving money for her story and said that Mr X would deal with her editor. She already had at that stage a letter to hand to her in these terms:

> "The Sunday Mirror agrees that it will not publish the interview conducted on 06-07-2010 until a reasonable negotiated settlement is reached between us regarding publication of the said interview."

32. The Second Defendant herself appeared to be tempted, at least, and enquired: "Privacy laws aside, is this sellable? Is this the sort of stuff they like because of who he is?"

33. Not surprisingly, the Second Defendant, in a further conversation with David Price at 10.30 the following morning, said that she was "in a living nightmare" and "scared".

She told him, "I'm being pushed and pushed and pushed". She understood exactly what was happening. By now, she seemed to be going in quite the opposite direction from that which she had intended when she first sought help from Mr X. She wanted his advice on keeping her private affairs out of the newspapers, but it seemed that he was in touch with the *Sunday Mirror* editor and that a "confidentiality agreement" had already been drafted giving exclusive rights to that newspaper subject only to "a reasonable negotiated settlement" (i.e. presumably as to an agreeable sum of money).

34. It was in the newspaper's interest to publish a story of some kind. It was also in Mr X's interest because that is how he would be paid. It seems, however, that the Second Defendant still remained to be persuaded that it was in *her* best interests. The only advantage to her would be financial, and yet she had said (no doubt quite genuinely) that she was not the "kiss and tell" type. David Price can hardly be blamed, however, for greeting the news of her interview with some scepticism. He could not immediately understand why she would give an interview to a journalist at Mr X's office if she genuinely wished to avoid publicity. It would naturally appear as if either she had been misleading him up to that point, about her true intentions, or she was being manipulated into providing a tabloid story against her wishes.

35. Twelve hours later, the Second Defendant texted the First Claimant and assured him that she had not yet signed anything other than the "confidentiality agreement" with the newspaper. She also said that she had only just found out that "no paper can publish a story without evidence". This may perhaps seem an odd comment to make, but it rather indicates not only her naivety and her vulnerability to being manipulated, but also her need, at that time, to find someone she could trust to give her independent and realistic advice. It was shortly after this, it seems, that Mr X put her in touch with a firm of solicitors he had used before and which has been acting in this litigation for the *Sunday Mirror* also.

36. It is instructive to follow through the narrative of these developments as they occurred. On 8 July, a friend of the Second Defendant, being apparently concerned about the circumstances in which she then found herself, telephoned a solicitor in David Price's firm. A transcript of the conversation has been made available. He was clearly anxious because he understood that the Second Defendant was being "bounced" into agreeing to a story being published, even though that was not her wish. He also seemed to know of the "standard ploy": that is to say, he was aware that she was being persuaded that such a story would, by some means, come out in any event. It is surely reasonable to assume that the friend in question could only have got that account from the Second Defendant herself – whether or not she had actually authorised the call to be made. He was recorded as saying:

> "Obviously all her contacts at the moment, her confidants are [X] and the [news]papers, and they are all advising her that this story is going to get out one way or another, because they are all biased in my opinion. They all want a story. … She has been advised by [X] and everyone else that, if she doesn't give her story, there will be another story that is bound to go to print."

He said that Mr X was telling her that she had better get her story out, as the information would be coming out on the Internet.

37. Later that day, in conversation with David Price, the Second Defendant herself confirmed that this was exactly the course being adopted by Ms K, who had yet again told her, at a meeting that evening, that if she co-operated with David Price he would inform all the other newspapers. There was no ground for saying this, but it had clearly alarmed her. (It is conceivable, of course, that if the Second Defendant agreed to a consent order she might have been identified in a confidential schedule, but that would only have been part of the process of maintaining her privacy – as she originally wanted.)

38. This was the conversation in which the Second Defendant also reported to David Price that the "BBC side of things" was important because "it would look good in front of a judge".

39. An hour later, at about 21.30 on 8 July, the Second Defendant revealed her then wishes and intention in a text to David Price: "I am happy that between us we can keep this out of public". She added that her mind was "worn out with the worry". All this would appear to be consistent with the concerns expressed earlier to David Price's colleague by the Second Defendant's friend. Yet Ms K continued to exert pressure and again, as I have said, made a disparaging and unfounded allegation against David Price in a text just after 22.30 the same evening:

> "Your call entirely, but remember your name will go round in a memo from Price who is being paid to protect [the First Claimant], not you. Sleep on it and see what you think in the morning. [K] … X"

The message was clear: namely, that David Price should not be trusted and that her interests would be better advanced by confiding in Mr X and the *Sunday Mirror*.

