Neutral Citation Number: [2007] EWHC 1908 (Ch)

Case No: IHC 168/07
HC05C01669

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2007

Before :

MR JUSTICE PATTEN

- -

Between :

DAVID MURRAY (by his litigation friends NEIL MURRAY and JOANNE MURRAY)	**Claimant**
- and -	
(1) EXPRESS NEWSPAPERS plc (2) BIG PICTURES (UK) LIMITED	**Defendant**

- -

- -

Mr Richard Spearman Q.C and **Mr Godwin Busuttil** (instructed by **Schillings**) for the **Claimant**
Mr Mark Warby Q.C and **Mr Jonathan Barnes** (instructed by **Solomon Taylor & Shaw)** for the **Second Defendant**

Hearing dates: 20,21 and 22 June 2007

- -

Judgment

Mr Justice Patten :

Introduction

1. The Claimant is the infant son of his litigation friends, Dr Neil Murray and Mrs Joanne Murray (who is better known as J.K Rowling, the author of the Harry Potter series of books). He was born on 23 March 2003. His parents also have a daughter, Mackenzie, who was born on 23 January 2005 and Mrs Murray has a daughter, Jessica, by a previous marriage who was born on 27 July 1993.

2. The Second Defendant, Big Pictures (UK) Limited ("BPL") carries on the business of a photographic agency and licences photographs it has taken or acquired from members of the public for use both in the UK and internationally. The images can be ordered by telephone or from an online catalogue which it operates.

3. On 7 November 2004 a colour photograph was taken by BPL of the Claimant and his parents in a public street in Edinburgh. It shows him being pushed along in a buggy by his father with his mother walking alongside. At the time the photograph was taken she was pregnant with her daughter Mackenzie. The photograph shows the Claimant's face in profile, the clothes he is wearing, his size, the style and colour of

his hair and the colour of his skin. It was taken covertly by a photographer using a long range lens. The Claimant and his parents were unaware that the photograph was being taken and did not give their consent.

4. On 3 April 2005 the photograph appeared in the Sunday Express magazine published by the First Defendant accompanied by the headline "My Secret" and the text of a quotation attributed to the Claimant's mother in which she sets out some thoughts on her approach to motherhood and family life. The accuracy of the quotation is not disputed but the pleaded case is that it related to Jessica, was made several years earlier and was not provided for publication in that edition of the Sunday Express or in conjunction with the photograph.

5. On 24 June 2005 the Claimant issued proceedings against the Defendants seeking an injunction to restrain further publication of the photograph or any other or similar photograph of him taken without his consent and for damages or an account of profits for breach of confidence, the infringement of his right to privacy and the misuse of private information resulting from the taking, recording, holding and publication of the photograph. There is also an alternative claim for relief under the Data Protection Act 1998.

6. The First Defendant has compromised the claim against it and the action continues only against BPL. Despite attempts to settle it, the claim has continued and I think it is fair to say that it is seen by the Claimant's parents as something of a test case designed to establish the right of persons in the public eye (such as the Claimant's mother) to protection from intrusion into parts of their private or family life even when they consist of activities conducted in a public place.

7. The case is unusual in that the Claimant himself is a child who was less than two years' old when the photograph was taken and is not alleged to have suffered any individual distress from the taking of it. It is obvious that he is not in any sense a public figure and that he was only photographed because of the identity of his mother. The issue for the Court in these proceedings and most of the argument on this application is centred on the degree of protection which someone who is well known or of public interest is entitled to in respect of their private family life. The reality of the case is that the Claimant's parents seek through their son to establish a right to personal privacy for themselves and their children when engaged in ordinary family activities wherever conducted.

The application

8. The pleadings in the action are now closed and orders were made at a CMC in March for disclosure and the exchange of witness statements. However, on 7 March 2007 BPL issued an application seeking summary judgment in the action or alternatively an order striking out the claim under CPR Part 3.4 on the ground that the statement of case discloses no reasonable grounds for bringing the claim. Master Moncaster gave directions for the application on 28 March 2007. For BPL to succeed on its strike out application it has to show that the facts as pleaded do not disclose any legally recognised claim against it and for that reason that the Claimant's case has no real prospect of success. The application for summary judgment under CPR Pt 24 raises essentially the same issue.

9. There are, of course, obvious disadvantages in seeking to resolve proceedings of this kind short of a trial. The matters relied upon by the Claimant in his statement of case as founding his claim to privacy include factual assertions which are in issue. Similarly, BPL has raised various defences denying its responsibility for the publication of the photograph in the Sunday Express and in the alternative seeking to justify the taking of the photograph and its subsequent publication as a legitimate piece of journalism necessary for the maintenance of a well informed and interesting press.

10. Issues such as responsibility for publication can only be resolved at the trial. Similarly, the Court is being invited to form a view about the Claimant's prospects of success in the action based on what are currently assumed facts about the way in which his parents have sought to protect their children and their family life from the publicity which has attended his mother as an author. It may be that at a trial of the action facts will emerge which give a different picture of the position of the Claimant and his family or which in any event exculpate BPL. But Mr Warby Q.C on behalf of BPL contends that even if the trial establishes all the facts and other matters relied upon by the Claimant in his statement of case (so that the case can be put at its highest) there has been no interference with his rights to privacy or any abuse of confidence and no breach of duty under the Data Protection Act.

11. Mr Spearman Q.C on behalf of the Claimant was resistant to this attempt to resolve the issues in the action at this stage but did not press his opposition to the point of submitting that I should reject the application out of hand simply on procedural grounds. Both sides have submitted detailed skeleton arguments on the law and I believe that I am as well placed as the trial judge will be to decide whether the Claimant has on the authorities as they now stand, a reasonable prospect of securing the relief he seeks assuming that the facts as pleaded are made out. BPL's case (at least on privacy and breach of confidence) is essentially that the English courts have refused to recognise the right to an individual not to be photographed in a public place absent some other special circumstance such as harassment, distress caused to a child, or the disclosure through the photograph of some private or confidential information notwithstanding that the picture was taken in a public place. Absent special circumstances of this kind there is, they say, no reasonable expectation of privacy or if it exists nothing which effectively outweighs the rights of BPL or the press to freedom of expression. But in terms of the authorities, the issue is whether and to what extent the application of the principles set out by the House of Lords in *Campbell v MGN Limited [2004] 2 AC 457* need to be re-considered or amended in the light of the more recent Strasbourg jurisprudence and in particular the decisions of the ECHR in *Von Hannover v Germany [2004] EMLR 21* and *Sciacca v Italy (2006) 43 EHRR 20.*

12. One argument which sometimes surfaces in relation to the trial of issues of law on an interlocutory basis is that the judgment should be deferred until after a full trial because of the difficulty of applying the principles of a developing part of law to a set of assumed facts. In the case of an application for summary judgment under CPR Part 24 the existence of unresolved factual issues may in itself be an answer to the application. But in this case it is difficult to see how oral evidence would assist the Court to decide whether the taking of the photograph was or was not a breach of the Claimant's rights if it did no more than to confirm the facts pleaded in the Particulars of Claim. On the more limited basis on which this application is made I would not be

assisted by such evidence. The only purpose of a trial would be to enable BPL to substantiate its own pleaded case. In these circumstances, the Court has to apply the law as it sees it to the facts on which the Claimant relies. There is nothing to suggest that the principles to be applied will change materially between now and a trial and BPL is, I think, entitled to test the Claimant's case as a matter of law on the basis of how things now stand. In the recent case of *HRH The Prince of Wales v Associated Newspapers Ltd [2007]3 WLR 222* the Court of Appeal felt able to determine the Prince's claim to confidentiality in his journals under CPR Part 24 by applying the law to largely uncontested facts. Although the facts in this case have to be assumed to be true it is open to me at least under CPR 3.4 to adopt the same approach.

The facts

13. I have already set out the basic facts as pleaded, but there are a number of additional matters set out in the Particulars of Claim which have to be brought into account as part of the assumed basis for the claim. They can be summarised as follows:

i) The Claimant's mother has achieved enormous success and wealth from the hugely popular series of Harry Potter books together with the films of those novels and associated merchandising;

ii) The Claimant's mother accepts that as a result of this there will be curiosity and even a measure of legitimate interest on the part of the media and the general public in her activities and her appearance;

iii) In contrast to (ii) above the Claimant's parents since his birth have never sought to place the Claimant's family as a unit or his siblings as individuals in the public eye but have repeatedly and consistently taken steps to secure and maintain the privacy of the Claimant and their other children in which they have been substantially successful. In particular, the children have never been taken to events such as a book launch at which they would have been exposed to public view and to media and other publicity;

iv) The Claimant's mother has not placed any photograph of any of her children on her website or provided any such photograph for publication;

v) The Claimant's mother has never discussed details of her private life or those of her family in any interview;

vi) Only three photographs of Jessica have appeared in the media and none of these was authorised by the Claimant's parents. In the case of one of the photographs (taken on a beach in Mauritius) the Claimant's mother made a complaint to the Press Complaints Commission (PCC) which was upheld by a decision of the PCC as a breach of Cl.3 of the Code; and

vii) Notwithstanding this, not only the Claimant's mother but also the rest of the family have been subjected to continual and repeated attention by the media and members of the public. This is unwelcome and threatens in future to involve either a direct or indirect interference with the Claimant's private life in particular because his mother becomes upset while she is out on the street

and is photographed with her children and her children also become upset either on their own account or because she has become upset.

