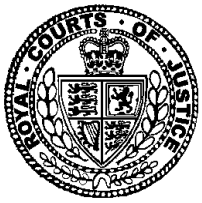

Neutral Citation Number: [2011] EWCA civ 808

Case No: 2010/2863

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Mr Justice Eady
HQ 10X04600

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2011

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE ETHERTON
and
LORD JUSTICE GROSS

- -

Between :

Christopher Hutcheson (formerly known as "KGM")	**Appellant**
- and -	
News Group Newspapers Ltd & Ors	**Respondents**

- -
- -

Mr Hugh Tomlinson QC and Ms Sara Mansoori (instructed by **Schillings**) for the **Appellant**
Ms Adrienne Page QC and Mr Jacob Dean (instructed by **Farrer & Co**) for the **First Respondent**
Ms Heather Rogers QC (instructed by **Davenport Lyons**) for the **Second Respondent**
Mr Mark Warby QC (instructed by **Reynolds Porter Chamberlain**) for the **Third Respondent**

Hearing dates: 24th & 25th May 2011

- -

Approved Judgment

LORD JUSTICE GROSS:

INTRODUCTION

1. This has been the appeal of the Appellant, "KGM" as he was originally styled, from the Judgment of Eady J, dated 1st December, 2010 ("the judgment"), refusing him a "privacy" injunction against the First Respondent ("NGN"). The judgment also dealt with an issue which arose between KGM and the Second and Third Respondents ("MGN" and "ANL" respectively).

2. At the conclusion of the hearing, we indicated that KGM's appeal in respect of NGN would be dismissed, with our reasons to follow. These are my reasons.

3. Various consequences followed from giving our decision at once. First, it necessarily followed that KGM can now be referred to by his name – Mr. Christopher Hutcheson ("Mr. Hutcheson") - a course I propose to follow in this judgment. Secondly, this judgment can be and is a public judgment. Thirdly, there was no longer any need for the judgment of Eady J to remain a Judgment in Private, albeit that some very few redactions remain in place, for extraneous reasons which need not take up time here. Fourthly, the issue between Mr. Hutcheson and MGN and ANL became academic, so that no more need be said of it.

4. In essence these proceedings concerned Mr. Hutcheson's application to restrain NGN from publishing information in the following categories:

   i) As to the fact of his relationship with Frances Styles;

   ii) As to the fact that he is the father of Christopher and Victoria (of whom more below);

   iii) As to Frances and their children (i.e., Christopher and Victoria) being Mr. Hutcheson's "second family".

5. I gratefully adopt, from the judgment, Eady J's concise summary of the factual background:

> " 10. The information in respect of which the Claimant seeks to maintain confidentiality falls within a very narrow compass. In 1968 he married a lady with whom he had four children, who are now grown up. The marriage still subsists. In the meantime, from about 1976 he developed a relationship with another woman with whom, in 1979 and 1981 respectively, he had two children. Obviously, they too are now adults. For many years, however, the Claimant managed to keep the information about his 'second' family secret, to a greater or lesser extent. How far he succeeded in this intention has been a matter of debate in the light of the limited evidence available. The position now is that, finally, all members of the Claimant's 'first' family are aware of the situation, although I am told that one of his daughters was only informed two or three weeks ago.

> She was told by her husband, who himself had known of the 'second' family only since the beginning of last year.
>
> 11. The Claimant's case is that the information is no more widely known than among his two families and that it is not 'public knowledge'. He says that he still has a reasonable expectation of keeping his 'second' family secret, in the sense that he should not be identified as being the father of the two children in question or as having had a relationship with their mother.
>
> 12. I need to explain how it is that the information has become of interest at this point and why *The Sun* newspaper wishes to make it public by way of an 'exclusive' story.
>
> 13. It so happens that the daughter who only found out recently about her father's 'second' family is married to the chef and businessman Gordon Ramsay. The Claimant was until recently associated with Gordon Ramsay in business. He was the chief executive of Gordon Ramsay Holdings Ltd and Gordon Ramsay Holdings International Ltd which, together with various subsidiaries, constitute the Gordon Ramsay Group. In October of this year [i.e., 2010], however, the Claimant was dismissed.
>
> 14. Since that time, there has been a very public slanging match between Gordon Ramsay and the Claimant in the columns of various newspapers. Each of them has been making unappetising allegations about the other. This has not been confined to business matters. I was shown, for example, an 'open letter' from Gordon Ramsay to the Claimant's wife in which he refers to her estrangement from her daughter (Mrs Ramsay) and her grandchildren and calls for a degree of reconciliation. On the other hand, the Claimant for his part puts the blame for the estrangement on Gordon Ramsay. "

6. As recorded by Eady J (judgment, at [15] – [16]), *The Sun* (part of NGN) wished to pursue an allegation, based on an unidentified "source", that Mr. Hutcheson was dismissed from Gordon Ramsay Holdings because he had been using company monies to fund his second family.