40. Although I was told in court by Mr James Price that the Second Defendant wished to publish her story by that stage, it is obvious from these exchanges that this was not always so. Indeed, even up to the time when she first consulted the solicitors introduced to her by Mr X, and who were also acting for the *Mirror*, her wish (unlike that of the newspaper) was to avoid publication. Moreover, the pressure being exerted on her by Ms K (exemplified through her misrepresentations about David Price) is something to be borne in mind when the court comes to carry out the balancing exercise as between Article 8 rights (including those of the Second Defendant) and the Article 10 rights of the two Defendants. It is clear, for example, from the Court of Appeal decision in *Murray v Express Newspapers Plc* [2009] Ch 481, at [36], that a judge needs to take into account *inter alia* " … the circumstances in which and the purposes for which the information came into the hands of the publisher". These are relevant considerations when it comes to attributing a value to the proposed exercise of the Defendants' Article 10 rights as compared to the intrusive effect it would have upon the Article 8 rights of the Claimants. It is part of making an assessment of proportionality.

41. Ms K's persistence seems eventually to have prevailed by the morning of 9 July, after she had given the Second Defendant the chance to "sleep on it". At 13.10 that afternoon, she texted David Price (still without in any way complaining about his behaviour):

> "Sorry, David. I'm being convinced this will very likely get out. If [the First Claimant] or I gag ourselves [i.e. by giving cross-undertakings], we'll have no defence opportunity."

42. It is worth noting that this reason for changing her mind, as being given at that stage, has nothing to do with receiving "independent legal advice", as was later suggested in the course of submissions. It seems to have been brought about through her being persuaded (by Ms K and/or Mr X and/or by the solicitors he introduced) that the story would get out in the public domain – even if she withheld her co-operation. Yet no one ever offered her any rational explanation as to why that should be so. Nor was the prediction borne out by events.

43. I must now come to the balancing exercise, as between the various competing Convention rights, and particularly having regard to the several public interest arguments presented on behalf of the Defendants. This requires me to come to a conclusion as to the "likely" outcome at trial: see Lord Nicholls' speech in *Cream Holdings*, cited above. It is one of those cases in which there are conflicts of evidence, and of interpretation, such that the court has to labour at a disadvantage: there has been no cross-examination to test the various accounts. No application was made for oral evidence to be given and it would be a most unusual step to take in an application of this kind. One has, therefore, to decide what is "likely" to happen at trial on the basis merely of what is so far available.

44. As to the Defendants' BBC argument, there is a conflict between the Second Defendant and the production manager. She is said by the Second Defendant to have offered her protection on behalf of the BBC. This seems to me to be highly unlikely. The context was that the First Claimant and the production manager were in a public house where they spent the evening of 21 April 2009 watching a football match. It is accepted that they discussed the unhappy state of the Claimants' marriage, in very general terms, and the First Claimant's friendship at the time with the Second Defendant. The production manager, who had known the First Claimant for many years, was sorry to hear about it and thought that he should stick with his wife. She would not in any way (she told the court) have encouraged or assisted him in leaving her. Nor would she have been in a position to offer protection from the BBC and thus would not have made any such an offer. It is conceivable, in theory, that she will be persuaded to change her mind in cross-examination but, as things stand, it seems most unlikely that any such facts could be established. There is no reason to suppose that a member of the production team would have it within her power to offer such protection – and why would she pretend otherwise? She had no wish to see the break-up of the Claimants' marriage.

45. A second "public interest" point was that there was a breach of s.127 of the Communications Act 2003, in that the First Claimant and the Second Defendant sent intimate images of themselves to one another by email. This is common ground. There is no need for me to go into detail. Whether this gives rise to a matter of public interest is rather doubtful. The point of whether such communications would give rise to criminal liability under the statute was expressly left open in relation to the telephone system in *DPP v Collins* [2006] 1 WLR 2223, where the legislative purpose of the provisions was analysed in the quite different context of racial abuse. As to telephone chat-lines, the position was referred to in passing at the end of Lord

Brown's speech, he being the only member of the panel to address the question (*obiter*):

> "(Quite where that leaves telephone chat-lines, the very essence of which might be thought to involve the sending of indecent or obscene messages such as are also proscribed by section 127(1)(a) was not explored before your Lordships and can be left for another day)."