14. Mr Warby emphasises as part of his application a number of what he says are significant omissions from the Particulars of Claim; (1) no particular act of an intimate or private nature is said to have been depicted; (2) the photograph is not said to have portrayed any particular physical feature of the Claimant; (3) no reliance is placed on the fact that the Claimant is or was a child, nor is his infancy said to give rise to any particular sensitivities or vulnerabilities relevant to the claim; and (4) no allegation is made of any actual upset caused at the time of the photograph to the Claimant or either of his parents and no claim is made by the Claimant in respect of upset caused to himself or to his parents.

15. So far as this last point is concerned, it is accepted by the Claimant that he was not himself upset by the taking of the photograph or by its subsequent publication and cannot in any event claim for any upset caused to others. But this, I think, highlights the somewhat artificial nature of a claim by a child in relation to the issues of breach of confidence and privacy. Very young children are likely to be oblivious to the taking of photographs unless they are taken at very close range and in a way which causes the child actual fear and distress. This is not what this case is about. It is not based on distress or harassment caused to the Claimant. The issue of principle is whether the Claimant who is not a public figure in his own right but is the child of one, is entitled to protection from being photographed in a public place even where a photograph shows nothing embarrassing or untoward but in which he is shown depicted with his parents. Looked at from the perspective of his parents and in particular his mother the question is, as I stated earlier, whether someone who is well known or a public figure, is entitled to a measure of protection in respect of their ordinary family life even when conducted in a public place. If such a right is established, then it must in my opinion extend not only to the adult individual but also to the infant and dependant members of his or her family and be enforceable equally by each of them. This approach is, I believe, consistent with the Court's duties towards the Claimant as a child. In relation to under age children the Court has to make assumptions and a judgment as to what measure of protection they are entitled to having regard to the way in which they have been brought up; the way they have led their lives under the control of their parents and any other relevant circumstances. The fact that they are children is obviously important in itself and Mr Spearman has rightly stressed the Claimant's status as a child and its recognition (eg) in the Press Complaints Commission Code and in the 1990 United Nation's Convention on the Rights of the Child with its emphasis on the need for the state and its institutions to protect the child from unlawful interference with his or her privacy, family and home: see UNCRC Art.16.

16. But one needs, I think, to differentiate between the case where the child has for medical or some other personal reasons come to the knowledge of the general public and for those very reasons may be particularly vulnerable to harm from intrusive press exposure and the much more ordinary case (such as the present one) in which the child comes into focus largely if not exclusively by being in the company of his or her much more famous parents. Even in cases of this kind the Court is bound to have regard to any particular harm (actual or prospective) which the child may suffer from having his image publicly displayed. But in most such cases (and on the pleadings

this is no exception) the child will have suffered no upset or harm. The purpose of the claim will be to carve out for the child some private space in relation to his public appearances.

17. For this reason it is difficult to see how in the converse case a famous parent who chooses to exploit his children to gain personal publicity could avoid publication of photographs taken of his children in a public place simply by resorting to the device of making that child the Claimant. There is an obvious argument that the reasonable expectations of a child in respect of his or her privacy cannot be wholly divorced from the wishes and actions of its parents and the Court has to look at all the relevant circumstances in the round when deciding what degree of protection to enforce. This is, I think, recognised in this case from the express reference in the Particulars of Claim to the degree to which the Claimant's mother has taken steps to keep her children out of the limelight.

The English authorities

18. It is, I think, common ground that before the coming into force of the Human Rights Act 1998 English law did not recognise any right of confidentiality or privacy in relation to a person's appearance in a public place. The decision of the House of Lords in *Wainwright v Home Office [2004] AC 406* establishes that there is no general tort or cause of action for invasion of privacy and that the Court has instead concentrated on the development of existing causes of action such as breach of confidence and the absorption into them of the rights protected by Arts. 8 and 10 of the European Convention of Human Rights as part of its duty as a public authority to give horizontal effect to convention rights.

19. The speeches of Lord Nicholls and Lord Hoffmann in the case of *Campbell v MGN Ltd [2004] 2 AC 457* trace this development of the action for breach of confidence from its source in the protection of confidential information from disclosure by those in an intimate or confidential relationship to the imposition of a duty of confidence on any person who receives information which he knows or ought to know is fairly and reasonably to be regarded as confidential: see *AG v Guardian Newspapers Ltd (No 2) [1990]1 AC 109 at p.281.*

20. The incorporation of convention values into this branch of the law widens the focus of the cause of action to include private information which would never have been regarded as confidential by a court of equity in the days of *Prince Albert v Strange (1849) 2 De G & Sm* or even those of *Coco v AN Clark (Engineers) Ltd [1969] RPC41.* Conduct, however intimate or embarrassing, in a public place is not as a matter of ordinary language confidential, not least because it takes place in circumstances which could never have been expected or perhaps intended to be secret. The Courts have therefore had to recognise that they are not protecting information with a personal or industrial value but are imposing limitations on the publication of events which were visible to any member of the public who happened to be around at the time. In the case of confidential information properly so called, the starting point is the confidential nature of the information itself which requires a justification for its disclosure. In the case of allegedly private information consisting of public conduct, the ultimate issue for the court is whether any restraints should be imposed on the wider dissemination of what begins as public information.

21. Lord Hoffmann in *Campbell* analysed these developments in this way:

> "***50*** *What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state-I have particularly in mind the position of the media, to which I shall return in a moment-but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter.*
>
> ***51*** *The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in* Douglas v Hello! Ltd *[2001] QB 967, 1001, the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon 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.*
>
> **52** *These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified."*

22. The starting point has to be to identify the test for determining whether the conduct complained of has engaged Art. 8 at all. As Lord Nicholls points out in *Campbell* this question is logically prior to the balancing exercise and the issues of proportionality which follow when reliance is placed by the Defendant on either Art. 8 (2) or Art. 10. The House of Lords has opted for the test of whether the complainant had a reasonable expectation of privacy in respect of the disclosed facts whether pictorial or literal. Lord Nicholls set this out in paragraphs 21 – 22 as follows:

> " "***21*** Accordingly, in deciding what was the ambit of an individual's "private life" in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the

> disclosed facts the person in question had a reasonable expectation of privacy."
>
> ***22*** Different forms of words, usually to much the same effect, have been suggested from time to time. The American Law Institute, Restatement of the Law, Torts, 2d (1977), section 652D, uses the formulation of disclosure of matter which "would be highly offensive to a reasonable person". In Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 226, para 42, Gleeson CJ used words, widely quoted, having a similar meaning. This particular formulation should be used with care, for two reasons. First, the "highly offensive" phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the "highly offensive" formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion."

Lord Hope in his speech (at paragraphs 99-100) emphasised the objective nature of the test by contrast to the position taken by the Court of Appeal:

> *"**99** The approach which the Court of Appeal took to this issue seems to me, with great respect, to be quite unreal. I do not think that they had a sound basis for differing from the conclusion reached by the trial judge as to whether the information was private. They were also in error, in my opinion, when they were asking themselves whether the disclosure would have offended the reasonable man of ordinary susceptibilities. The mind that they examined was the mind of the reader: para 54. This is wrong. It greatly reduces the level of protection that is afforded to the right of privacy. The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.*
>
> ***100*** *In P v D [2000] 2 NZLR 591 the claimant was a public figure who was told that publicity was about to be given to that fact that he had been treated at a psychiatric hospital. In my opinion the objective test was correctly described and applied by Nicholson J, at p 601, para 39, when he said:*
>
> *"The factor that the matter must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities prescribes an objective test. But this is on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position, that is, in*

> *the context of the particular circumstances. I accept that P has the stated feelings and consider that a reasonable person of ordinary sensibilities would in the circumstances also find publication of information that they had been a patient in a psychiatric hospital highly offensive and objectionable."*
>
> *That this is the correct approach is confirmed by the Restatement, p 387, which states at the end of its comment on clause (a) of section 652D: "It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises." (Emphasis added.)*"

23. This test cannot, of course, be applied to a child of the Claimant's age who has no obvious sensitivity to any invasion of his privacy which does not involve some direct physical intrusion into his personal space. A literal application of Lord Hope's words would lead to a rejection of any claim by an infant unless it related to harassment of an extreme kind. A proper consideration of the degree of protection to which a child is entitled under Art. 8 has, I think, for the reasons which I gave earlier to be considered in a wider context by taking into account not only the circumstances in which the photograph was taken and its actual impact on the child, but also the position of the child's parents and the way in which the child's life as part of that family has been conducted. This merely reinforces my view about the artificiality of bringing the claim in the name of the child. The question whether a child in any particular circumstances has a reasonable expectation for privacy must be determined by the Court taking an objective view of the matter including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private. Ultimately it will be a matter of judgment for the Court with every case depending upon its own facts. The point that needs to be emphasized is that the assessment of the impact of the taking and the subsequent publication of the photograph on the child cannot be limited by whether the child was physically aware of the photograph being taken or published or personally affected by it. The Court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing.