7. In the event, Eady J refused to grant the relief sought by Mr. Hutcheson. The learned Judge based himself on the well-established test, with which neither party could nor did take exception:

> " 5. …..it is clear that an applicant who seeks to restrain publication of personal information will need to approach the matter in two stages. First, it is necessary to demonstrate that he has a reasonable expectation of privacy in respect of the subject-matter in question, having regard to Article 8 of the European Convention on Human Rights and Fundamental

> Freedoms. If that hurdle is overcome, it next has to be shown that there is no countervailing public interest sufficient to outweigh his right to protect that information. At the second stage, the court will apply what has been termed 'an intense focus' to the particular circumstances of the case, in order to arrive at a determination of where the balance lies between the competing rights concerned…… "

8. As to the first issue, namely whether Mr. Hutcheson could persuade the Court that he had a "reasonable expectation of privacy" in respect of the information about his second family, the Judge's conclusion was as follows (at [36]):

> " 36. I would accept that article 8 is certainly engaged so far as concerns the Claimant and the members of both his families. Yet there is no question of intruding, by any proposed publication, into intimate matters internal to the 'second family' or to the Claimant's extra-marital relationship. It is a 'bare fact' case; that is to say, the court is concerned only with the bare fact of the familiar relationship……Factual information of that kind may sometimes involve a relatively low degree of intrusion. It may be reasonable to treat it discreetly, but that is not the same as enforcing a right to keep it secret *vis-à-vis* the right of another to exercise freedom of speech by referring to it. In the circumstances of this particular case, I would hold that there is, at this stage, no reasonable expectation of privacy as to the fact of the 'second family'. "

9. Strictly speaking, as Mr. Hutcheson had failed at the first hurdle, Eady J's conclusion – that there was no reasonable expectation of privacy as to the fact of the second family – was sufficient to decide the application adversely to him. Nonetheless, Eady J went on to consider the "ultimate balancing exercise" required at the second stage. Here, the Judge's conclusion, again adverse to Mr. Hutcheson, appears from the following paragraphs of the judgment:

> " 40. In the present case, ….[NGN]…wish to have the opportunity, in reliance upon their well placed source, to publish allegations relating to the supposedly true reason for the Claimant's dismissal from the Gordon Ramsay Group, which was said to involve his having misapplied corporate resources in some way connected with his 'second family'. That the newspaper is entitled to do subject, of course, as always, to the constraints of the law of libel. The Claimant cannot rely on the law of privacy to prevent that…..
>
> 41. Furthermore, I referred earlier to the Claimant's highly publicised attacks on Gordon Ramsay, both in relation to the way he runs his business and as to this supposed responsibility for the breakdown of relations between his wife and her parents. It seems that there may be another side to this, and that the estrangement may not be wholly unconnected with the Claimant's double life and Mrs Ramsay's recent discovery of

> the true position. The Claimant can hardly expect to have it all his own way and to use the court's processes to cover up the true position or to prevent Gordon Ramsay from responding to his allegations by using the full facts at his disposal. It can thus be readily understood, in this particular case, that it would be very difficult to draw hard and fast boundaries between 'zones' – whether business or familial in nature. According at least to this newspaper's source, the two seem to be intertwined."

10. Ultimately (at [42] of the judgment), the Judge observed that there was much in dispute and that it was impossible for the Court to come to a "definitive conclusion" as to where the truth lay regarding "these very public quarrels – relating, as they do, to both business and family matters". In the circumstances, Eady J posed the question, as required by s.12(3) of the Human Rights Act 1998 ("the HRA"), whether Mr. Hutcheson was "likely" to succeed at trial in establishing his entitlement to a permanent injunction; the Judge concluded that he was not so persuaded and therefore declined to grant the interim relief sought. Eady J said this (ibid):

> " I cannot say that it would be necessary or proportionate, either in the interests of the administration of justice or for the protection of the Claimant's legitimate expectations in respect of Article 8, to restrict the freedom of expression of any of these Respondents."

11. Relatively little needs to be added by way of factual outline. Nothing more need be said as to Mr. Hutcheson's "first family", save that, as is clear from the judgment, both his wife and the children of that family all already knew – by the time of the hearing before Eady J - of the information Mr. Hutcheson was seeking to restrain NGN from publishing.