46. In any event, even supposing that their activities did technically amount to a breach of those statutory provisions, it would not follow that the public interest in exposing this would be such as to justify the infringement of their privacy involved in newspaper exposure. There is nothing in either domestic or Strasbourg jurisprudence cited by Mr James Price that would support that proposition. It always remains a matter of balancing competing rights while paying due regard to proportionality: see e.g. the discussion in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at [113] - [119].

47. Again, therefore, I would conclude on the evidence at this stage that it is unlikely that, at trial, the exchange of intimate images would be held to be such as to justify the publication of allegations that would otherwise give rise to infringements of Article 8. It is, incidentally, unclear as to how the revelation would be in the interest of the Second Defendant since, *if* there was any significant wrongdoing, she would appear to be just as implicated herself.

48. A third public interest argument presented on the Defendants' behalf was that the First Claimant had been exploiting a vulnerable woman for his own "gratification" and that this deserves, in the opinion of the relevant journalists, public exposure and condemnation. There was no whisper of this from the Second Defendant herself until after she came into contact with the newspaper and its lawyers. The evidence of the communications between them would appear to show quite clearly that her participation in the explicit exchanges was not only willing but enthusiastic. It is said that until she had the advantage of being advised independently, by the lawyers introduced by Mr X, she was not in a position to appreciate that she had been exploited. It was only the *Mirror* journalists who were perceptive enough to see this and, through the same lawyers, were able to make her realise that she had been a victim of the First Claimant (rather than a willing participant). A number of points need to be made about this argument.

49. First, it involves the assumption that the Second Defendant was vulnerable and not always capable of recognising when she was being exploited. The argument is two-edged, in the sense that if I make that assumption it would behove the court to take that vulnerability into account in assessing *any* act of exploitation. That is to say, I should be equally wary, when addressing the balance between her Article 8 rights and those under Article 10, as to her sudden change of heart about "going public". If her apparently willing participation in the electronic and telephone exchanges is now *not* to be taken at face value, because of her vulnerability, why should the same caution not be applied to her recent *volte face* in deciding to allow her private life to be exposed in the tabloid newspaper?

50. Secondly, the suggestion of exploitation needs also to be assessed against the background of the Second Defendant's communications with other men on Twitter. Once again, I shall not identify them or what passed between them, but it is clear from paragraphs 35-37 of the First Claimant's second witness statement that she enjoyed sexually explicit and provocative exchanges not only with him but with others on the Internet generally – what Mr James Price called "telephone sex". Indeed, on 29 January 2009 she herself described her Twitter account as "looking like a celeb stalkers function room". This does not *appear* to be consistent with "victim" status.

51. Thirdly, whether she was exploited by the First Claimant is an issue of fact, to be determined according to the available evidence (at this stage, of course, incomplete). It is not a matter of "independent legal advice". There is no evidence that points clearly to exploitation in the copious transcripts before me. It is an *interpretation* which the First Defendant and its lawyers now seek to put upon what happened. They invite the court to do the same but, in any event, argue that it is their interpretation which matters for present purposes and that it should prevail – whether the court is inclined to agree with it or not. But it seems to be clear, as a matter of legal principle, that it is for the court to decide whether the facts give rise to a public interest in overriding relevant Article 8 rights (or are likely to do so at trial). It cannot be a trump card that one or more of the Defendants have been able to think up an interpretation of the facts, in hindsight, which happens to provide the makings of a public interest argument. The court has to come to its own conclusion on the matter. Unlike the situation in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, which concerned the outcome of a trial, the court in the present case has to form a view about whether a public interest argument is likely ultimately to succeed. Nonetheless, it is still for the court to come to its own conclusion on that.

52. If it *were* relevant to address the issue of "independent legal advice", it would be necessary to have in mind the newspaper's interest in publishing a story about the private affairs of the Second Defendant and her clearly expressed wish, until she met the lawyers, to keep those matters private. That could be said to give rise to at least a potential conflict of interest which would, in itself, tend to undermine any argument based upon "independent legal advice".