24. Mr Warby's primary submission is that this case does not get over the first stage by establishing that there was a reasonable expectation of privacy in respect of the event that was photographed. His fall back position is that even if there is enough to engage Art. 8 the case is not strong enough to outweigh BPL's rights to freedom of expression. In this connection he has referred to the decision of the House of Lords in *Re S (A child) (Identification: Restrictions on Publication)[2005] 1 AC 953* in which Lord Steyn (at para 17) emphasized that the convention values enshrined in Arts. 8 and 10 are to be accorded equal weight and value and when in conflict require there to be what he describes as an intense focus on their comparative importance in the particular case.

25. In some of the earlier English authorities involving the taking of photographs of a child in a public street, the Courts have regarded the infringement of the Claimant's Art. 8 rights as minimal or even non-existent having regard to where the photographs were taken. An example is the unreported decision of Connell J in *MGN Ltd v Attard (19 October 2001)* which concerned the publication of photographs of the survivor of

conjoined twins who was at the time only one year old. The photographs were taken in a street in Malta but followed the earlier publication of photographs and press articles based on interviews which the child's parents gave in order to raise money for her care. Connell J said that he considered that the photograph constituted at best a minimal breach of the right to privacy given the innocuous nature of the photographs and the fact that they would not enable the reader to make a subsequent identification of the child. But he also expressed doubts as to whether Art. 8 was engaged at all given the public nature of the area where they were taken.

26. If one needed a simple rule capable of easy application then the distinction based on whether the photograph was taken of the Claimant in a public or private place might have much to recommend it. However, the decision of the House of Lords in *Campbell* has confirmed that the engagement of a Claimant's Art. 8 rights cannot be conclusively determined on that basis. The photographs taken of Naomi Campbell in Chelsea showed her in the street outside the building where she had attended a meeting of Narcotics Anonymous. But the fact that they were taken in a public place did not prevent the majority of the House ruling that they constituted an invasion of her Art. 8 rights. That conclusion was reached by taking into account the additional information conveyed in some of the photographs and the accompanying text: namely that she was undergoing treatment for drug addiction. This factor was held to differentiate the claim from what might have been the case had the photographs depicted Ms Campbell on a more banal errand such as a shopping expedition. It therefore demonstrates that the mere fact that the activity photographed takes place in a public place is not determinative of the issue.

27. This case does not, of course, contain any of the additional elements of the kind that featured in *Campbell*. The Claimant was being pushed along by his father and mother on the most innocent and ordinary of occasions. The speeches in *Campbell* (particularly those of the majority) are relied on for the way in which they distinguish the photographs in that case from the more ordinary occasion of the kind I have to consider. Three passages in particular need to be analyzed. Lord Hoffmann's views on this point are set out in paragraph 73 – 75:

> *"**73** In the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Gleeson CJ said in Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, 226, para 41: "Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people.*
>
> ***74** But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of Peck v United Kingdom (2003) 36 EHRR 719 Mr Peck was filmed on a public street in an embarrassing moment by a CCTV camera. Subsequently, the film was broadcast several times on the television. The Strasbourg court said, at p 739,*

that this was an invasion of his privacy contrary to article 8: "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995."

***75** In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may in itself by such an infringement, even if there is nothing embarrassing about the picture itself:* Hellewell v Chief Constable of Derbyshire *[1995] 1 WLR 804, 807. As Lord Mustill said in* R v Broadcasting Standards Commission, Ex p British Broadcasting Corpn *[2001] QB 885, 900, "An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate."*

28. Lord Hope in his speech at paras 122 – 123 said:

*"**122** The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must, as Randerson J said in Hosking v Runting [2003] 3 NZLR 385, 415, para 138, be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive: Gault and Blanchard JJ in the Court of Appeal [2004] NZCA 34, para 165. A person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph, for the reasons given by L'Heureux-Dubé and Bastarache JJ in Aubry v Éditions Vice-Versa Inc [1998] 1 SCR 591, para 59. But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph. The question then arises, balancing the rights at issue, where the public's right to information can justify dissemination of a photograph taken without authorisation: Aubry, para 61. The European court has recognised that a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television: PG and JH v United Kingdom Reports of Judgments and Decisions*

2001-ix, p 195, para 57. But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain. In Peck v United Kingdom (2003) 36 EHRR 719, para 62 the court held that the release and publication of CCTV footage which showed the applicant in the process of attempting to commit suicide resulted in the moment being viewed to an extent that far exceeded any exposure to a passer-by or to security observation that he could have foreseen when he was in that street.

***123** The same process of reasoning that led to the findings in Peck that the article 8 right had been violated and by the majority in Aubry that there had been an infringement of the claimant's right to respect for her private life can be applied here. Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixelated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. Neither the place nor the person were instantly recognisable. The reader only had the editor's word as to the truth of these details."*

29. Finally, at paras 154 – 155 Baroness Hale said this:

*"**154** Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf* Aubry v Éditions Vice-Versa Inc *[1998] 1 SCR 591. We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It*

> *may not be a high order of freedom of speech but there is nothing to justify interfering with it. (This was the view of Randerson J in* Hosking v Runting *[2003] 3 NZLR 385, which concerned a similarly innocuous outing; see now the decision of the Court of Appeal [2004] NZCA 34.)*
>
> ***155*** *But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place, which will have been entirely recognisable to anyone who knew the locality. A picture is "worth a thousand words" because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again."*

30. Mr Warby relies on these passages as demonstrating that the House of Lords in *Campbell* would not have upheld the claim to privacy if the photographs had done little more than to depict Ms Campbell walking along or talking to friends in the street. The absence of consent and the covert nature of the photography does not affect this nor of itself does the publication of the image to the world at large. For these factors to combine to engage Art. 8 there needs, he says, to be some additional element which makes what would otherwise be a public occasion a private one.

31. The decision in *Campbell* is, of course, binding on me and it is not useful to attempt to dissect the speeches with a view to isolating passages that might strictly be regarded as obiter dicta. The conclusions depend upon the reasoning and I would ordinarily feel obliged to give effect to the principles expressed regardless of whether they form part of the ratio of the case. But in anticipation of the Claimant's argument that the decision in *Campbell* has now to be considered in the light of the more recent decision in *Von Hannover* it is, I think, important to make one or two observations about the status of some of the authorities referred to in the extracts quoted above.

32. The first point to make is that the legal position in Canada is very different. The decision of the Canadian Supreme Court in *Les Editions Vice-Versa v Aubry(1998) 157 DLR 4th 577* turns on s.5 of the Quebec Charter of Human Rights and Freedoms which was held to give an individual a right to protect his or her own image from publication without consent. This principle applies regardless of whether the image affects the reputation of the person depicted and a model was therefore able to sue following the publication of a targeted photograph showing her sitting on a Montreal street.

33. More interesting are the New Zealand authorities. In *Hosking v Runting [2005] 1 NZLR 1* a photographer was commissioned by the publisher of a magazine to take some photographs of the children of a well known television personality. He took pictures of Mr Hosking's eighteen month old twins being pushed down a street by

their mother. Mr and Mrs Hosking sought injunctions to prevent publication of the photograph relying on a cause of action for breach of confidence and for breach of privacy. The New Zealand Court of Appeal (affirming Randerson J) held that under New Zealand law there was no cause of action in tort for breach of privacy based upon the publication of photographs taken in a public place and that the action for breach of confidence required there to be established a reasonable expectation of privacy in respect of matters whose publication would be considered highly offensive to an objective reasonable person. This is the test derived from the judgment of Gleeson CJ in the decision of the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199.*

34. Gault J dealt with the facts of the case under appeal in the following paragraphs of his judgment which are directly relevant to the argument in the present case:

> *"**161** The real concern of the appellants as parents relates not to the publication of photographs of their two children in the street, but to publication of the photographs along with identification and the association of them with a "celebrity" parent. We accept the sincerity of their anxiety for the wellbeing of the children and their concern at the prospect of recurring unwanted media attention. They wish to protect the freedom of the children to live normal lives without constant fear of media intrusion. They feel that if publication of the present photographs is prevented there will be no incentive for those who, in the future, might pursue the children in order to capture marketable images.*
>
> ***162** We must focus on the issues now presented. If there is no case for relief now, we cannot address the future. We are inclined to the view, however, that the concerns are overstated.*
>
> ***163** We are not persuaded that a case is made out for an injunction to protect the children from a real risk of physical harm. We do not see any substantial likelihood of anyone with ill intent seeking to identify the children from magazine photographs. We cannot see the intended publication increasing any risk that might exist because of the public prominence of their father.*
>
> ***164** The inclusion of the photographs of Ruby and Bella in an article in New Idea would not publicise any fact in respect of which there could be a reasonable expectation of privacy. The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day. They do not show where the children live, or disclose any information that might be useful to someone with ill intent. The existence of the twins, their age and the fact that their parents are separated are already matters of public record. There is a considerable line of cases in the United States establishing that generally there is no right to privacy when a person is photographed on a*

