Neutral Citation Number: [2011] EWHC 1232 (QB)

Case No: HQ11X01432

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 May 2011

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

CTB	**Claimant**
- and -	
(1) NEWS GROUP NEWSPAPERS LIMITED **(2) IMOGEN THOMAS**	**Defendants**

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Hugh Tomlinson QC and **Sara Mansoori** (instructed by **Schillings**) for the **Claimant**
Richard Spearman QC (instructed by **Farrer & Co**) for the **First Defendant**
David Price QC (of **David Price Solicitors & Advocates**) for the **Second Defendant**

Hearing dates: 14 & 20 April 2011

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Judgment

Publication of any report as to the subject-matter of these proceedings or the identity of the Claimant is limited to what is contained in this judgment and in the order of the court dated 21 April 2011.

Mr Justice Eady :

1. During the afternoon of 14 April 2011 I granted a temporary injunction until the return date on 20 April against two defendants, who were News Group Newspapers Ltd and a woman called Imogen Thomas. It had emerged from a telephone conversation between her and one of the solicitors acting on the Claimant's behalf, shortly before the hearing, that she had at some stage engaged the services of Mr Max Clifford as her publicist. Earlier that day, there had appeared in *The Sun* newspaper an account, attributed to her "pals", of a sexual relationship she had with a footballer. She was identified as the subject of the coverage, probably with her consent. The footballer in question was not, however, named. That was because a *Sun* representative had given his solicitor an undertaking to that effect on the evening of 13 April (which was to expire at 4 p.m. the following day).

2. The initial application was made by Mr Hugh Tomlinson QC on behalf of the Claimant, who was referred to throughout as CTB. The purpose of the exercise was

to restrain publication not only of the identity of the Claimant but also of any further account, or purported account, of such a relationship. According to his witness statement of 14 April, he had met Ms Thomas in September 2010 and on two further occasions, once in November and once in December. There might thus appear to be a conflict between them as to the length and nature of the relationship. According at least to the published account of Ms Thomas, it continued for about six months and would thus have involved more frequent meetings between them. So far, that account has not been set out in any witness statement. To date, therefore, the Claimant's evidence on these matters remains uncontradicted.

3. The Claimant is a married man with a family. It is well established, in such circumstances, that the court needs to take into account and have regard to the interests of the claimant's family members, and their rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms. This emerges clearly, for example, from a number of decisions in the Court of Appeal: see e.g. *Donald v Ntuli* [2011] 1 WLR 294, at [24], *Ambrosiadou v Coward* [2011] EWCA Civ 409 and, most recently, *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

4. On 14 April, News Group Newspapers Ltd was represented by leading counsel, Mr Richard Spearman QC, who did not oppose the grant of an injunction over the short interval before the return date. Ms Thomas was not represented, and indeed had not been notified of the hearing, since on the evidence I was satisfied that there would otherwise have been a risk of further disclosure of private or confidential information prior to her being served with the order.

5. The Claimant's witness statement was to the effect that Ms Thomas had made contact with him by various text messages in March, which led him to conclude that she was at that stage thinking of selling her story, such as it was. She told him by this means that she wanted, or "needed", a payment from him of £50,000. It was against this background that he agreed (he says with some reluctance) to meet her in a hotel where he was staying in early April of this year in order to discuss her demands. Although he had no wish to meet, he eventually agreed because he was concerned that she would go to the newspapers if he refused. On that occasion, which was according to his evidence only the fourth time they had met, they were together for no more than 30 minutes. She had asked him to provide her with a signed football shirt, which he did, but he told her that he was not prepared to pay her the sum of £50,000.

6. The next development was that she asked to see him again, in a different hotel, a few days later (where he was also staying). He agreed with reluctance and on this occasion, as she had requested, provided her with some football tickets.

7. It now seems that the Claimant may well have been "set up" so that photographs could be taken of Ms Thomas going to one or other, or both, of the hotels. Although the position is not yet by any means clear, the evidence before me on 14 April *appeared* to suggest that Ms Thomas had arranged the hotel rendezvous in collaboration with photographers and/or journalists. He first began to "smell a rat" when she told him at the first April meeting, perhaps feigning innocence, that she had been followed and recognised when she visited the first hotel.

8. On 12 April, the Claimant sent Ms Thomas a message to say that he did not want any further contact with her. Then, in something of a quandary, he thought better of it and sent her a further message the following day. This was to convey to her that he might be willing to pay her some money after all. By this time, however, she made it clear that she was looking for £100,000. She later texted him to say that there was a journalist outside her house.

9. The evidence before the court at that point, therefore, appeared strongly to suggest that the Claimant was being blackmailed (although that is not how he put it himself). I hasten to add, as is obvious, that I cannot come to any final conclusion about it at this stage. I have to make an assessment of the situation on the limited (and untested) evidence as it now stands. (That is what is required by s.12(3) of the Human Rights Act, to which I shall return shortly.)