53. It was an unfortunate aspect of this application that the Defendants and their solicitors sought to criticise Mr David Price, as I have already said, for adopting a bullying manner towards the Second Defendant (who herself appeared initially to seek his assistance in keeping *her* affairs private). When it came to the hearing, Mr James Price quite rightly eschewed any attacks upon David Price's professional conduct and it is thus perhaps unnecessary to say anything more about it. Since, however, the attacks were made in evidence to the court, I should make clear that I see no justification for them. He was entitled to represent his client's best interests by exploring the Second Defendant's intentions with regard to publication and to point out to her (since she was at that stage unrepresented) the fact that proceedings might be necessary against her – she being the person in possession of the relevant information. That is not "bullying" or "threatening". The First Defendant's implication, however, is that he was in some way acting improperly and it was these criticisms which led Mr David Price to instruct counsel, rather than conducting the case himself, and thus to incur additional expense on his client's behalf. It is ironic that these attacks should have been made by the Defendants' solicitors in support of

their argument that the Second Defendant had not had the benefit of independent legal advice, given the fact that there was an obvious potential conflict between the two Defendants. Yet the partner concerned, in her first conversation with the Second Defendant, joined in the general disparagement of David Price, stating that *he* needed to behave himself.

54. In the course of the hearing, reference having been made to communications between the Second Defendant and her newly instructed solicitors, I was asked to rule that privilege had been waived and that the Claimants' advisers were thus entitled to see the relevant attendance note of 9 July. I was invited to read it and, subject to a number of deletions, ruled that part of it should be disclosed. In the light of this, further submissions were made on the Claimants' behalf on the issue of "independent legal advice" and upon how the Second Defendant came so dramatically to change her stance on publication between about 6 and 9 July. Although not central to the limited issues I now have to determine, it is appropriate to state my conclusions on the submissions that have been made.

55. It was pointed out by Mr Browne that, according to the attendance note, the suggestion that his client had exploited the Second Defendant's vulnerability was actually introduced by the partner in the Defendants' firm of solicitors – not by the Second Defendant herself – just as, earlier, the same point had been introduced by Ms K, but to no effect. (I have not identified the solicitor concerned, since it is quite possible that Mr Browne's criticisms of her will not be upheld at trial, following cross-examination. I will refer to her simply as "the partner".) The note contained, for example, the following passages:

> "[The partner] *commenting* that [the Second Defendant's} background makes her ripe for [the First Claimant's] behaviour. In these circumstances most people would tell [him] to leave them alone. [She] did not because of her background. This also makes it easier for David Price to threaten [her] …. [The partner] *stating* that [the Second Defendant] susceptible due to history of abuse. Easy to create trauma of confrontation." (Emphasis added)

56. This tends to support the Claimants' submission that the exploitation argument was lawyer-driven. It seems to have emerged in a solicitor's letter of 20 July, which anticipated that the response would be one of incredulity. It acknowledged that "she may not have expressed herself clearly to [the First Claimant] or his lawyer", but proffered the explanation that "she was not at that point in receipt of independent legal advice". This lacks conviction, since she had expressed herself to David Price with complete clarity and consistency.

57. The partner was suggesting arguments that would, in the words of Ms K, "look good in front of a judge". It is to be contrasted with the Second Defendant's own attitude up to that point. Not only is there no evidence in the intimate exchanges to support exploitation, but there are many examples of the Second Defendant expressing friendly and affectionate thoughts about the First Claimant. I do not propose to list them in this judgment, as it is not necessary to be so intrusive. Mr Browne draws attention, however, to one example of her robust assessment of the relationship, which seems to indicate equality and mutuality, so far as it goes:

> "He told me all his crap and I told him all my crap – put it like that. And we trusted each other."

In that statement she comes close to recognising, in lay terms, that this was one of those common situations in which a duty of "old fashioned" confidence subsisted alongside Article 8 rights in respect of private information: see e.g. *McKennitt v Ash* [2008] QB 73 at [8] and [16]. It is significant also that in the interview with Ms K on 6 July the Second Defendant told those present that the First Claimant was a "smashing guy … very easy to talk to, very funny, very sweet". At that stage, as I have already recorded, she rejected the suggestion that he had preyed upon her vulnerability.