> *public street. Cases such as Peck and perhaps Campbell qualify this to some extent, so that in exceptional cases a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances. That is not, however, this case.*
>
> ***165*** *We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved. One of the photographs depicts a relatively detailed image of the twins' faces. However, it is not sufficient that the circumstances of the photography were considered intrusive by the subject (even if that were the case, which it is not here because Mrs Hosking was not even aware the photographs had been taken). The real issue is whether publicising the content of the photographs (or the "fact" that is being given publicity) would be offensive to the ordinary person. We cannot see any real harm in it."*

35. Lord Hope in *Campbell* (in the passage from para 99 quoted above) said that this formulation greatly reduced the level of protection available and that the enquiry as to whether publication could cause offence had to be directed to the person affected by the publicity rather than to the reader of the article. As indicated earlier, there was general agreement in all the speeches that the reasonable expectation of privacy in the material had to be that of the Claimant. But despite this difference in the test, neither Lord Hope nor Baroness Hale expressed any doubts about the outcome in *Hosking*. Both referred with approval to the judgment of Randerson J at first instance who had refused to grant the injunction preventing publication of the photographs of the children despite their parents desire to shield them from publicity in the media. The facts of *Hosking v Runting* are to my mind indistinguishable from those of the present case. There is no allegation that the Claimant and his parents were aware of the photograph being taken or were therefore distressed about it at the time. Nor is there any suggestion in this case that the photograph revealed information which put the Claimant in some kind of danger or otherwise exposed him to harm.

Strasbourg

36. It is convenient in chronological terms to refer at this stage to the Strasbourg authorities which are said to require a modification to the approach taken by the House of Lords in *Campbell* to what might be termed intimate (and in that sense private) occasions which occur in a public place. The first of these is *Peck v United Kingdom (2003) 36 EHRR 41* which concerned the release to the BBC and the subsequent broadcast of CCTV footage of the applicant armed with a knife in a public street following an attempt by him at suicide. The decision of the ECtHR that this amounted to a violation of Mr Peck's Art. 8 rights is not surprising and it was treated by the House of Lords in *Campbell* as a good example of what Lord Hoffmann (in para 75 of his speech quoted above) described as a situation of humiliation or severe embarrassment which attracted a reasonable expectation of privacy from public dissemination even though occurring in a public place.

37. In paragraph 62 of the judgment the ECtHR refers to the use of the CCTV footage by the media as far exceeding any exposure to a passer-by or to security observation. This was to take account of the nature of Mr Peck's complaint, which was not that his activities were captured on CCTV but that they had been subsequently broadcast to a much wider audience whom he could never have anticipated would have been shown the images in question. That distinction does not however take the matter any further in this (or I suspect in any) case where the private or personal conduct of an individual is exposed by the media to the world at large. Mr Spearman made it clear that his client was not objecting (and probably could not object) to photographs taken casually by members of the public for their own purposes which would have a very limited circulation. The essence of the complaint in virtually all of these cases centres on the degree of publicity which the occasion photographed ultimately receives. A photograph taken by a member of the public which remains the property of that person and is at most shown to family and friends does not infringe any right of privacy because it does not lead to any real public exposure of the events portrayed. They remain essentially private and unseen. It is only when the photograph is sold to an agency or a newspaper for publication that any appreciable invasion of privacy can be said to occur. This, I think, has relevance when one comes to consider cases like *Hosking v Runting* which do not involve the depiction of conduct or events that could in any sense be described as embarrassing or intimate. In such cases the actionable complaint is not and cannot be that the claimant was photographed or that press photographers were present to witness the events in question. Some degree of public exposure (at least to the eyes of those around at the time) is the inevitable consequence of operating in a public place. If absolute privacy is required then it can only be secured behind closed doors or a high garden wall. The question whether there has been an actionable invasion of privacy in cases such as this therefore turns on whether activities which probably could be protected from widespread public scrutiny if conducted in private qualify for the same degree of protection when they are open to public view. The stance of the English courts in the decisions up to and including *Campbell* (like those in New Zealand) has been to limit the protection in such cases to conduct or information of a personal or embarrassing kind. But *Von Hannover* is said to have changed all that.

38. *Von Hannover* was a claim by Princess Caroline of Monaco in relation to the publication of photographs in various German magazines. Three series of photographs were in issue. The first (taken in July and August 1993) included photographs of the Princess with her children engaged in sporting and other family activities. Other photographs in this series showed her at a restaurant in the company of a male friend and shopping in a market with a bodyguard. The second series (taken in 1997) consisted mostly of photographs of the Princess with her husband (Prince Ernst August Von Hannover) skiing on holiday, visiting a horse show and cycling. The third series (also taken in 1997) show the Princess at the Monte Carlo Beach Club dressed in a swimsuit and towel, tripping over and falling down.

39. The German Federal Court held that the publication of the photograph taken in the restaurant was a breach of the Princess' right to privacy because the couple had deliberately moved to a secluded part of the restaurant in order to keep out of public view. But it refused her any further relief in respect of the other photographs. The Federal Consitutional Court took the matter slightly further by upholding the claim to privacy in respect of the photographs of the Princess with her children in the first

series but refused her relief in respect of the remaining photographs. The ECHR allowed the Princess' appeal and held that the publication of the other images of her shopping, riding and cycling did violate her convention rights under Art. 8.

40. The Princess' submissions to the Court (as recorded in the judgment) refer to her having been constantly hounded by paparazzi whenever she left her home and whatever she did, including collecting her children from school, shopping or going on holiday. The Court began its treatment of Art. 8 with the following statements of general principle:

> *"50. The court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name (see* Burghartz v Switzerland *[1994] ECHR 16293/90 at para 24), or a person's picture (see* Schussel v Austria *(App no 42409/98) (admissibility decision, 21 February 2002)).*
>
> *Furthermore, private life, in the court's view, includes a person's physical and psychological integrity; the guarantee afforded by art 8 of the convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings (see, mutatis mutandis,* Niemietz v Germany *[1992] ECHR 13710/88 at para 29, and* Botta v Italy *(1998) 4 BHRC 81 at para 32). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'*
>
> *51. The court has also indicated that, in certain circumstances, a person has a 'legitimate expectation' of protection and respect for his or her private life. Accordingly, it has held in a case concerning the interception of telephone calls on business premises that the applicant 'would have had a reasonable expectation of privacy for such calls' (see* Halford v UK *(1997) 3 BHRC 31 at para 45).*
>
> *52. As regards photos, with a view to defining the scope of the protection afforded by art 8 against arbitrary interference by public authorities, the Commission had regard to whether the photographs related to private or public matters and whether the material thus obtained was envisaged for a limited use or was likely to be made available to the general public (see, mutatis mutandis,* Friedl v Austria *[1995] ECHR 15225/89, (1995) 21 EHRR 83, Friendly Settlement, Commission opinion, at paras 49–52;* PG v UK *[2001] ECHR 44787/98 at para 58; and* Peck v UK *(2003) 13 BHRC 669 at para 61).*
>
> *53. In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life.*

…

57. The court reiterates that although the object of art 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, mutatis mutandis, X and Y v Netherlands [1985] ECHR 8978/80 at para 23; Stjerna v Finland [1994] ECHR 18131/91 at para 38; and Verliere v Switzerland (App no 41953/98) (admissibility decision, 28 June 2001)). That also applies to the protection of a person's picture against abuse by others (see Schussel v Austria (App no 42409/98) (admissibility decision, 21 February 2002)).

The boundary between the state's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, none the less, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation (see, among many other authorities, Keegan v Ireland [1994] ECHR 16969/90 at para 49, and Botta v Italy (1998) 4 BHRC 81 at para 33).

58. That protection of private life has to be balanced against the freedom of expression guaranteed by art 10 of the convention. In that context the court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society. Subject to art 10(2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society' (see Handyside v UK [1976] ECHR 5493/72 at para 49).

In that connection the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest (see, among many authorities, Observer and Guardian v UK [1991] ECHR 13585/88 at para 59, and Bladet Tromso v Norway (1999) 6 BHRC 599 at para 59). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even

provocation (see Prager and Oberschlick v Austria [1995] ECHR 15974/90 at para 38; Tammer v Estonia (2001) 10 BHRC 543 at paras 59–63; and Prisma Press v France (App nos 66910/01 and 71612/01) (admissibility decision, 1 July 2003)).

59. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution."

41. In its application of these principles to the case in point, the judgment begins with a discussion of the legitimate role of press reporting in relation to well known individuals whose activities are likely to generate a degree of public interest:

*"63. The court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest' (*Observer and Guardian v UK *[1991] ECHR 13585/88) it does not do so in the latter case.*

64. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned (see Plon (Societe) v France *(App no 58148/00) (judgment, 18 May 2004)), this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.*

65. As in other similar cases it has examined, the court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public (see, mutatis mutandis, Jaime Campmany

y Diez de Revenga and Juan Luis Lopez-Galiacho Perona v Spain (App no 54224/00) (admissibility decision, 12 December 2000); Julio Bou Gibert and El Hogar Y La Moda JA v Spain (App no 14929/02) (admissibility decision, 13 May 2003); and Prisma Press v France (App nos 66910/01 and 71612/01) (admissibility decision, 1 July 2003)).