10. Ms Thomas made contact with the Claimant again on 13 April and asked him to call her. When he spoke to her, he formed the impression that she had someone with her – probably a journalist. At all events, she told him that *The Sun* was thinking of publishing a story to the effect that they had had an affair for some six months and that this account would be supported by photographs of her at or near the hotels where the April visits had taken place. She did not give any indication that she herself was in any way responsible for this. It is hardly likely that she would have done so, of course, if she was still hoping to extract money from the Claimant. It seems, nevertheless, that *The Sun* was ready to take advantage of these prearranged meetings in order to be able to put forward the claim that it was *The Sun* which had *found* him "romping with a busty Big Brother babe". This was no doubt to give the impression, which Ms Thomas herself may have fostered, that a sexual liaison between them was still continuing at the time of the two hotel rendezvous in April.

11. Shortly afterwards, still apparently seeking to absolve herself from any responsibility for the newspaper coverage, Ms Thomas sent a message to the Claimant to the effect that one of his friends must have tipped off the newspaper. According to his account, the Claimant knew this to be untrue, since he had never mentioned her to anyone.

12. The evidence before the court at that stage, therefore, appeared to indicate, rightly or wrongly, that Ms Thomas had arranged for photographs to be taken, having already agreed a payment or payments from the newspaper. Despite that, she was still requesting £100,000 from the Claimant. This was the background against which I had decided that there was ample reason not to trust Ms Thomas. It seemed reasonable, in those circumstances, that the Claimant and his advisers should be excused the need to serve her in advance of the 14 April hearing.

13. At all events, it seems probable that she had agreed at some point to contribute to the story in *The Sun* that was published in its issue for 14 April (i.e. prior to the hearing of the injunction application). It is thus ironic that Ms Thomas has subsequently complained of the court's supposed unfairness in according anonymity to the Claimant but not to her. She was already identified, apparently of her own volition, before any application was made to the court. It seemed to me that the Claimant was fully entitled to the protection of anonymity at the time he came before the court on the first occasion – not least for the reasons acknowledged and explained by the Court of Appeal in *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324 at [40].

14. On the return date, being the last day of term, the application was renewed by Mr Tomlinson. Mr Spearman again appeared on behalf of News Group Newspapers Ltd and, on this occasion, Ms Thomas was represented by Mr David Price QC, who had only recently been instructed on her behalf and took a largely "watching" role.

15. It seems that Ms Thomas had instructed other solicitors for a short time, with whom the Claimant's advisers had made contact on 15 April. On that date she had signed a very brief witness statement accepting that she wished to publish her account of her relationship with the Claimant and that she was in discussion with the *Mail on Sunday* about that. This was in support of a proposed application by Associated Newspapers Ltd to vary the terms of my order of 14 April because she had been advised that it "arguably" prevented her from doing so. In the event, that application did not materialise. Then there was a hiatus during which she had no legal representation before Mr Price was finally instructed. In the meantime, however, there were further publications over the weekend in other tabloids. She appears to have collaborated at least in a *Sunday Mirror* article.

16. On 20 April I was prepared to continue the injunction and, following detailed negotiations between counsel, I approved an agreed order on 21 April. I now set out more fully the reasons for granting the injunction on 14 April and for continuing it with effect from the return date.

17. I now wish to make it clear that, shortly before this judgment was handed down, Mr Price stated on his client's behalf that she denies either causing the publication in *The Sun* on 14 April or asking the Claimant for money.

18. The judicial function on applications of this kind is now so well established and so well known that there should be no need to explain it yet again.

19. The courts are required to carry out a balancing exercise between competing Convention rights, as was always overtly acknowledged by the government prior to the enactment of the Human Rights Act 1998. It was, for example, explained by the then Lord Chancellor, Lord Irvine, when the bill was before the House of Lords on 24 November 1997 (*Hansard*, HL Debates, Col.785). He said that any privacy law developed by the judges following the enactment would be a better law because they would have to balance and have regard to both Article 8 and Article 10 (as indeed has been happening over the last decade). When the statute came into effect in October 2000, it explicitly required the courts to take into account Strasbourg jurisprudence when discharging those responsibilities.

20. Despite this long history, it has for several years been repeatedly claimed in media reports that courts are "introducing a law of privacy by the back door". Yet the principles have long been open to scrutiny. They are readily apparent from the terms of the Human Rights Act, and indeed from the content of the European Convention itself. Furthermore, they were clearly expounded seven years ago in two decisions of the House of Lords which was, of course, at that time the highest court in this jurisdiction: *Campbell v MGN Ltd* [2004] 2 AC 457 and *Re S (A Child)* [2005] 1 AC 593.