58. The partner *appears* (from the limited summary now before me) to adopt the "standard ploy", as though she was seeking to persuade the Second Defendant to publish a story on behalf of the newspaper, rather than attempting to give her objective advice in her own interests. Thus, she makes reference to the possibility of a story coming out in the media without, for some reason, making it clear that there were no grounds to suspect that this could happen without her co-operation. Only she had the relevant information in her possession. The partner speculates that a story angle might be that "[the First Claimant] leaves wife for crazy anorexic". That was plainly calculated to scare the Second Defendant into going public, despite her reluctance to do so, in order to put her side of the story. She even goes so far as to suggest: "You have the right to tell your story. Arguably [the First Claimant] deserves it/others should know about it". That could hardly be described as legal advice – independent or otherwise. She also added that it would be "nice" to receive some money for telling the story, while stating that it was (obviously) the client's decision.

59. Oddly, the partner did not appear to give the Second Defendant any advice about the risks of breaching confidence and becoming, unnecessarily, involved in litigation. In order to give such advice, she would need to have analysed the communications between the two people concerned, so as to form a judgment as to whether they, truly, disclosed evidence of "oppression" or "exploitation" or merely consensual exchanges. There is no evidence that she had by this stage done so. It is clear from *McKennitt v Ash*, for example, that in a "kiss and tell" situation, it is not appropriate to give unqualified advice to the effect that "you have the right to tell your story". It all depends upon a careful analysis of the individual circumstances.

60. Nevertheless, the partner seems to have formed the view (on "instinct") that the Claimants were unlikely to sue. This was plainly wrong, but it is very difficult to ascertain the grounds upon which advice to that effect could possibly have been given at that stage.

61. I also received submissions from Mr James Price on the attendance note. He argued that Mr Browne's arguments illustrated the dangers of ordering production of privileged documents. He reaffirmed that the Second Defendant is "unequivocally determined to publish" in full knowledge of everything – including what was revealed at the hearing. She has "reached a settled and fully informed decision". Therefore, he submits, it is now "simply a matter of history what may or may not have been the position four weeks ago".

62. He suggests in the light of the evidence that there had indeed been a risk that a story would have come out in a form displeasing to the Second Defendant. A "tipster" had been "hawking the story round other newspapers", as a result of which she had been door-stepped by the *News of the World*. The allegations could well have been published without her consent and without reference to her. In that respect, therefore, she had not been misled by Mr X or the *Sunday Mirror* or their solicitors. The "tipster", however, appears to have been putting about rumours that happen to have been false. No act of adultery had taken place and the Claimants were not separated. It is extremely unlikely, in those circumstances, that a sensible newspaper would have published rumours of that sort without obtaining confirmation from one of the relevant parties – and especially without there being, at that stage, any apparent "public interest" justification for doing so. As recounted by the *News of the World* journalist, at the end of June, the story appeared to be merely the standard fare of a minor celebrity leaving his wife for another woman.

63. As to Mr Browne's reference to the "standard ploy", Mr James Price argues that it is " … virtually standard tabloid newspaper practice to seek to persuade a celebrity who is the subject of such a story that the newspaper will tell the story from his point of view if he will provide them with the material to do so". Thus, there seems to be agreement at least on this point.

64. Mr James Price also defends the conduct of his solicitor during the 9 July conversation, as recorded in the attendance note. His observations at this point, however, teeter on the boundary between legal submissions and expert evidence:

> "[His instructing solicitor] has understood what the Claimants' counsel and solicitors have wholly failed to understand, namely how the victims of abuse react to their abusers and to others who subsequently take advantage of them."

He added that the First Claimant himself " … should have been alive to the particular problems that abused women face and to [the Second Defendant's] obvious need for care and support".