66. In these conditions freedom of expression calls for a narrower interpretation (see Prisma Press v France (App nos 66910/01 and 71612/01) (admissibility decision, 1 July 2003), and, by converse implication, Krone Verlag GmbH & Co KG v Austria [2002] ECHR 34315/96 at para 37).

67. In that connection the court also takes account of the resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy, which stresses the 'one-sided interpretation of the right to freedom of expression' by certain media which attempt to justify an infringement of the rights protected by art 8 of the convention by claiming that 'their readers are entitled to know everything about public figures' (see para 42, above, and Prisma Press v France (App nos 66910/01 and 71612/01) (admissibility decision, 1 July 2003)).

68. The court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken—without the applicant's knowledge or consent –and the harassment endured by many public figures in their daily lives cannot be fully disregarded (see para 59, above).

In the present case this point is illustrated in particularly striking fashion by the photos taken of the applicant at the Monte Carlo Beach Club tripping over an obstacle and falling down (see para 17, above). It appears that these photos were taken secretly at a distance of several hundred metres, probably from a neighbouring house, whereas journalists and photographers' access to the club was strictly regulated (see para 33, above).

69. The court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection—as stated above—extends beyond the private family circle and also includes a social dimension. The court considers that anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life (see para 51, above and, mutatis mutandis, Halford v UK (1997) 3 BHRC 31 at para 45).

….

73. Lastly, the distinction drawn between figures of contemporary society 'par excellence' and 'relatively' public figures has to be clear and obvious so that, in a state governed by the rule of law, the individual has precise indications as to the behaviour he or she should adopt. Above all, they need to know exactly when and where they are in a protected sphere or, on the contrary, in a sphere in which they must expect interference from others, especially the tabloid press.

74. The court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the applicant's private life effectively. As a figure of contemporary society 'par excellence' she cannot—in the name of freedom of the press and the public interest—rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.

75. In the court's view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. In the present case merely classifying the applicant as a figure of contemporary society 'par excellence' does not suffice to justify such an intrusion into her private life."

42. The Court's decision was that the domestic court's application of local German law did not adequately protect the Princess' rights under Art. 8:

"76. As the court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life.

77. Furthermore, the court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial interest of the magazines in publishing these photos and these articles, in the instant case those interests must, in the court's

> *view, yield to the applicant's right to the effective protection of her private life.*
>
> *78. Lastly, in the court's opinion the criteria established by the domestic courts were not sufficient to ensure the effective protection of the applicant's private life and she should, in the circumstances of the case, have had a 'legitimate expectation' of protection of her private life.*
>
> *79. Having regard to all the foregoing factors, and despite the margin of appreciation afforded to the state in this area, the court considers that the German courts did not strike a fair balance between the competing interests.*
>
> *80. There has therefore been a breach of art 8 of the convention."*

43. One of the difficulties about this judgment is to identify and to dissect from the Court's reasoning the precise factors which in its view engage the Princess' rights under Art. 8. Much of the discussion and certainly the conclusion is based on the Court's view that in the balancing exercise which follows between the Princess' claim to privacy and the right of the press to freedom of expression, the scales come down firmly in favour of the Princess. It is, however, inherent in that analysis that Art. 8 was engaged by the publication of the whole range of photographs involved in the complaint including apparently innocuous images of the Princess shopping, riding and playing tennis. Whilst the photographs of her tripping over at the Monte Carlo beach club might be said to be embarrassing the same rubric cannot be applied to the others.

44. Looked at in isolation from the subject matter of the complaint, the statement of principle contained in paragraph 59 of the judgment is unexceptional. The very personal or intimate information about an individual clearly raises an expectation of privacy for the reasons already referred to and the publication of photographs containing that information is likely to engage Art. 8. The important and perhaps novel aspect of the decision is the Court's acceptance that these criteria were satisfied in relation to many of the images under consideration. I was shown some of the photographs during the course of the hearing and with the exception of the beach club pictures, most of them (to use Lord Nicholls' words) show nothing untoward or undignified.

45. The ECtHR clearly took a much wider view of what should be regarded as falling within the scope of an individual's private life for purposes of Art. 8. This is made clear in paragraphs 53 and 69 of the judgment. Their decision was that this can include ordinary activities such as family holidays or expeditions which are not public in any sense beyond the fact that they are conducted in a street or some other public place. Outings or games with one's children are of course in one sense intimate occasions, but if Baroness Hale is correct that popping out for a bottle of milk is not to be regarded as a private occasion, then some very fine distinctions will have to be made.

46. One possible distinguishing factor (strongly relied on by BPL in this case) is the element of harassment which the Princess referred to in her complaint and which was

picked up by the Court in paragraph 59 of its judgment. This obviously can increase the sense and degree of intrusion involved but it is difficult to see how or why it should be capable of converting an essentially public occasion into a private one. If the applicant has a reasonable expectation of privacy in respect of the information contained in the photographs then the publication of the image by one newspaper alone will breach that right. Conversely, an activity in which no such expectation exists is unaffected in its nature by the degree of press interest it excites. As a matter of principle, harassment ought at best to be regarded as an aggravating feature in any proper claim for invasion of privacy but not as the determinant of whether such a right exists. Where it occurs it can be and often is dealt with separately: see the Protection from Harassment Act 1997.

47. My own reading therefore of *Von Hannover* is that it recognises that an individual whose life and activities are of public interest may have a legitimate expectation of privacy in relation to private family and personal activities which are not in themselves either embarrassing or intimate in a sexual or medical sense. It also establishes that in the case of someone like the Princess who is well known but not a public figure in the sense of being a politician or the like, the publication of the photographs and the information they contain cannot be justified as a legitimate exercise of the right to freedom of expression where the sole purpose of publication is to satisfy readers' curiosity rather than to contribute to a debate on or the raising of an issue of general public interest or importance. Some commentators have observed that the unfettered application of this view of *Von Hannover* "would herald a revolution in Britain's journalistic culture": see *Tugendhat & Christie, The Law of Privacy and the Media (2nd ed) Supp at para 6.52.* I agree. It is, I think, common knowledge that much of the continental press adopts a far less aggressive and prurient approach to the private lives of celebrities and politicians than do their English tabloid counterparts. But the question of how one should accommodate *Von Hannover* with present journalistic assumptions cannot in my view be answered by treating the case as an exception confined to its own special facts and heavily influenced by the issues of harassment which I referred to earlier.

48. This, I think, is made clear by the subsequent decision of the ECtHR in *Sciacca v Italy(2006) 43 EHRR 20* in which the issue was whether the applicant's rights under Art. 8 had been infringed by the release to the press of an identity photograph taken of her by the Italian Revenue Police while she was under arrest and investigation for various criminal offences. The case concerns a vertical application of Art. 8 in very different circumstances from the present one, but the reasoning of the Court includes reference to *Von Hannover.* In paragraph 29 the Court states:

> *"Regarding whether there has been an interference, the Court reiterates that the concept of private life includes elements relating to a person's right to their picture and that the publication of a photograph falls within the scope of private life. It has also given guidelines regarding the scope of private life and found that there is:*
> *"a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'.*

> *In the instant case the applicant's status as an "ordinary person" enlarges the zone of interaction which may fall within the scope of private life, and the fact that the applicant was the subject of criminal proceedings cannot curtail the scope of such protection."*

49. This citation does not characterize the decision in *Von Hannover* as dependant upon harassment or significant press intrusion. Rather it emphasizes the scope of the concept of private life which *Von Hannover* establishes. There is certainly no retrenchment. On this basis the limits set by *Von Hannover* ought properly to be regarded as confirmed by *Sciacca* and the correct approach is to consider how far the English courts are now required to take account of the principles set out in the decision when interpreting and giving effect to Arts. 8 and 10 as part of English law.

The Post Von-Hannover English authorities

50. These begin with the decision of Eady J in *McKennitt v Ash [2006] EMLR 178.* This was not a case about photographs. It concerned a book written by the Defendant about her friendship and travels with Loreena McKennitt, the Canadian folk musician. The book contained a variety of anecdotes including revelations about Ms McKennitt's personal and sexual relationships, her emotional reaction to her fiancé's death, a detailed description of her home and the history of a property dispute between the parties which led to litigation.

