



Neutral Citation Number: [2010] EWHC 119 (QB)

Case No: HQ10X00271

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

John Terry
(previously referred to as "LNS")

Applicant

- and -

PERSONS UNKNOWN

Respondent

Mr Richard Spearman QC (instructed by Schillings) for the Applicant
The Respondent did not appear and was not represented

Hearing dates: 22 January 2010

Approved Judgement

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. This application for an interim injunction raises issues as to how the court is at the same time to act compatibly with rights under each of Arts 6, 8 and 10 of ECHR, and to give effect to corresponding common law principles, from which those rights are derived. These relate to open justice, to the right to a fair hearing, to the right to private life and to reputation, and to the right to speak freely.
2. The application was made by LNS at 1445 on Friday 22 January 2010. I heard submissions from Mr Spearman for about two hours. No notice had been given to any Respondent or other person. The applicant states that the order is “likely to be served on media third parties”. No third party is identified in the draft order, but one, the publisher of The News of the World (“NGN”), is named in the evidence.
3. At that hearing I made orders for there to be a private hearing and anonymity (CPR39.2(3) and (4)) and I granted an order substantially in the form sought. This prohibited the publication of certain information. But that order is expressed to last only until I delivered my decision on the application, which I now do.
4. This judgment is drafted in a form which should be publishable in the usual way, whatever the outcome of this hearing, or any subsequent hearing in any court in these proceedings. It is necessary to use awkward language to achieve this aim, which is necessary to protect the rights of individuals referred to in this judgment.

THE SUBSTANCE OF THE ORDER SOUGHT – ARTS 8 AND 10

5. There is a Confidential Schedule to the draft Order submitted to the court, and a confidential annex to this judgment.
6. The draft order seeks a prohibition on publishing “all or any part of the information or purported information” and documents in four categories. I paraphrase this as follows: (1) the fact of a specified personal relationship (“the Relationship”) between LNS and another person who is named (“the other person”); (2) details of that relationship including certain specific consequences of it; (3) information leading to the identification of LNS or the other person and (4) any photographs evidencing or relating to the fact or details of these matters.
7. The applicant accepts the truth of certain information which is sought to be protected by the draft order. I do not know whether or not LNS considers that those matters were acceptable for a person in LNS’s position in life. But the application is to stop further publication of such information, at least to the public to large. I shall consider below what reasons are given for that. LNS does not know what NGN or anyone else may be intending to publish, so there is no admission that whatever may be published will be true.
8. Evidence is before the court of LNS’s position in life, both professional and personal. In my view, there is a real prospect that this information could form the basis for a submission for a respondent (or a third party given notice of the order) that publication of at least the fact of the Relationship ought to not to be

prohibited, on the ground that publication would be in the public interest, alternatively on the ground that the respondent (or person given notice of the order) believes that publication would be in the public interest. By the public interest I include the matters listed in ECHR Art 8(2) and in the PCC Code. I express no view, at this stage, as to whether that submission would succeed. I merely state that there is a real prospect that it could properly be advanced. The reasons for this conclusion are set out below.

9. In the language of defamation, the information, if published, would be capable of lowering LNS in the estimation of right thinking members of society generally. That is all that a judge could say at this interim stage. Whether it would so lower him, would be a matter for a jury to decide.
10. Nothing in or about the Relationship appears likely to be unlawful. Mr Spearman submits that the information is all private, and that a publication would be a misuse of the information.
11. There is reference in the evidence to some unspecified details of the Relationship, and some unspecified photographs. Publication of these would undoubtedly be prohibited, if it were established that they are as intrusive as the applicant suggests, and if there is sufficient evidence of a threat to publish them to justify the making of a court order.
12. There is also reference in the evidence to individuals (other than LNS and the other person) whose rights of privacy the applicant says would also be affected by any publication. I shall call these “the first interested person”, and so on. Neither the other person, nor any of the interested persons, is a party to this application. In principle all or any of them could be joined as applicants, if they wished to be, so far as I have understood. I shall have to consider to what extent I should have regard to rights which LNS, but not they themselves, are choosing to seek to establish in these proceedings.
13. The upshot thus far is that, subject to the other issues I shall consider, this is a case where the applicant could expect an injunction to be granted in some form, including at least some of the information in category (2), if there is sufficient evidence of a threat in relation to that category.
14. I will consider below whether there is sufficient evidence of a threat to publish details of the Relationship or photographs relating to it. Save for one mention of the existence of photographs, the only evidence relates to the alleged threat of publication of the fact of the relationship. The case that there is a threat to publish detailed information or photographs is largely based on inference from the threat to publish the fact of the Relationship.
15. The issues raised in this application include:
 - (1) whether the limitations upon, or defences to, a claim in misuse of private information on grounds of public interest are such that an injunction ought, or ought not, to be granted; and whether or not the law to be applied to this application is that set out in *Bonnard v Perryman* (recently re-affirmed in *Greene v Associated Newspapers* [2004] EWCA Civ 1462; [2005] QB 972);

- (2) whether the court should order the derogations sought from open justice, the requirements of fairness, and Art 6;
- (3) whether the court should order the derogations sought from other provisions of the CPR;
- (4) what should be the scope of any prohibition granted: the order sought is unqualified in form, but according to the evidence the information is already circulating widely by word of mouth, and what appears to be sought is in reality a prohibition of publication to the public at large by broadcast in the press or other media.