65. It is therefore a little curious that it is sought to buttress this argument by adding, "He saw with his own eyes how [she] reacted when (in around July 2009) [he] dropped her". It is odd for several reasons:

i) If the evidence for her vulnerability is pinned to her reaction when the "relationship" apparently ended, it is hard to criticise him for not spotting her supposed vulnerability from the outset. He certainly denies any knowledge of continuing psychiatric problems.

ii) To use the derogatory term "dropped her" appears to elevate what passed between them, described by Mr Price himself as "telephone sex", into some kind of quasi-partnership in which he owed her a duty of commitment analogous to that in marriage.

iii) It does not seem consistent with the recent allegations that he was pestering her or forcing unwanted attention upon her. Indeed, the records show that she was repeatedly contacting him between May and July 2009 and was

continuing to express sexual enthusiasm for him as late as February 2010. I was told that in April 2009 alone she made 12 telephone calls and sent 316 texts.

66. All this illustrates how the Defendants' case, by way of justifying infringements of Article 8 rights, depends upon placing a unilateral interpretation upon events which are in themselves to a great extent uncontroversial. It is an interpretation which does not appear to me to emerge from the evidence as it now stands. I cannot say that it will necessarily be rejected at trial after fuller examination than is now possible. Detailed cross-examination of the deponents may throw a different light on matters, of course, but I have to assess the likelihood of this interpretation being upheld at trial on the material currently available.

67. As to the explanation that the Second Defendant only changed her mind about selling her story to the *Mirror* because she had received "independent legal advice" as to her "victim" status, it is not for me to come to a conclusion about that. It may have to be investigated fully at trial, and especially in cross-examination, but at this stage I cannot possibly say that such an argument is "likely" to succeed. The material before me points in the opposite direction. In the end, however, this may simply prove to be a side issue, since it is a matter of balancing the Second Defendant's Article 10 right to "tell her story" (and, of course, the right of the First Defendant to publish it) against the Claimants' rights of privacy and/or confidentiality – *irrespective* of when or how she came to decide that she wanted to sell her account to the newspaper in question.

68. Another side issue raised in the Defendants' evidence is the suggestion that the First Claimant had in some way "tricked" her into revealing her telephone number. She gives an account of her registering by way of email on a website of the First Claimant and revealing her number for that purpose. That is the means by which she claims to have been "tricked" into revealing her telephone number. The evidence points to the registration having taken place on 30 March 2009. Yet telephone records show that conversations (some quite lengthy) took place prior to that date. If the issue is significant (which I rather doubt) it will have to be investigated at trial. On the evidence originally placed before me, the suggestion of a trick seemed unlikely to be upheld.

69. On 29 and 30 September, when I was about to release the judgment in draft, further submissions on this issue were received in writing. It appears that disclosure had taken place, in the light of which the Defendants' solicitor concluded that it " … has not solved the puzzling matter of whether [he] obtained [her] telephone number and home address via the email registration". They went on to observe that the parties' evidence "clearly conflicts". That is not a conflict that I can resolve on the present application and the question, therefore, remains whether I conclude that the Defendants are likely at trial to prove that he did obtain the telephone number by a "trick" on 30 March 2009. Given the evidence of his making calls before that date, I cannot see how I could do so.

70. On 30 July, I had granted an order for the Defendants' advisers to inspect the Claimants' computer, primarily in order for them to see if they could establish that the registration on the website had taken place earlier than 30 March. The Claimants' expert, I was told, was left in no doubt as to the authenticity of the date of the registration (i.e. 30 March). On the other hand, the Defendants have yet to take the

opportunity to inspect the computer through their own expert. In light of this, Mr David Price made the following submissions:

> "If they do not wish to do so, they should state whether it remains the case of either or both of their clients that the registration did not take place on 30 March. Such a case inevitably involves an accusation of perverting the course of justice against our client. We do not think that the Defendants' legal representatives can properly continue to advance a case that the registration did not take place on 30 March without (at the very least) taking advantage of the inspection of our client's computer that they sought and obtained from the Judge and adducing evidence from their expert in relation to the inspection. It is wholly disingenuous to persist in presenting the position in relation to the date of registration as 'puzzling'."

He went on to suggest that judgment should be postponed until the outstanding issues of disclosure can be resolved.

71. The only relevance of this is that the establishing of such a trick would supposedly demonstrate a public interest such as to override the Claimants' rights of privacy. This seems somewhat far-fetched in the circumstances – especially since the Second Defendant herself, in the 6 July interview, twice described the obtaining of her number merely as "cheeky". This would hardly seem to be the stuff of genuine "public interest".