12. So far as concerned Mr. Hutcheson's second family, a number of matters of relevance are in evidence and are conveniently mentioned here:

    i) Frances Styles at some time called herself "Mrs Hutcheson" and changed her name, by deed poll, to "Frances Hutcheson".

    ii) Although Mr. Hutcheson's name was not on the birth certificates of Christopher and Victoria, the children took his name. Subsequently, when Victoria married in the USA in 2007, her marriage certificate recorded Mr. Hutcheson as her "father/parent". Both the birth certificates and the marriage certificate are in the public domain.

    iii) Mr. Hutcheson provided financially for the "second family". In his evidence, he has said that he loved all his children immensely and was very proud of them. As to Christopher and Victoria, he had "played a full role in their upbringing". Subsequently, however, Mr. Hutcheson added that his relationship with Frances had been conducted "surreptitiously"; given his business commitments and the requirements of his first family, the amount of time he could spend with his second family was "greatly restricted". It followed that he had played a "much fuller role" in the upbringing of the children of his first family. He had, however, attended meetings at

> Christopher's and Victoria's schools, such as parents' evenings; those at the school knew him as Mr. Hutcheson but, he said, did not know that he had another family. When Christopher and Victoria had reached an appropriate age (about 10 to 12), it had been explained to them that he did not live with them because he had another family with whom he lived; thereafter, they had understood the need for "discretion". In short, having regard to living arrangements, social functions and holidays, he had "…publicly played the role of father to Christopher and Victoria on a very limited number and type of occasions…". No one who knew him in connection with the second family (other than the second family itself) knew of his first family – an essential matter if he was to keep knowledge of the second family from his wife and children of the first family. Likewise, apart from professional advisors and one other person, no one outside of the second family knew of its existence – until he began informing his first family of the second family's existence.

13. As to the impact of publication of the information, Mr. Hutcheson forthrightly made it plain that he was not concerned with the effect it would have on his own reputation. There would be some who would criticise his actions and think less of him; that, however, was of no concern to him. His concern lay elsewhere, with the distressing intrusion into the lives of his wife, Frances and the children. In that regard, however, all the evidence as to the impact of publication on members of his first and second families came from Mr. Hutcheson. There was no evidence from Mr. Hutcheson's wife, from Frances, or from any of his children.

14. Eady J referred in the judgment to the termination of Mr. Hutcheson's employment with the Gordon Ramsay Group. The letter of dismissal, addressed to Mr. Hutcheson and signed by Mr. Ramsay, was dated the 16th October, 2010 ("the letter of dismissal"). It spoke of a preliminary investigation into the Group which had revealed:

> " ….a number of serious instances of misconduct, including: misrepresentation, making false representations on insurance policies, accounting errors, misuse of the directors' loan account, personal use of company credit cards, failure to invoice for work done, mis-management of Group income and breaches of internal accounting procedures. The investigation has revealed serious breaches of the Group's internal policies and procedures, as well as contractual, fiduciary and statutory breaches. "

It further said that the misrepresentations made on the Group's insurance policies alone constituted gross misconduct and left Mr. Ramsay with "no option but to summarily dismiss" Mr. Hutcheson. In fairness to Mr. Hutcheson, it may be noted that there is no reference in the letter of dismissal to him using company monies to fund his second family.

15. The public "spat" which has followed the termination of Mr. Hutcheson's employment, played out by Mr. Ramsay and Mr. Hutcheson in the newspapers and as described by Eady J in the judgment, does not appear, at least on the evidence to which we have been taken, to reflect well on anyone concerned. Statements attributed to Mr. Ramsay contain what may be veiled references to Mr. Hutcheson's second

family. More importantly for present purposes, are remarks made by Mr. Hutcheson himself (as reported in *The Mail on Sunday*, 31st October, 2010). Mr. Hutcheson said that he did not know why Mr. Ramsay had turned on him; he:

> " …robustly denies any financial impropriety, admitting to using a company credit card and taking out loans but insisting everything was paid back. "

Mr. Hutcheson added that he had taken money out of the company – just as Mr. Ramsay would have done – but he had not used it "unethically, without anyone knowing, without accountants knowing or Gordon knowing". Mr. Hutcheson placed the blame for the rift on Mr. Ramsay – in the process of doing so, making a variety of personal criticisms of him - and spoke of the "impressive empire" they had built together. He also made reference to the support he had given Mr. Ramsay in keeping his marriage together when he (Mr. Ramsay) had been accused of "cheating" his wife (Mr. Hutcheson's daughter). Overall, Mr. Hutcheson claimed that he had been made a scapegoat for the Group's difficulties.

16. *The Sun's* position appears from a witness statement of a Mr. Pharo, its Head of News, dated 16th November, 2010. Mr. Pharo said this:

> " 10. On Wednesday 10 November 2010 one of the reporters in my team told me that he had spoken to one of his sources about the Claimant and the reasons for his dismissal from Gordon Ramsay Holdings. I cannot reveal the identity of the source because the information they had provided to the reporter was given on a confidential and/or 'off the record'….basis. However, I am aware of the identity of the source and can confirm that the source is a reliable and regular source, having provided us with information previously which has been accurate, reliable and resulted in published stories.
>
> 11. The reporter went on to tell me that during his conversation with the source, the source confirmed ….that the reason the Claimant was sacked from Gordon Ramsay Holdings was because it had been alleged that the Claimant had been using company monies to fund his 'second family'….."