51. The case differs in certain important respects from cases like *Campbell* and the present one because it concerned the disclosure of allegedly confidential information by someone who had clearly been in a confidential relationship with the claimant and had in fact worked for her under a contract containing a confidentiality clause. But the decision is interesting and important for its treatment of the Claimant's Art. 8 rights in the light of the decision in *Von Hannover.*

52. Eady J, after setting out the issues in *Von Hannover* and *Peck*, observed that:

> *"In the light of these cases, a trend has emerged towards acknowledging a 'legitimate expectation' of protection and respect for private life, on some occasions, in relatively public circumstances. It is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons."*

53. In paragraph 58 of his judgment Eady J refers to the relationship between *Von Hannover* and *Campbell*. After quoting from paragraphs 20 – 21 of Lord Nicholls' speech he said this about the quality of the information necessary to found a claim for invasion of privacy:

> *"This would strongly suggest that the mere fact that information concerning an individual is 'anodyne' or 'trivial' will not necessarily mean that art 8 is not engaged. For the purpose of determining that initial question, it seems that the subject matter must be carefully assessed. If it is such as to give rise*

> *to a 'reasonable expectation of privacy', then questions such as triviality or banality may well need to be considered at the later stage of bringing to bear an 'intense focus' upon the comparative importance of the specific rights being claimed in the individual case. They will be relevant to proportionality.*
>
> *Whether, in any given circumstances, an individual citizen can have a reasonable expectation that his privacy will be protected may depend simply upon the nature of the information itself or, on the other hand, it may depend upon a combination of factors. Sometimes such an expectation will arise from the circumstances in which the information has been voluntarily imparted to another person or persons. In particular, the expectation may be justified by a duty of confidence arising expressly or by implication at the time.*"

54. This balancing exercise had to be performed in *McKennitt v Ash* because by no means all of the information contained in the book could be described as highly personal. A good example is a reference to a shopping trip to Italy to buy furniture and other household items. Eady J described this disclosure as:

> *"…..trivial and of no consequence, and unlike relatively trivial but intrusive descriptions of a person's home, there is no need for the law to step in and offer protection. Nor is it likely to cause significant distress or other harm to say, of a celebrity or anyone else, that a friend accompanied her on a shopping trip and managed to bargain with vendors to save money. It is anodyne, and not such as to attract any obligation of confidence. I do not even need to ask whether there is any public interest-although, of course, there is not."*

55. The Court of Appeal dismissed the Defendant's appeal *([2007] 3 WLR 194*) holding that the judge had been right in his determination of what did and did not constitute private information within the ambit of Art. 8. The passages in the judgment of Buxton LJ are important and relevant to the issue in this case. At paragraph 12 he dealt specifically with the judge's dismissal of the claim for protection in respect of "anodyne" material. He said that the judge's approach was in conformity with the guidance given by Lord Walker of Gestingthorpe in *M v Secretary of State for Work & Pensions [2006] 2 AC 91* who at paragraph 83 had suggested that interference with private life had to be of some seriousness before Art. 8 was engaged.

56. Mr Spearman submitted that Buxton LJ was wrong to elevate the reference in Lord Walker's speech to the seriousness of the interference required in order to engage Art. 8 into a statement of principle that ordinary, familiar activities cannot qualify for protection. The remarks have, he said, to be considered in the context in which they were made: i.e. in response to a submission in that case that since the concept of respect for private and family life was so wide, any act of sexual discrimination (in that case in relation to a child support scheme) within Art. 14 also fell within the ambit of Art. 8.

57. I do not believe that it is helpful to over-analyse Lord Walker's dictum which was not made in relation to a case like the present one or by reference to the decision in *Von Hannover*. It was not in any event central to Buxton LJ's reasoning in *McKennitt v*

Ash. The important passage in his judgment is where he deals in terms with the effect of *Von Hannover* on the scope of Art. 8. In paragraph 37 of the judgment he begins by stating that there is little doubt that *Von Hannover* has extended the reach of Art. 8 beyond what had previously been understood. At paragraphs 39 – 42 he says this:

> *"**[39]** Eady J suggested, at his para 58, that that approach was consistent with the assumption in* Campbell *that art 8 protected a person's reasonable expectation of privacy. That is so in broad terms, but at the same time it is far from clear that the House of Lords that decided* Campbell *would have handled* Von Hannover *in the same way as did the ECtHR. Very extensive argument and discussion was seen as required before Ms Campbell was able to enjoin the publication of photographs of her in the public street, and then only because of their connexion with her medical condition. Had the House had the benefit of* Von Hannover *a shorter course might have been taken.*
>
> ***[40]** That does not however mean (to anticipate an argument that will arise again under art 10) that the English courts should not now give respectful attention to* Von Hannover. *The House of Lords in* Campbell *made no specific findings as to the content of art 8 save in the very general terms extracted by Eady J. As it is put in a work shown to us by the media parties, Professor Fenwick and Mr Phillipson's Media Freedom Under the Human Rights Act (2006), at p 764, "the test propounded-of a reasonable expectation of privacy, of whether the information is obviously private-is to be structured by reference to the art 8 case law". It thus remains for the national court to apply that case law, as it currently stands, to the facts before it. It was therefore certainly open to Eady J to have regard to* Von Hannover *in relation to the very different facts of the present case.*
>
> ***[41]** Perhaps realising the force of observations such as the foregoing, the media parties, in particular, were most anxious to persuade us that the ECtHR went no further in* Von Hannover *than to hold that the Princess's privacy had been invaded by a campaign of media intrusion into her life, of which the enjoined photographs were the fruit. The taking and publication of the photographs would otherwise not have been in itself an invasion of privacy. They cited in support some observations of Fenwick and Phillipson at p 768 of their book, though it is fair to say that the learned authors also say that that analysis is not without its difficulties. The judge, at his para 53, did not accept that analysis, nor would I. While it is quite correct that there is reference in the judgment of the ECtHR to media intrusion, it is not possible to say that the general statements of principle set out in para 38 above are so limited. And Mr Browne was able to show us authority from the*

> *ECtHR decided since* Von Hannover *that applies those statements in situations that were not ones of media intrusion. Of those, the most significant is* Sciacca v Italy *(Application 50774/99), paras 27 and 29 of the judgment of the ECtHR applying* Von Hannover *to a case that was not one of press harassment, and citing the jurisprudence of* Von Hannover *in entirely general terms.*
>
> ***[42]*** *I would therefore conclude that to the extent that it is the Appellant's case that the judge should not have had regard to* Von Hannover *when considering the first question of whether art 8 was engaged; and to the extent if at all that the issue matters for the determination of this part of the case; that complaint is unfounded."*

58. The other case which I need to mention is *John v Associated Newspapers Ltd [2006] EMLR 722,* another decision of Eady J. It concerned some photographs taken of Sir Elton John in a London street outside his home. They showed him dressed in a tracksuit and wearing a baseball cap but were otherwise innocuous. Eady J refused to grant an injunction on the basis that Sir Elton John could have no reasonable expectation of privacy in respect of the information conveyed by the photograph. It was, he said, a "popping out for a pint of milk" type of case. In relation to *Von Hannover* Eady J said (at para 16) that an important factor in that case was the element of harassment which again was absent in relation to the photographs taken of Sir Elton John. This decision was given before that of the Court of Appeal in *McKennitt v Ash.*

59. For the reasons which I have given, I do not believe that *Von Hannover* can be isolated in that way and my own reading of the case is confirmed by the decision of the Court of Appeal in *McKennitt v Ash*. What is, I think, important about that decision is that although accepting the wider interpretation of *Von Hannover* Buxton LJ did not consider that this invalidated Eady J's conclusion that the more trivial information in the book (eg the shopping trip to Italy) did not qualify for protection. He clearly considered that there must remain a category of cases involving innocuous, unimportant and unremarkable events, which although private in one sense do not necessarily qualify for protection under Art. 8. There is, however, no specific guidance (and probably cannot be) as to where precisely the line should be drawn.

60. One of the difficulties which I face in this case as a first instance judge is to decide how I should attempt to give effect to what I perceive to be the reasoning of the ECtHR in *Von Hannover* where it appears to conflict with the decision of the House of Lords in *Campbell.* It is well established on authority that the Court should attempt to follow the clear and constant jurisprudence of the ECtHR and in *R (Ullah) v Special Adjudicator [2004] 2AC 323* Lord Bingham expressed the view that the Convention is an international instrument the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. Using this as a reference point, decisions on the meaning of the Convention should be kept uniform throughout the states affected by it.

61. But as a matter of precedence I am bound by the decision in *Campbell* (as is the Court of Appeal) and for the reasons already given it is not my intention to attempt to

unpick the speeches in that case with a view to determining whether certain passages in them did or did not form part of the ratio of the case. The House of Lords has also held that English courts of first instance are bound to follow the decisions of the Court of Appeal and House of Lords where there appears to be a conflict between those decisions and any ruling of the ECtHR. In *Kay v Lambeth L.B.C [2006] 2 AC 465* Lord Bingham at paragraphs 43 – 44 said this:

> *"It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here.*
>
> ***44*** *There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply."*

62. I am in no doubt therefore that if it comes to a straight choice between *Von Hannover* and *Campbell* I should follow the decision in *Campbell.*

63. But is the position in fact as stark as that? As noted earlier, Buxton LJ in *McKennitt v Ash* was prepared to uphold the decision of Eady J that even post *Von Hannover* certain categories of innocuous or anodyne personal information would not raise an expectation of protection from disclosure under Art. 8. In the context of a confidential relationship those categories would, in my judgment, have to be very tightly drawn since the existence of such a relationship is a highly relevant and influential factor in the assessment of whether there has been an infringement of the Claimant's right to confidentiality: see *Prince of Wales v Associated Newspapers Ltd (supra).* But *McKennitt v Ash* shows that they do exist.