72. I did not believe it would be a proportionate use of time and money to delay the outcome, as David Price suggested, over what seems to be a fairly peripheral matter. I was nevertheless told on 4 October that the Claimants' expert report would be passed to the Defendants' advisers in the hope that this would resolve the impasse. This led to an acknowledgment on 13 October that the evidence did indeed suggest that the registration took place on 30 March 2009. There then followed a further round of submissions on 21 October. Mr David Price pointed out that, despite the acknowledgment of the force of the Claimants' expert evidence, the charge of "trickery" had still not been withdrawn. That may be a little ungracious, but the point seems threadbare in any event. Despite this, it has been responsible for much of the unnecessary delay in resolving this application.

73. More central to the decision I have to make is the issue of whether the proposed revelations, intrusive as they plainly would be, are "likely" at trial to be classified merely as embarrassing tittle tattle or rather as serving some more valuable function. Is it likely to be held that it would be in the public interest as contemplated, for example, in the Press Complaints Commission Code? Or would it contribute, in the words of the Court in Strasbourg, in *Von Hannover v Germany* (2005) 40 EHRR 1, to a "debate of general interest to society"? On the evidence before me, it seems clear that the answers would be in the negative. Accordingly, I will continue the injunction, as in my judgment the Claimants are likely to succeed in obtaining a permanent injunction against intrusions of the kind contemplated by the Defendants.

74. I had in mind that this anonymised judgment should be publicly available and that to reduce the risks of "jigsaw identification", which are well known generally and

evident in this case, it would be appropriate to make an order of the kind proposed by Sharp J in *DFT v TFD* [2010] EWHC 2335 (QB) and by the Court of Appeal in *Donald v Ntuli*, cited above. The need for such an order is rather confirmed by recent evidence which, Mr Browne suggests, indicates that the Second Defendant herself has regrettably been seeking ways in which to circumvent the existing order of the court. I took into account submissions on the form of order that was appropriate in the light of my rulings.

75. As I indicated at the outset of the judgment, the Defendants sought to argue, very late in the day, that the judgment should, after all, not be anonymised. This has been responsible for the further delay since it was first raised on 27 October.

76. There is no point in any longer anonymising the First Defendant, since I have identified MGN Ltd in paragraph [5] above and throughout the judgment. As to the individual parties, however, it seems to me self-evident that to identify either of them would entirely defeat the court's purpose in granting the injunction. That which it is intended should be kept private, until the trial, would to all intents and purposes become public: there would be no point in having a trial.

77. As has recently been re-emphasised by the Court of Appeal in *Donald v Ntuli*, at [54], and by the Supreme Court in *Secretary of State for the Home Department v AP (No 2)* [2010] 1 WLR 1652 at [7], the question of anonymity is "an essentially case-sensitive subject".

78. The desirability of open justice has long been acknowledged and was explained, for example, a century ago in *Scott v Scott* [1913] AC 417. Lord Diplock referred to that earlier decision in *Att.-Gen. v Leveller Magazine Ltd* [1979] AC 440, 449-50 and summarised the position succinctly:

> "If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice."

79. To similar effect were the words of Woodhouse P in the New Zealand Court of Appeal in *Broadcasting Corp of New Zealand v Att.-Gen.* [1982] 1 NZLR 120, 122-3, where he referred to the importance of public access to justice and the need for judges to carry out their responsibilities under the eyes of their fellow citizens. The purpose is to provide daily and public assurance, *inter alia*, that justice is being administered by a fair and balanced application of the law to facts as they really appear to be. He continued:

> "It is a matter as well of maintaining a system of justice which requires that the judiciary will be seen day by day attempting to grapple in the same even fashion with the whole generality of cases."

80. It is to be noted that in both these passages what is given emphasis, for obvious reasons, is the need for the public to understand the court's reasoning processes and how the law has been applied in different factual situations.

81. Nonetheless, it has always been recognised that in certain circumstances it may become necessary to impose restrictions on the principle of open justice for various reasons. Even so, where such circumstances arise, those restrictions need to be kept to the minimum necessary to achieve the particular purpose. As Lord Diplock observed in the *Leveller* case:

> " … since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."

82. So too, Lord Loreburn noted in *Scott v Scott*, at 446:

> "In all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court."