Mr. Pharo explained (at para. 3) that he was making the witness statement rather than the reporter concerned, because he believed that if the reporter was identified it would reveal the identity of "the confidential source". Mr. Pharo spoke (at para. 13) of the public interest in the story being published quickly. He also – and frankly – emphasised the commercial interest of NGN in being free to publish the story, having spent time and money researching it and while it remained "a current matter of public debate". If not free to do so, he was concerned that the news value of the story would "perish" or that the information might be published elsewhere (perhaps outside the jurisdiction), thereby losing for NGN the exclusivity of the story.

THE LEGAL FRAMEWORK

17. Although, as has already been seen, this case is concerned with, by now, well travelled (if fast moving) areas of Arts. 8 and 10 of the European Convention on Human Rights ("ECHR") and s.12 of the HRA, it is worth taking a little time over the legal framework – essentially to articulate the position in which, with reference to the issues in the present case, the Court is placed when asked to grant pre-trial relief of this nature.

18. *(1) The provisions:* Art. 8 provides as follows:

> "Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

19. Art. 10 is in these terms:

> "Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…..
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

20. S.12, so far as here material, provides as follows:

> " Freedom of expression.
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

> …..
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or articstic material (or to conduct connected with such material), to –
>
> (a) the extent to which –
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

21. *(2) General statements:* So far as general statements are concerned, they serve to illuminate, first, the nature of the rights under consideration here; secondly, the inter-relationship between them; and, thirdly, the issue/s for decision.

22. I turn first to the judgment of Sir Anthony Clarke MR (as he then was) in *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481, at [24], helpfully summarising the principles stated by Lord Nicholls in his speech in *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, esp. at [12] – [22], as follows:

> " ….(i) The right to freedom of expression enshrined in article 10 of the Convention and the right to respect for a person's privacy enshrined in article 8 are vitally important rights. Both lie at the heart of liberty in a modern state and neither has precedence over the other….. (ii) Although the origin of the cause of action relied upon is breach of confidence, since information about an individual's private life would not, in ordinary usage, be called 'confidential', the more natural description of the position today is that such information is private and the essence of the tort is better encapsulated now as misuse of private information……(iii) The values enshrined in articles 8 and 10 are now part of the cause of action and should be treated as of general application and as being as much applicable to disputes between individuals as to disputes between individuals and a public authority…..(iv) Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy…..(v) In deciding whether there is in principle an invasion of privacy, it is important to distinguish

> between that question, which seems to us to be the question which is often described as whether article 8 is engaged, and the subsequent question whether, if it is, the individual's rights are nevertheless not infringed because of the combined effect of article 8(2) and article 10….. "

23. Another most helpful summary, encapsulating the learning from a number of authorities, is that found in the judgment of Maurice Kay LJ, in *Donald v Ntuli* [2010] EWCA Civ 1276; [2011] 1 WLR 294:

> " 10. Prior to the coming into force of the Human Rights Act 1998 the approach to cases such as this lacked coherence in domestic law. However, the basic principles of substantive law are now well settled. In *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para. 17, Lord Steyn extracted four propositions from *Campbell v MGN*….:
>
> > 'First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.'
>
> ……..
>
> 12. The authorities were rigorously reviewed by Buxton LJ in *McKennitt v Ash* [2008] QB 73 where he said, at para. 11:
>
> > 'in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If 'no', that is the end of the case. If 'yes', the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter inquiry is commonly referred to as the balancing exercise……' "

24. *(3) Art. 8:* In addressing the question of whether Mr. Hutcheson is entitled to assert a claim to privacy in respect of the second family, it is next helpful to highlight various features of Art. 8, beginning with the identification in the authorities of "private information as something worth protecting as an aspect of human autonomy and dignity": *Campbell v MGN Ltd (supra),* at [50]. The cause of action focuses upon (*ibid*, at [52]):

> " …the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

Picking up on the same theme in the context of a free society, Laws LJ said this in *R (Wood) v Comr of Police of Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123:

> " 21. The notion of the personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification…….an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image…..He is the presumed owner of these aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so.
>
> 22. This cluster of values, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual's liberty, is a defining characteristic of a free society. We therefore need to preserve it even in little cases. At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think there are three safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if article 8 is to be engaged) attain 'a certain level of seriousness'. Secondly, the touchstone for article 8(1)'s engagement is whether the claimant enjoys on the facts a 'reasonable expectation of privacy' …….Absent such an expectation, there is no relevant interference with personal autonomy. Thirdly, the breadth of article 8(1) may in many instances be greatly curtailed by the scope of the justifications available to the state pursuant to article 8(2)…… "

That, in the event, this judgment of Laws LJ was a dissenting judgment, is neither here nor there on the questions of principle canvassed in the passage cited.