21. Since those decisions were promulgated in 2004, the law has been loyally applied by the courts in a wide variety of circumstances and exhaustively explained in numerous

appellate judgments. In particular, there are a number of important decisions of the Court of Appeal in addition to those I have already mentioned: see *Douglas v Hello! Ltd (No 3)* [2006] QB 125; *McKennitt v Ash* [2008] QB 73; *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103; and *Murray v Express Newspapers* [2009] Ch. 481. This does not purport to be an exhaustive list, but it will suffice to establish beyond doubt the legal framework within which the courts are required to operate on applications of this kind. It is widely known that the House of Lords refused permission to appeal with regard to each of the last four cases I have listed. This can only, surely, have been on the basis that it was by that stage recognised that the principles were sufficiently clearly established.

22. The majority of cases over the last few years, in which the courts have had to apply those principles, would appear to be of the so called "kiss and tell" variety and they not infrequently involve blackmailing threats. Blackmail is, of course, a crime and in that context the courts have long afforded anonymity to those targeted as a matter of public policy. That has not hitherto been questioned. In the modern context, against the background of the Human Rights Act, it is equally clear that the courts have an obligation to afford remedies to such individuals, to discourage blackmailers and to give some protection in respect of personal or private information where there is a threat of revelation.

23. In circumstances of this kind, there has to be a two stage process. This accords with what has been described as "the new methodology": *Re S (A Child)*, cited above, at [23]. First, the court has to decide whether the subject matter of the threatened publication would be such as to give rise to a "reasonable expectation of privacy" on the part of the applicant. In this case, as in so many others, there can be no doubt on that score. It is concerned with conduct of an intimate and sexual nature and, what is more, there has been no suggestion in this case that the relationship, for so long as it lasted, was conducted publicly. It is clear both from domestic and Strasbourg jurisprudence that such personal relationships are entitled to Article 8 protection: see e.g. the discussion in *Mosley v News Group Newspapers Ltd* [2008] EMLR 679, and in particular at [100] and at [125]-[132] and, for yet another decision of the Court of Appeal, in this context, see also *ASG v GSA* [2009] EWCA Civ 1574.

24. Once that hurdle has been overcome, the next stage is for the court to weigh against the claimant's Article 8 rights, and any duty owed to him under the traditional law of confidence, whether it would be appropriate for those rights to be overridden by any countervailing considerations. In the present case, of course, it is necessary to weigh up the Article 10 rights of Ms Thomas, together with those of any journalists she has approached. Also, it is necessary to have regard to the public interest and to the right of citizens generally to receive information.

25. I have to consider whether there would be a legitimate public interest in the revelation of this particular information, in so far as it is not already in the public domain, and whether publication would contribute to "a debate of general interest", in the sense conveyed by the European Court of Human Rights in such cases as *Von Hannover v Germany* (2004) 40 EHRR 1. Would it help to achieve some legitimate social purpose, such as the prevention or detection of crime? Or again, echoing the terminology of the Press Complaints Commission Code, would publication in some way prevent the public from being seriously misled?

26. As in so many "kiss and tell" cases, it seems to me that the answer, at stage two, is not far to seek. Indeed, it was not even argued that publication would serve the public interest.

27. Discussion focused rather on the extent to which relevant material might already, at that time, be in the public domain. In most of these cases, it will be appropriate, in accordance with established practice, to include within the terms of any court order what is called a "public domain proviso": see e.g. *Att.-Gen. v Times Newspapers Ltd* [2001] 1 WLR 885; *X and Y v Persons Unknown* [2007] 1 FLR 1567. There may well be, in any given case, room for argument as to what truly is or is not in the public domain; but the principle is clear, namely that the court will not attempt to prevent publication or discussion of material that is genuinely in the public domain since, where that is so, there will no longer be any confidentiality or privacy to protect. This is reflected in one of Lord Goff's "limiting principles", to be found in his speech in *Att.-Gen. v Guardian Newspapers (No 2)* [1990] 1 AC 109, 282B-F:

> "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."

28. A distinction was drawn, however, in *Att.-Gen. v Guardian* between government or state secrets and those relating to a person's private life: see at p.260E-H (Lord Keith) and p.287C-D (Lord Goff). It is more difficult to establish that confidentiality or a reasonable expectation of privacy has gone for all purposes, in the context of personal information, by reason of its having come to the attention of only certain categories of readers: see also *R v Broadcasting Complaints Commission ex parte Granada TV* [1995] EMLR 16. It is not a black and white distinction between public and private in such circumstances, but rather a matter of looking at the particular facts and deciding whether, notwithstanding *some* publication, there remains a reasonable expectation of *some* privacy. It is regarded as a question of degree: a distinction has sometimes been drawn, for example, in respect of private information between that which has been published in the national media and that which is only available on a more limited scale: see e.g. *Venables v News Group Newspapers* [2001] Fam 430, 470-471 and the general discussion in *Carter-Ruck on Libel and Privacy* (6th edn) at 19.86 *et seq*. Each case has to be assessed on its own facts.