64. Cases like the present one are not rooted in any such pre-existing relationship and as disclosed earlier, require the Court to limit the dissemination of what in its origin was publicly visible material. I am not concerned here with the publication of private

information in the sense that the term was used by Lord Hoffmann and Baroness Hale in the extracts from their speeches quoted above. Nor is it alleged that the photograph will make the Claimant vulnerable to kidnapping or some other form of danger. It is said to be a breach of his Art. 8 rights because he through his parents has never sought publicity or been exposed to it and wishes to lead an anonymous and private life. It is therefore an attempt to apply *Von Hannover* in what Professor Gavin Phillipson has described as its most absolutist form.

65. It seems to me that a distinction can be drawn between a child (or an adult) engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. The first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends. Publicity on the test deployed in *Von-Hannover* is intrusive and can adversely affect the exercise of such social activities. But if the law is such as to give every adult or child a legitimate expectation of not being photographed without consent on any occasion on which they are not, so to speak, on public business then it will have created a right for most people to the protection of their image. If a simple walk down the street qualifies for protection then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians or the like, there will be virtually no aspect of their life which cannot be characterized as private. Similarly, even celebrities would be able to confine unauthorized photography to the occasions on which they were at a concert, film premiere or some similar occasion.

66. I start with a strong predisposition to the view that routine acts such as the visit to the shop or the ride on the bus should not attract any reasonable expectation of privacy. Although the arguments in favour of freedom of expression have specifically to be considered once a Claimant's Art. 8 rights are engaged, it seems to me inevitable that the boundaries of what any individual can reasonably expect to remain confidential or private are necessarily influenced by the fact that we live in an open society with a free press. If harassment becomes an issue then it can and should be dealt with specifically as it is by the 1997 Act. I have considerable sympathy for the Claimant's parents and anyone else who wishes to shield their children from intrusive media attention. But the law does not in my judgment (as it stands) allow them to carve out a press-free zone for their children in respect of absolutely everything they choose to do. Even after *Von-Hannover* there remains, I believe, an area of routine activity which when conducted in a public place carries no guarantee of privacy. In my view this is just such a case. As mentioned earlier, there is no allegation of any direct harm or distress being caused to the Claimant or to his parents at the time and I am not persuaded that his mother's understandable sensitivity to and upset caused by her children being photographed on any occasion can of itself be allowed to dictate what the legal boundaries of protection should be.

67. It is though important to stress the dangers of categorizing various types of information for purposes of defining what is the scope of an individual's private life for the purposes of Art. 8 and I have taken this into account in making my own assessment in this case. Information or events which can in one sense be described as anodyne or trivial may be of considerable importance and sensitivity to a particular person in certain circumstances. Eady J recognized this in *McKennitt v Ash* and I endorse that approach. It is a matter of fact and degree in every case. But I am not

satisfied that the facts pleaded either individually or collectively are sufficient in this case to engage the Claimant's Art. 8 rights.

68. In summary, therefore, I propose to strike out or dismiss the claim based on breach of confidence or invasion of privacy for two reasons: firstly, that on my understanding of the law including *Von Hannover* there remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy; and secondly, that even if the ECtHR in *Von Hannover* has extended the scope of protection into areas which conflict with the principles and the decision in *Campbell,* I am bound to follow *Campbell* in preference. Because I regard this case as materially indistinguishable from the facts in *Hosking v Runting* I am satisfied that on that test it has no realistic prospects of success. In these circumstances it is not necessary for me to consider the wider issues of freedom of expression or to perform the balancing exercise required by reason of Art. 10.

Data Protection Act

69. The alternative claim is for relief under the Data Protection Act. Under s.4 (4) of the Act it is the duty of a data controller to comply with the data protection principles in relation to all personal data with respect to which he is the data controller. It is common ground that BPL was a data controller in respect of the photograph and the information which it contains and that the latter comprise personal data. "Personal data" is defined in s.1(1) as meaning:

> *"data which relate to a living individual who can be identified—*
>
> *(a) from those data, or*
>
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
>
> *and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual"*

70. The data protection principles referred to in s.4 (4) are those set out in Part 1 of Schedule 1. The Claimant relies on the first of these principles which is that:

> *"**1** Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*
>
> *(a) at least one of the conditions in Schedule 2 is met, and*
>
> *(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

71. There is no further guidance in the Act as to what is meant by lawfully but Part II of Schedule 1 sets out various tests for determining whether personal data is processed

fairly within the meaning of the first principle. So far as relevant, paragraphs 1 and 2 provide that:

> *"**1***
>
> *(1) In determining for the purposes of the first principle whether personal data are processed fairly, regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed.*
>
> ….
>
> ***2***
>
> *(1) Subject to paragraph 3, for the purposes of the first principle personal data are not to be treated as processed fairly unless—*
>
> *(a) in the case of data obtained from the data subject, the data controller ensures so far as practicable that the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3), and*
>
> *(b) in any other case, the data controller ensures so far as practicable that, before the relevant time or as soon as practicable after that time, the data subject has, is provided with, or has made readily available to him, the information specified in sub-paragraph (3).*
>
> *(2) In sub-paragraph (1)(b) "the relevant time" means—*
>
> *(a) the time when the data controller first processes the data, or*
>
> *(b) in a case where at that time disclosure to a third party within a reasonable period is envisaged—*
>
> *(i) if the data are in fact disclosed to such a person within that period, the time when the data are first disclosed,*
>
> *(ii) if within that period the data controller becomes, or ought to become, aware that the data are unlikely to be disclosed to such a person within that period, the time when the data controller does become, or ought to become, so aware, or*
>
> *(iii) in any other case, the end of that period.*

> *(3) The information referred to in sub-paragraph (1) is as follows, namely—*
>
> *(a) the identity of the data controller,*
>
> *(b) if he has nominated a representative for the purposes of this Act, the identity of that representative,*
>
> *(c) the purpose or purposes for which the data are intended to be processed, and*
>
> *(d) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair."*

72. It seems to me that the reference to lawfully in Schedule 1, Part 1 must be construed by reference to the current state of the law in particular in relation to the misuse of confidential information. The draftsman of the Act has not attempted to give the word any wider or special meaning and it is therefore necessary to apply to the processor of the personal data the same obligations of confidentiality as would otherwise apply but for the Act. The principles discussed in the first part of this judgment are therefore directly applicable to the first principle and should produce a consistent result. On this basis the data was processed lawfully within the meaning of paragraph 1, but was it also processed fairly?

73. The Claimant contends that BPL did not comply with paragraph 1(1) of Part II because of the way in which the photograph was taken. I disagree. The taking of the photograph was not consented to and was taken covertly but no actual deception as such was practised and I do not consider that the taking of a photograph in this way can be said to be unfair if it is otherwise lawful. None of the authorities reviewed earlier suggests that the fact that the photograph was taken without consent is decisive in itself of whether Art. 8 is engaged although it may be a relevant and aggravating factor when the information which the photograph contains is otherwise personal. But I do not consider that in this case the circumstances in which the photograph was taken amount to unfairness. There are no special factors beyond it being taken without consent.

74. That, however, is not the end of the matter. Mr Spearman also relies on paragraph 2 of Part II which in certain specified circumstances deems the processing of personal data to be unfair. BPL accepts that it did not provide the Claimant with the information referred to in paragraph 2 and cannot therefore comply with the conditions set out. The processing of the Claimant's personal data was therefore unfair even though it was otherwise lawful but for reasons which I shall come to shortly, Mr Warby submits that this is of no consequence.

75. Before leaving Schedule 1 it is also necessary to deal with the conditions which have to be satisfied under paragraph 1. In the case of personal data they are set out in Schedule 2 but where the data also consists of sensitive personal data then there is a

further set of conditions in Schedule 3 at least one of which has to be satisfied. So far as relevant "sensitive personal data" is defined in s.2 as:

> *"personal data consisting of information as to—*
>
> *(a) the racial or ethnic origin of the data subject*
>
> …..
>
> *(e) his physical or mental health or condition,*
>
> *….."*

76. BPL relies on the conditions in paragraph 6 of Schedule 2 and paragraph 5 of Schedule 3. The condition in paragraph 6 of Schedule 2 is that:

> *"**6***
>
> *(1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*

It seems to me that "necessary" in this context means no more than that the processing should be required to be proportionate to the legitimate interests pursued by the data controller and I accept Mr Warby's submission that the pursuit of a legitimate business is a legitimate interest for these purposes. This condition seems to me to replicate the considerations which the Court has routinely to take into account under Art. 8 and Art. 10 and it is therefore satisfied in this case. For the reasons already given, I do not consider that the Claimant's rights under Art. 8 in this case outweigh BPL's rights to freedom of expression.

77. This brings me to the question of sensitive personal data. BPL does not accept that the photograph and the information it contains constitute sensitive personal data within the meaning of s.2 but if it is wrong about that it also contends that condition 5 in Schedule 3 is in any event satisfied. It is a pleaded fact and therefore a given in this case that the photograph does show the colour of the Claimant's hair and the colour of his skin. It does not reveal any specific information about his physical condition other than that he appears to be a normal healthy young child.