25. It should further be noted that the mere fact that otherwise private information is known – and thus "public" - but within a limited circle of people, does not, without more, preclude a claim to prevent publication to the world at large.

26. As will be apparent, a complaint of misuse of private information is necessarily fact sensitive. That Art. 8 may be, in principle, applicable (or "engaged") does not by itself mean that there has been a breach of its provisions: *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, at [47], *per* Lord Hope. Further, the nature of the information requires careful consideration. There may, for instance, be a difference (both at this stage and when conducting the balancing exercise) between information

as to the *bare fact of a relationship* and information as to the contents or detail of that relationship: see, *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295; [2008] QB 103, at [57] *et seq*. Further still, evidence is required as to the Art. 8 rights of the individuals said to be affected; as Tugendhat J expressed it, in *Terry and Persons Unknown* [2010] EWHC 119; [2010] EMLR 16, at [65]:

> " Respect for the dignity and autonomy of the individuals concerned requires that, if practicable, they should speak for themselves."

27. There is no question of Art. 8 furnishing an *absolute* right to privacy. Art. 8.2 qualifies, in terms, the right conferred by Art. 8.1. The claims of privacy must of course also be read with the right to freedom of expression provided by Art. 10 (in this jurisdiction, to be read together with s.12 of the HRA). Moreover and, in my view, with respect, wisely, Laws LJ emphasised in *Wood (supra)*, at [22], that the purpose of the "safeguards" or "qualifications" to which he referred was to ensure that the "…core right protected by article 8….should not be read so widely that its claims become unreal and unreasonable".

28. *(4) Art. 10 and the balancing exercise:* Art. 10 enshrines another vitally important right in a free society, that of freedom of expression. It is unsurprising that the balancing exercise between the competing values of Arts. 8 and 10 may be difficult and necessarily requires an "intense" focus on the facts of the individual case. As US Appellate Judge and jurist, Richard A. Posner observed (in *How Judges Think*, 2008, at p.246):

> " ….when cases are difficult to decide it is usually because the decision must strike a balance between two legitimate interests, one of which must give way."

29. In the area of sexual conduct, the decision in *Terry (supra)* raises a question which (while it does not have to be resolved in this case) highlights the conflict or tension between these two competing fundamental rights. Against the background of Eady J having upheld, at trial, a claim to privacy in respect of sadomasochistic conduct in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777; [2008] EMLR 20, counsel in *Terry* (seeking an interim injunction in respect of information about an alleged adulterous relationship) appears to have submitted that the conduct of one person in private must be unlawful before another person should be permitted to criticise it in public. In a powerful passage, Tugendhat J disagreed, emphasising (at [99] *et seq*) the importance of public discussion and the freedom to criticise. Tugendhat J observed (at [101] and [104]):

> " It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have. That is not the issue. The issue is what the judge should prohibit one person from saying publicly about another…..
>
> …..
>
> …..There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever

> suggest that it ought to be. But in a plural society there will be some who would suggest that it ought to be discouraged…..Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being harmful or wrong….It is as a result of public discussion and debate that public opinion develops….."

See too, the thoughtful discussion in *Tugendhat and Christie, The Law of Privacy and the Media* (2nd ed.), at paras. 12.208 – 12.216, under the heading "plurality of opinion".

30. *(5) Prior restraints on publication:* In striking the correct balance, prior restraints on publication give rise to particular concerns. In this jurisdiction, elaboration is unnecessary; such concerns are given statutory force by the clear wording of s.12 of the HRA (set out above).

31. *(6) Burden of proof:* So far as the burden of proof is concerned, it is, in my judgment, unnecessary to take time over a somewhat theoretical discussion as to legal, evidentiary and shifting burdens. Suffice to say that it is for the applicant for interim relief to make out the case of an infringement of his Art. 8 rights and for the respondent to raise a case of freedom of expression under Art. 10. But, ultimately, in a matter such as this, it is plain that the burden rests on the applicant to satisfy the requirements of s.12(3), HRA, or fail.

32. *(7) Appeals:* Throughout this case, I have been very mindful that we have not been hearing it *de novo* but on appeal, for that matter, from the decision of a vastly experienced Judge in this field. As it seems to me, this Court should be slow to interfere with the Judge's assessment in a case such as this and should not do so unless persuaded that the Judge has gone wrong. Insofar as this approach has been articulated in somewhat varying terms (cf. *Browne, supra,* at [45] on the one hand and *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804 at [49], together with *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] EMLR 15, at [26] on the other), these formulations, with respect, appear more to reflect theoretical distinctions than to give rise to practical differences.