29. A complicating factor in the present case, as the Claimant's advisers recognised, was that the order had to be drafted in such a way as to exclude from the general prohibition not only information which could be categorised, broadly, as in the "public domain" but also, specifically, that which had appeared in *The Sun* on the morning of 14 April. This was simply a fact of life. Nothing could be done about it. The Claimant was not accepting either that the allegations in the newspaper would have been outside the scope of private or confidential information, prior to publication, or that they were true. Nevertheless, in reality it was no longer possible to maintain an objection to publication. That is why the order, and in particular the

proviso, had to be drafted in specifically tailored terms, intended to reflect what had appeared in the newspaper that morning.

30. When the matter was before me, I was not persuaded that there was by that time nothing left to protect in respect of which the Claimant still had a reasonable expectation of privacy.

31. When applying the "new methodology" in this sort of case, it is necessary, where the court is required to carry out "the ultimate balancing test" between two or more competing Convention rights, to have regard to the following propositions identified in *Re S (A Child)* at [17]:

    i) No one Convention article has as such precedence over another.

    ii) Where conflict arises between rights under Article 8 and Article 10, an "intense focus" is required in the particular circumstances of the case upon the comparative importance of the specific rights being claimed.

    iii) The court must take into account the justification put forward for interfering with or restricting each right.

    iv) The proportionality test must be applied to each.

32. This approach, as adopted by their Lordships, was entirely consistent with that of the Council of Europe in Resolution 1165 of 1998:

> " … the Assembly reaffirms the importance of every person's right to privacy, and of the right of freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value."

33. It follows that one can rarely arrive at the answer in any given case merely by reference to generalities. It must all depend upon the particular facts of the case. It follows too that there can be no *automatic* priority accorded to freedom of speech. The relative importance of the competing values must be weighed by reference to the individual set of circumstances confronting the court. Of course the court will pay particular regard to freedom of expression, but that does not entail giving it automatic priority. All will depend on the value to be attached to the exercise or proposed exercise of that freedom in the particular case. It will rarely be the case that the privacy rights of an individual or of his family will have to yield in priority to another's right to publish what has been described in the House of Lords as "tittle-tattle about the activities of footballers' wives and girlfriends": see e.g. *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359 at [147]. It has recently been re-emphasised by the Court in Strasbourg that the reporting of "tawdry allegations about an individual's private life" does not attract the robust protection under Article 10 afforded to more serious journalism. In such cases, "freedom of expression requires a more narrow interpretation": *Mosley v UK* (App. No. 48009/08), 10 May 2011, at [114].

34. When an interim application is sought at this stage, with a view to maintaining the status quo until trial, the court has to proceed on the basis of evidence that may well be incomplete and has certainly not been tested in the witness box. But Parliament has imposed the obligation on judges in these circumstances to form a view, on such evidence as is available, as to whether the particular claimant is "likely" to succeed, at trial, in obtaining an injunction on a permanent basis to protect the information in question: see s.12(3) of the Human Rights Act. It has been established that "likely" in this context has generally to be equated to "more likely than not": *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at [22].

35. It is obvious that by the time a case comes on for trial the totality of the material before the court may present a rather different picture. It is possible, for example, that some of the evidence relied on at the early interlocutory stage will have been shown by then to be inaccurate or misleading. Nevertheless, the court is required to decide whether or not to grant an interim injunction on the evidence as it stands at that time.

36. The courts will have to apply this methodology unless and until Parliament decides to legislate to different effect.

37. On the evidence before me, as at 14 and 20 April, I formed the view that the Claimant would be "likely" to obtain a permanent injunction at trial, if the matter goes that far. As I have said, it remains uncontradicted. The information is such that he is still entitled to a "reasonable expectation of privacy" and no countervailing argument has been advanced to suggest that the Article 10 rights of the Defendants, or indeed of anyone else, should prevail. There is certainly no suggestion of any legitimate public interest in publishing such material.

38. Moreover, in so far as Ms Thomas wishes to exercise her Article 10 right by selling her life story, she is entitled to do so, but only subject to the qualification that she is not thereby relieved of any obligation of confidence she may owe, or free to intrude upon the privacy rights of others: see e.g. *McKennitt v Ash*, cited above, at [28]-[32] and [50]-[51]. In so far as there are any conflicts of evidence or of recollection between her and the Claimant, it will be for the court to resolve them at the appropriate time. I will discuss with counsel whether it would be appropriate to order a speedy trial for that purpose.

Publication of any report as to the subject-matter of these proceedings or the identity of the Claimant is limited to what is contained in this judgment and in the order of the court dated 21 April 2011.