THE DEROGATIONS FROM OPEN JUSTICE, THE REQUIREMENTS OF FAIRNESS, Art 6 and CPR

16. The following derogations from open justice, the requirements of fairness, and Art 6, are sought in the draft order: (1) a private hearing, (2) anonymity for the persons involved in the Relationship, (3) that the entire court file should be sealed pursuant to CPR5.4C(7), (4) that the order should prohibit publication of the existence of these proceedings, and that it should do so not just until service of the proceedings, or until a return date, but that it do so “until after the conclusion of the trial of this claim or further Order in the meantime”, (5) that (notwithstanding the provision of CRP PD 25 para 9.2), the applicant shall *not* be required to provide any third party served with a copy of the order a copy of any materials read by the judge and/or a note of the hearing.
17. There are further derogations from the CPR sought in the draft order as follows: (a) that the order shall be made until trial or further order (whereas in orders made without notice CPR PD para 5 provides that there must be a return date); (b) that time for service of the Claim Form pursuant to CPR 7.5 and CPR 7.6(1) be extended “generally until 21 days after the identification of the Respondent(s) by the Claimant”.
18. The draft order sets out correctly that (in accordance with what is known as the *Spycatcher* principle: see *A-G v Newspaper Publishing plc* [1988] Ch 333, 380):

“Effect of this order: It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be imprisoned, fined or have their assets seized”.
19. Of course, the draft order also provides that the order itself, including all of these derogations from the norms, are to be subject to the right of the respondent, and of anyone served with or notified of the order, to apply to the court to vary or discharge the order (or so much of it as affects them). But the effect of this is to place upon a respondent or third party the burden of making an application to the court. A person considering making an application to vary the order would do so without knowing anything about the basis upon which it had been granted. He would not even know whether, and if so to what extent, the court will permit disclosure to him of the material upon which the order was granted. The draft

order thus seeks to transfer to third parties notified of the order the financial risk of incurring costs which they might not incur if they had been informed (as required by CPR PD 25 para 9) of the grounds of the application. CPR PD 25 para 9 provides:

“9.1 The following provisions apply to orders which will affect a person other than the applicant or respondent, who:

(1) did not attend the hearing at which the order was made; and

(2) is served with the order.

9.2 Where such a person served with the order requests –

(1) a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or

(2) a note of the hearing,

the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise”.

20. The overall likely effect of the order sought appeared to me to be as follows. The applicant was likely to notify a limited number of media third parties promptly. After the hearing that was done, as set out below. If it were not intended to do that, there would be no point in the court making the order (since it is admitted the Respondent has not been identified). In my view, on the information now before me, the applicant is unlikely ever to serve the Claim Form on any respondent. Journalists do not normally reveal their sources and can rarely be obliged to do so: *Financial Times v UK* (Application no. 821/03) 15 December 2009. As that case showed, even leak enquiries conducted with the resources of a major corporation, backed up by specialist investigators, commonly fail to identify the source of a leak. But that will not trouble the applicant. There is no provision for a return date. Since service on the Respondent is unlikely, it follows that no trial is likely to be held. Unless a third party is prepared to take the risk in costs of applying to vary this order, this interim application is likely to be the only occasion on which the matter comes before the court. The real target of this application is the media third parties who are not respondents. The only third parties who will ever hear of the proceedings are those whom the applicant chooses to notify. According to the terms of the draft order, no one else will have any means of discovering that an order has been made at all. The third parties who will be notified will be told nothing by the applicant about the grounds for the claim, or any possible defence to it. If they want to know more, they will be at risk as to costs in making an application to the court. In short, the effect of the interim order sought is likely to be that of a permanent injunction (without any trial) binding upon any person to whom LNS chooses to give notice that the order exists.

21. The CPR provide for departures from the rules if the court so orders, and from time to time, when justice so requires, court orders are made which include significant derogations from normal procedural requirements. I do not recall any order that has been made with derogations as comprehensive as those sought in this case, although Mr Spearman informs me that there have been some. Substantial derogations have been ordered in cases involving national security and risk to the lives of others, as mentioned below.
22. Other derogations, including provisions for a private hearing, and for anonymity for the applicant, are not uncommon: see for example *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 at p75 (claim for an injunctions preventing further publication by a friend of the claimant of a book describing the claimant's private life). Without these provisions an application for an order prohibiting the disclosure of private or confidential information would in many cases be self-defeating. And orders made without the 3 days notice prescribed by CPR 23.7(1)(b) do not always provide for a return date. That is often because a respondent has been contacted informally and indicated he will not oppose the application. In other cases, too, the court from time to time dispenses with a return date for various reasons. Mr Spearman submits that in this case a return date "would probably achieve no more than to ensure that further costs and Court time are expended on that hearing". Mr Spearman did not envisage that any third party would wish to ask the court to vary the order sought.
23. Orders have from time to time been made providing for sealing the whole court file. But such a wide order under CPR 5.4C is very rarely necessary. Normally sufficient protection to the claimant is given if there is an order for the anonymity of the claimant, and for statements of case, and witness statements, to include any private or confidential information in a separate confidential schedule. Any order under CPR 5.4C can then be confined to the confidential schedule.
24. Orders have from time to time been made prohibiting the disclosure of the fact that an order has been made and providing for sealing the whole court file. Some newspapers refer to these as 'super injunctions'. I shall consider such orders below.
25. The grounds for any derogation from the normal provisions of the CPR should be set out in evidence put before the court asked to make the order. CPR 25.3 provides:
 - "25.3(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice.
 - (2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.
 - (3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given."