33. *(8) Pulling the threads together:* The foundation for the application for an interim injunction in cases of this kind is the (alleged) infringement of *privacy*. By contrast with the law of defamation (perhaps more familiar, at least to common lawyers), the fact that the information is true is, of itself, no bar to the obtaining of an injunction; instead and often, if not invariably, the fact that the information is true is the reason why injunctive relief is sought.

34. To some, applicants in privacy claims may seem unattractive. However, to others, intrusive media coverage of matters of sexual conduct, particularly if it includes salacious detail, may be equally unattractive. That said, for sections of the media, developments in privacy law impinging on their ability to publish such matters, may not only give rise to issues of principle as to freedom of expression in the individual case but also to real commercial concerns - which, at least to the extent of the general public interest in having a thriving and vigorous newspaper industry, representing all

legitimate opinions, may also be argued to give rise to a relevant factor for the court to take into account.

35. To grapple with such issues, the Court can only have recourse to the legal framework discussed above. The starting point must therefore be the right to privacy, keeping well in mind that it is not for the Judge to impose whatever personal views he or she might have: *Terry, supra,* at [101]. That right must not, however, be read so widely that its claims become unreal and unreasonable: *Wood, supra,* at [22]. The Judge must in any event balance the claim to privacy (if the Art 8 right is *prima facie* infringed) with the equally fundamental Art. 10 right to freedom of expression, in the public interest and including the freedom to criticise: *Terry, supra,* at [104]. When considering interim injunctions (and, so, prior restraint on publication), s.12 of the HRA provides what might be termed a statutory steer, which it is incumbent on the Court to follow. How the Court strikes the balance in any particular case will, necessarily, be fact specific. Thus guided, I turn to the central issues in dispute on this appeal, under the convenient headings of: (1) Art. 8; and (2) the balancing exercise.

ART. 8

36. *(1) The rival cases:* For Mr. Hutcheson, Mr. Tomlinson QC submitted that the Judge had fallen into error at [36] of the judgment. The Judge's finding that Art. 8 was "engaged" determined that there was a reasonable expectation of privacy – and thus that Art. 8 would be infringed by publication. All that remained was the balancing exercise (Art. 10) and the question of pre-trial relief (s.12). A sexual relationship was "close to the core of private information"; keeping it private was a choice Mr. Hutcheson was entitled to make and the fact that it was necessarily known to a small circle of people did not mean that he could not seek to prevent tabloid publicity. That Mr. Hutcheson's conduct might be regarded as "morally blameworthy" was neither here nor there.

37. For NGN, Ms Page QC submitted that there had been no error on the part of the Judge. He had been entitled to treat the engagement of Art. 8 and the question of a reasonable expectation of privacy as two distinct questions. In any event, the criticism of the Judge in this regard was semantic only and lacking in merit. As Ms Page put it in her skeleton argument:

> " Thus in this case Article 8 is clearly 'engaged' in the sense that Article 8 is applicable; the fact of the second family is a fact relating to the Appellant's family life. But that provides only limited assistance on the question whether Article 8 is 'engaged' in the sense that the Appellant has a reasonable expectation of privacy in relation to that fact, such that publication of it in a newspaper requires special justification."

As to whether there was a reasonable expectation of privacy, the Judge had been right; this was a "fact of relationship" case. There were a variety of public incidents attaching to that relationship, going to the birth and marriage certificates already mentioned, together with Mr. Hutcheson's own evidence as to active parenthood. In any event, the essential reason for privacy had gone: his wife and the children of his first family now knew of the second family. There was an important distinction

between not wanting publicity and having a reasonable expectation of privacy, such as to justify intervention on the part of the Court.

38. *(2) Discussion:* For my part, I do not think that the criticism based on Eady J's approach is well-founded; in any event, it is, at most, semantic. Art. 8 may be "engaged" in the sense that information relates to family life without it necessarily following that there is a reasonable expectation of privacy in the information in question: see, *Harrow LBC v Qazi (supra)*. While it may often be as or more convenient to treat the question of the "engagement" of Art. 8 as encompassing the question of its infringement as well, the Judge cannot be faulted for approaching the issue in stages. To such extent at least, I am unable to accept Mr. Tomlinson's submissions.

39. The critical question under this heading, however, is whether Mr. Hutcheson had a reasonable expectation of privacy in respect of the information he has sought to restrain NGN from publishing. As will be recollected, at [36] of his judgment, Eady J held that there was no such expectation, underlining that this was a "bare fact" case.