His Lordship also commented that it may occasionally be necessary to exclude the public if "justice will be frustrated or declined if the court is made a place of moral torture". Of course, if those whose rights are threatened are "reasonably deterred from seeking [justice] at the hands of the court", then to that extent access to justice is denied and Article 6 rights are correspondingly undermined.

83. It is obvious why anonymity is so regularly applied in breach of confidence and privacy cases. If the parties were identified, it would often mean that the confidentiality was lost. As Sir John Donaldson MR put it in *Att.-Gen. v Newspaper Publishing Plc* [1988] Ch 333, the ice cube would have melted. The court and litigants alike would be frustrated in giving effect to important rights that need to be recognised and implemented by reason now of the European Convention. Usually, there will be competing rights under Article 8, Article 6 and Article 10 that have to be reconciled. In some well known cases, Article 2 has also been engaged, but that is of no relevance here. In this case, it is a question of balancing the rights of the Claimants (and/or their family) under Article 8 and Article 6, on the one side, with those of the Defendants under Article 10. Additionally, however, there is the interest of the general public in open justice (another aspect of Article 6).

84. The most important element of open justice in this case, as with many other privacy and confidence cases, is that interested observers and legal practitioners should be able to monitor the court's processes and form a view as to whether judges are applying a consistent, fair and balanced approach in the application of this recently developed jurisdiction to the facts of individual cases.

85. As Maurice Kay LJ pointed out in *Donald v Ntuli*, however, any litigant in such a case is entitled to expect that the court will adopt procedures which ensure that any ultimate vindication of his Article 8 case should not be undermined by the way in

which the court has processed any interim application. Thus it may be helpful to set about the balancing exercise, as between privacy rights and the public's interest in open justice, by posing the question in the form adopted by Lord Rodger in the *AP (No 2)* case. Is there a sufficient general, public interest in publishing a report of the proceedings which identifies the person concerned to justify any resulting curtailment of his right *and his family's right* to respect for their private and family life (my emphasis)? In this particular case, the rights of the parties' families are of considerable importance.

86. The central public consideration in this case is that the reasoning of the court should be transparent. Compared to that, the social utility or value to be attached to identification, as such, is relatively low: cf. *XJA v News Group Newspapers Ltd* [2010] EWHC 3174 (QB) at [15]. There may be cases in which it is possible to reveal the identity of one or more of the litigants involved and yet not defeat the purpose of the court's protection. If so, well and good. It is plainly desirable that everything should be made public unless there is a sound reason to withhold any information – including the parties' identities. But I am satisfied that this is not such a case. It is necessary and proportionate to withhold their identities to ensure, so far as possible, that the information to which rights of privacy are said to attach should not be revealed pending trial. Otherwise a trial would serve no purpose.

87. After the draft judgment was circulated, a further hearing took place in private to enable me to hear the parties' submissions on the consequential orders that would reflect my rulings. At that stage, Mr James Price invited me to consider anonymising in the public judgment, apart from the parties, (a) the *Sunday Mirror* journalist, (b) his instructing solicitor, (c) the Second Defendant's public relations adviser and (d) his assistant. This was a very unusual request, but it will already have been noted that, not without hesitation, I agreed to comply with it.

88. The reason for taking such an unusual course really springs from the nature of the exercise a judge is required to carry out under s.12(3) of the Human Rights Act. Although it might be thought that my conclusions do not reflect very well on those people, I have been at some pains to emphasise that I am not making findings about them at this stage. These hearings have not been part of a trial. All I am required to do is to try to decide on incomplete (and untested) evidence what is "likely" to be the outcome at trial.

89. Meanwhile, says Mr James Price, it might give rise to unfairness if casual observers interpret my observations as though they *were* the ultimate findings. It is true that much of what I have said is based on recordings and facts which are incontrovertible but, even so, upon closer examination facts sometimes emerge in a different light. That is why I was prepared to go along with counsel's suggestion for the time being. I was reminded of the decision in *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 and I bear in mind the important policy considerations addressed in that case but, for the reasons canvassed by Mr James Price, I will grant the anonymity to the non-parties on a temporary basis.

Publication of any report as to the subject matter of these proceedings or the identity of the Claimants is limited to what is contained in this judgment