78. The Claimant contends that the information conveyed by his image in the photograph does consist of information about his racial or ethnic origin and his physical health precisely because it shows him to be a white Caucasian male child with no obvious physical infirmities or defects. BPL says that a person's mere appearance is not information about his racial or ethnic origin and provides no information about his physical or mental condition. At most it enables certain things to be ruled out.

79. In *Campbell* at first instance ([2002] EWHC 499) Morland J at paras 80 – 90 rejected as irrelevant a submission that the photographs taken of Naomi Campbell were

sensitive personal data because they showed her to be black. But his reasoning was, I think, that she was rightly proud of her success as a black model and had therefore suffered no damage or distress by the processing of information which confirmed her racial identity. In paragraph 91 of the judgment he added that:

> *"However, it should not be understood that I am ruling that images whether photographic or otherwise that disclose, whether from physical characteristic or dress, racial or ethnic origins cannot amount to sensitive personal data."*

80. It seems to me that if a photograph and the information it contains constitutes personal data then it is hard to escape from the conclusion that insofar as it indicates the racial or ethnic origin of the data subject it also consists of sensitive personal data. I do not however accept that the present photograph also comprises sensitive personal data under s.2 (e). For that to be the case it would have to be of someone with some clearly identifiable physical condition which was exposed by the photograph. A photograph of an apparently healthy individual in fact tells one nothing about his actual state of health.

81. But in this case the Claimant's reliance on s.2 does not assist him because condition 5 of Schedule 3 is, in my view, satisfied. I accept that if one is dealing with sensitive personal data in the form of information conveyed by a person's own image alone then exposure of that image to the public by appearing in a public place satisfies the requirements of condition 5. The Claimant cannot, of course, be said to have deliberately taken the step of deciding to go out. That was a decision taken for him by his parents. But for these purposes their actions and intentions must, I think, be attributed to him.

82. Mr Warby contends that even if there was deemed unfairness involved in the processing of the Claimant's personal data due to BPL's failure to comply with the notice provisions of Schedule 1, Part II it made no difference to the course of events and was not causative of the publication complained of or of any consequential loss as a result of it. He relies on the approach taken by Lindsay J in *Douglas v Hello [2003] 3 All ER 996* (at para 239) that the loss and damage complained of must be caused by the alleged contravention of s. 4(4) of the Act. The argument which is advanced by BPL before me is that even if it had given the Claimant information in advance about the purpose for which it intended to process the data, no injunction could have been obtained. This is because of the provisions of s.32 of the Act which prohibit prior restraint at the suit of the data subject in cases in which the processing is undertaken with a view to the publication by any person of any journalistic material: see s. 32(1)(a); (2) and (4). The Court would have stayed any proceedings until either the Information Commissioner had determined that the photograph was being processed for journalistic purposes or the proceedings were withdrawn: see s. 32(5). Therefore, the Claimant lost nothing from the deemed unfairness caused by not giving him prior notice of publication because he could not have obtained an injunction anyway.

83. Mr Spearman put forward two answers to the causation point neither of which is pleaded. The first is the suggestion in some of the evidence that BPL made copies of the photograph available to the media at some earlier stage. The relevance of this is to s. 32 (4) (b) which limits the Court's power to stay proceedings to cases where there has been no prior publication by the data controller. It seems to me that even if

copies of the photograph were made available to other newspapers prior to the publication in the Sunday Express, that would not amount to making it available to the public or a section of the public which is the definition of "publish" in s. 32(6).

84. His second point was a more fundamental one which is that it transpires that at the relevant time BPL was not registered as a data controller under s. 19 of the Act. In the absence of registration there is a prohibition on processing personal data: see s. 17(1). Contravention of s. 17(1) is made a criminal offence under s. 21(1). Mr Spearman submits that in the circumstances BPL had no right to process the Claimant's data at all and that this of itself gives to the Claimant a right to compensation under s. 13(1) for the damage he has suffered by reason of that contravention of the Act regardless of the availability of an injunction. He also submits that so far as relevant a failure to register disentitled BPL to the benefit and protection of s. 32.

85. The s. 17 point is therefore relevant to two issues: (i) BPL's causation argument and (ii) as the basis for an independent claim for compensation. It seems clear to me that the Claimant would not have been entitled to seek an injunction to prevent the processing of his data solely on the ground that there had been a breach of s. 17(1). The section gives no private remedy to the data subject and only the Attorney-General on behalf of the Crown would have the locus necessary to seek from the Court an injunction in order to enforce this provision of the criminal law. In any event, no relief is sought by the Claimant on that basis in the present proceedings.

86. I am also not persuaded that a failure to register excludes the operation of s. 32 in respect of any claim to injunctive relief which the Claimant might have chosen to pursue based on a breach of s. 4(4). That section imposes a duty to comply with the data protection principles upon the data controller. This is defined in s. 1(1) as:

> *"….a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;*
>
> ….
>
> *data which relate to a living individual who can be identified—*
>
> *(a) from those data, or*
>
> *(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
>
> *and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;…."*

It does not depend on registration and in my judgment the provisions of s. 4(4) continued to bind BPL notwithstanding its failure to register. The sanction for non-registration is the specific criminal penalty under s. 21.

87. Reliance on a breach of s. 17 does not therefore answer the causation argument based on the breach of the s. 4(4) duty. Any application by the Claimant for injunctive relief to prevent the unfair processing of his personal data would have been subject to s. 32(4). But Mr Spearman's second point is, I think, that this is all irrelevant if a separate ground for compensation under s.13 arises out of the breach of s. 17 which is not dependent for its causative effect on the Claimant being able to obtain injunctive relief in order to prevent publication.

88. The right to compensation is statutory and depends upon the terms of s. 13. It requires the Claimant to show that he has suffered damage or distress by reason of a contravention by a data controller of any of the requirements of the Act. Even assuming that s. 17 is a requirement of the Act for these purposes it is difficult to see what damage or distress the Claimant suffered as a result of the photograph being processed by an unregistered data controller as opposed to a registered one. The failure to register was not causative in itself of the damage. What (if anything) caused the damage was the publication of the photograph but this loss (for the reasons set out earlier) would have resulted even if BPL had been registered as required.

89. But even if I am wrong about this and the Claimant is entitled to compensation for any damage or distress caused by a contravention of s. 17 it is still necessary for him to prove that he has suffered either of those things. It is accepted that the taking of the photograph and its subsequent publication caused him no distress. That leaves the question of damage. Damage under s. 13(1) means ordinary pecuniary loss: see *Johnson v The Medical Defence Union [2007] EWCA Civ 262* per Buxton LJ at paragraph 74. There is no allegation that the Claimant has suffered any pecuniary loss as a result of the photograph and compensation is said to be sought in respect of general rather than special damage. This is not a claim in contract for which nominal damages can be awarded and on the basis of the facts the claim for compensation is not made out if it is limited to direct pecuniary loss caused to the Claimant.

90. To meet this point Mr Spearman contends that I should award the Claimant by way of compensation a sum calculated by reference to the market value of the data which has been misused. Damages of this kind are sometimes labelled restitutionary and are commonly awarded either in lieu of an injunction to enforce equitable rights under (eg) a restrictive covenant (see *Wrotham Park Estate Co. Ltd. v Parkside Homes Ltd. [1974] 1 WLR 798)* or where the proper remedy is a form of equitable compensation or accounting designed to require the Defendant to disgorge the profits he has made from the use of the Claimant's property. In both cases the Court is in effect compensating the Claimant for his loss of bargaining opportunity or the compulsory acquisition by the Defendant of his rights: see *A-G v Blake [2001] 1 AC 268* per Lord Nicholls at p 281 G.

91. That decision establishes that in a case of breach of contract the common law will in appropriate cases award damages by reference to the benefit gained by the wrongdoer from his breach rather than the actual loss suffered by the Claimant which will often be minimal. In *Blake* Lord Nicholls set out the basis for such awards in his speech at p 285 B-E:

> *"The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific*

> *performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adopted to breach of contract. Further, in certain circumstances an account of profits is ordered in preference to an award of damages. Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible."*

92. It seems to me that these principles have no application in this case. They depend upon an analogy with property rights and the Court's power to enforce the terms of the contract. The Data Protection Act does not purport to give the data subject any property in his personal data but merely regulates the way in which it can be processed. Section 13 entitles him to compensation for pecuniary damage and distress suffered as a result of a contravention of the Act. I think that Mr Warby is right in his submission that this does not give him a cause of action based upon a misuse of data which does not actually cause him to suffer damage or distress but rather allows the data controller to profit from his use of the material. The claim is one for breach of statutory duty and I am not aware of any authority in which damages have been assessed on this rather than the more normal basis of direct pecuniary loss suffered by the Claimant himself. In *Blake* Lord Nicholls does refer to a number of instances of tortious conduct affecting property where damages have been assessed by reference to the value to the Defendant of the property rights which have been misappropriated. But they are all explicable on the basis that the Claimant has a property interest in the subject matter of the tort.

Conclusions

93. For these reasons therefore I also reject the claim for compensation under the Data Protection Act. It follows that the action has no reasonable or realistic prospect of success and I propose to strike out the claim. I am grateful to both Counsel for their assistance.