40. There is, it may be said, force in Mr. Tomlinson's submission, arising both from the sexual and family nature of the relationship, together with the fact that for decades the existence of the second family has remained "secret". That a limited number of people knew of it does not, as already underlined, equate to *carte blanche* for the tabloids, or for any other section of the media. That said, the Art. 8 issue in the present case is not straightforward. First, this is a "bare fact" or "fact of the relationship case". Secondly, there is the unavoidably public nature of certain aspects of the life of the second family. Thirdly, the knowledge the first family now has of the second family has removed at least much of the rationale for a claim to privacy.

41. In the circumstances and given the view which I take on the balancing exercise (see below), it is, in the event, unnecessary to reach a conclusion as to whether Mr. Hutcheson has made good the first limb of his case – namely, that the information is, in principle, protected by Art. 8. I am content instead to proceed by *assuming*, without deciding, that the information is so protected. I add only this; had I reached the conclusion that the information was protected by Art. 8, given the countervailing arguments already flagged, this conclusion would at most have been of a borderline nature. I turn to the balancing exercise.

THE BALANCING EXERCISE

42. *(1) The rival cases:* Mr. Tomlinson focused on the Judge's key conclusions, at [40] – [41] of the judgment (set out above). The first, at [40], related to the allegation of misconduct; namely, Mr. Hutcheson's alleged use of company monies to fund his second family. That allegation depended on hearsay material from an anonymous source. This was an insufficient foundation for a serious allegation and lacked plausibility, especially when contrasted with the letter of dismissal (set out above) – where no such allegation was advanced, despite a good many others being averred. So far as concerns the Judge's reasoning at [41] of the judgment, it was all too speculative; moreover, Mr. Ramsay could not (as Mr. Tomlinson put it) be described as "backward in coming forward". It followed, Mr. Tomlinson submitted, that the balancing exercise involved a manifestly private relationship on the one hand with a very speculative claim to publication in the public interest on the other. On this

footing there could be only one possible outcome at trial and Mr. Hutcheson's application for interim relief satisfied the requirements of s.12.

43. The foundation of Ms Page's submissions was the public interest in the exposure of wrongdoing. NGN could not be restrained from publishing an allegation that Mr. Hutcheson had been dismissed from the Gordon Ramsay Group for diverting funds to private purposes; but that would be an allegation shorn of content. NGN needed to publish the fact of the second family to authenticate the allegation made to it by the confidential source. That allegation sufficed, on its own, to justify publication and prevent Mr. Hutcheson satisfying the requirements of s.12. The letter of dismissal did not suggest otherwise; it reflected a preliminary investigation only and identified general headings of misconduct without underlying particulars. In any event, the allegation made by the source did not stand on its own. Publication was justified in the public interest, as Eady J held at [41] of the judgment, to ensure that the public was not misled. The publicity generated by Mr. Hutcheson (and Mr. Ramsay) in pursuing their dispute was such as to make it wrong and artificial to prohibit publication of the fact of the second family; an injunction would risk the presentation of a distorted picture to the public.

44. *(2) Discussion:* As already recounted, after conducting the balancing exercise, Eady J concluded that it was neither necessary nor proportionate to restrict NGN's freedom of expression. The Judge was not persuaded that Mr. Hutcheson was likely to succeed at trial in establishing his entitlement to a permanent injunction, so that he failed to satisfy the test furnished by s.12(3) of the HRA. In my judgment, Eady J was right; at all events, these were conclusions to which Eady J was amply entitled to come. Accordingly, I am of the clear view that, even assuming the information to be protected in principle by Art. 8, this is not a case in which this Court should interfere with the decision reached by the Judge. My reasons follow.

45. First, I begin with a focus on the public interest in publication of the fact of Mr. Hutcheson's second family. I have already referred to the very public dispute between Mr. Ramsay and Mr. Hutcheson, much ventilated in the media. To my mind, those who choose to conduct their quarrels in such a fashion take the risk that they may not be able to insist thereafter on clear boundary lines between what is public and what is private – regardless of whether they were, hitherto, only public personalities in a very limited sense. In the present case, as it seems to me, there is a very real risk of a distorted and partial picture being presented to the public of this dispute, were an injunction to be granted as sought by Mr. Hutcheson. With respect to Mr. Tomlinson's submissions, there is nothing speculative about this conclusion; the tenor of Mr. Hutcheson's press interview of the 31st October, 2010 speaks for itself. The Judge's conclusion at [41] of the judgment, that business and family matters had become intertwined, cannot be faulted; on any view, that was a conclusion the Judge was entitled to reach and it suffices to demonstrate a powerful interest in publication.

46. Matters do not, however, end there. I turn next to the allegation of wrongdoing involving the misuse of company monies to fund the second family. In this regard, Mr. Hutcheson's case effectively requires the allegation said to emanate from NGN's source to be disregarded. To my mind, it was, at the least, open to the Judge to reject such an approach, as he did at [40] and [42] of the judgment. Wealthy man though Mr. Hutcheson no doubt is or was, it stands to reason that supporting two families will cost more than supporting one. It is, furthermore, common ground that Mr.

Hutcheson *did* use company funds for private purposes, albeit he maintains that no wrongdoing was involved and that the monies were repaid. The fact that such an allegation was not expressed in the letter of dismissal is admittedly of some help to Mr. Tomlinson – but not, in my view, of much help. To put it no higher, the letter of dismissal followed a preliminary investigation and contained a variety of relatively generalised allegations; in such circumstances, the absence of a specific allegation as to the funding of Mr. Hutcheson's second family does not give rise to any particular inference that there is no substance in the allegation. Contrary to Mr. Tomlinson's submissions and in agreement with the Judge's views, I do not think it can be said at this stage where the truth ultimately lies; in those circumstances, it seems to me that there is a public interest in NGN being free to publish the fact of Mr. Hutcheson' second family to authenticate the allegation of diversion of corporate funds for private purposes. In doing so, NGN is obviously subject to the law of defamation, should the allegation turn out to be unfounded - but that is irrelevant in these proceedings, save that it tends to suggest that NGN is prepared to back Mr. Pharo's confidence in the source.

47. Secondly and as earlier foreshadowed, assuming without deciding that Mr. Hutcheson did have a reasonable expectation of privacy as to the information in question, the claim to privacy was, at best, a claim of the borderline variety. In this regard:

i) Mr. Hutcheson has effectively discounted his own claim to privacy; the claim essentially turns on the impact of publication on his wife, Frances and his children (of both families).

ii) That being so, it is noteworthy that there is no evidence whatever from any family members (first or second) in support of the claim for injunctive relief. As Tugendhat J observed in *Terry (supra)*, at [65], if practicable, the family members should have spoken for themselves; there is no explanation before this Court as to why they have not done so here, save for the valiant submission from Mr. Tomlinson that it may have been attributable to pressure of time, given the speed with which this application came before Eady J. On any view, if timescale was the problem, an application could have been made subsequently for such evidence to be introduced.

iii) It might have been supposed that the basis for a claim to privacy in Mr. Hutcheson's situation would be that the first family did not know about the second family. That basis is, however, no longer open to Mr. Hutcheson. All members of the first family now know. The second family have of course known about the first family for many years.

iv) Mr. Hutcheson's evidence (summarised above) betrayed a tension between his understandable desire to portray himself as a responsible parent to both families and his appreciation that active parenthood in the case of the second family led inescapably to underlining the public nature of his role in that regard. The reality is that there was a public dimension to the existence of the second family which could not be gainsaid. As earlier acknowledged, that dimension did not of itself mean that NGN was free to publish the fact of the second family to the world at large but it is a factor to be weighed in the balance.

48. Thirdly, for the reasons already given, this case involved a strong claim to freedom of expression in the public interest, against which there was, in the balance and, at best, a tenuous claim to privacy. Realistically, there was, at the least, a very real likelihood that Mr. Hutcheson would fail at trial. Against this background, the manner in which Eady J struck the balance (at [42] of the judgment) is, to my mind, unexceptionable; so too was his conclusion as to s.12(3), HRA. For my part, I agree with these conclusions of Eady J but, as already underlined, it suffices that these were conclusions to which he was amply entitled to come. There is an important distinction between the desire to keep information private and invoking the full panoply of the Court's jurisdiction in order to do so. It is and should remain a strong thing to impose a prior restraint on publication. Accordingly, I was of the view that this appeal should be dismissed.

49. For completeness, I record that Ms Page advanced further arguments pursuant to her Respondent's Notice, going to "responsible journalism" and the allegation that the nub of this claim involved an attempt by Mr. Hutcheson to protect his reputation. It is unnecessary to express any views on these submissions and I do not do so.

LORD JUSTICE ETHERTON:

50. I agree with Gross LJ that, even if the information which Mr Hutcheson seeks to restrain NGN from publishing is in principle protected by Art. 8 (which it is not necessary to decide), the appeal should nevertheless be dismissed. It should be dismissed because, for the reasons so clearly and cogently articulated by Gross LJ in paragraphs [45] to [48] of his judgment, Eady J was correct in his conclusions that it was neither necessary nor proportionate to restrain NGN's freedom of expression and that Mr Hutcheson failed to satisfy the test in the HRA s. 12(3), or at any event those were conclusions which Eady J was entitled to reach.

THE MASTER OF THE ROLLS:

51. For the reasons given by Gross LJ, I would also dismiss this appeal.