26. That has not been done in this case. The grounds have been advanced by Mr Spearman in his Skeleton argument.

THE FORM OF THE EVIDENCE

27. The evidence submitted is in the form of a short witness statement made by the applicant's solicitor. In order to maintain confidentiality, all the substantive evidence is contained in a nine page exhibit headed "Confidential" ("the exhibit"). The exhibit has 111 pages of attachments. All but 4 of these are print outs from the internet, mainly of results of searches against the name of LNS and the other person.

28. In the exhibit the solicitor describes LNS as a person well known in the field of professional sport. He goes on to state:

"On Wednesday evening, 20 January 2010, and together with [another solicitor of the same firm] I spoke with [LNS]'s business partners [BP1 and BP2 – "the business partners"]. [The business partners] told me of [LNS]'s very grave concern over the possibility of intrusion into [LNS]'s personal life. This concern has arisen as a result of [LNS] being aware of rumours circulating among the [relevant sporting] community concerning [LNS]'s private life. It is that concern that leads to the present application being made... In the afternoon of 22 January 2010 [the business partners] met with [the other person] at a London hotel. [The other person] confirmed to [the business partners] that [the other person] considered the fact and detail of [the other person's] relationship with [LNS] to be private and that [the other person] did not want any such information ... to become public. For the avoidance of doubt however it should be made clear that a substantial amount of information is in the public domain concerning [the other person] which in the case of a less well known person would not be in the public domain, at least some of it at [the other person's] instigation or with [the other person's] consent I refer by way of illustration ... [and illustrations of this are attached to the exhibit]. At the meeting, [the other person] executed a confidentiality agreement and side letter confirming these wishes. A copy of these documents is attached...."

29. The side letter is dated 21 January 2010 and addressed to the applicant's solicitors. It consists of seven lines signed by the other person personally. The other person writes:

"I understand that there have been claims made concerning a relationship between [LNS] and myself. Whilst I do not make any admission as to the truth or otherwise of such rumours, speculation concerning [LNS, the other person and the Relationship] is private and I agree to keep such

information private and confidential. If I receive any enquiries from the media concerning the above, I agree that I shall notify [BP1] about this as soon as possible”.

30. The confidentiality agreement bears the same date and signature. It consists of 15 clauses covering two full pages. It starts:

“As a result of my dealings with you there has been speculation about a relationship with you. Whilst I do not make any admission as to the truth or otherwise of such speculation, I do not want such information to be disclosed. In order to assist you in keeping such matters confidential and in consideration of £1 receipt of which is hereby acknowledged I agree as follows:

....

2. I agree not to disclose any Confidential Information to any third parties (save to my legal advisors or as required by law).

3. I agree not to disclose any Confidential Information to any media organisations, journalists or any 3rd party who may provide such Confidential Information to any media organisation ...

14. The terms of this agreement are confidential...”

31. So the source for the information contained in the document is not the applicant directly, nor the other person. It is the business partners. This is a matter of concern. It is not said that the business partners are solicitors, or have received any advice from solicitors as to how they should go about collecting information to be put before the court. I infer that they are not solicitors. The significance of this is that solicitors owe duties to the court and are skilled in taking statements from witnesses. It is very important that information from witnesses should be what the witness truly believes, and that words should not be put into the mouth of a witness: see White Book (2010) note 32.8.1. An applicant for interim relief owes duties of full and frank disclosure to the court. No one but a solicitor will be in a position to assess what that duty requires in the context of an application such as this. When the evidence before the court is not verified by the person who is the source for the information, there is not the assurance that that person feels at risk of sanctions if the information is untrue.

32. There is no information given as to the business in which the two “business partners” are partners of the applicant. As noted below, the exhibit includes a statement that LNS has “a number of high profile sponsorship or endorsement deals for companies...” That is a business which successful sporting figures commonly engage in. It is a matter of common knowledge that for very successful professionals, income earned in this way can be very large indeed. But high profile sponsors are sensitive to the reputation of the sports professionals to whom they pay the large sponsorship fees demanded for promoting the sponsor’s

products. They may cease to use a famous face if it is associated with behaviour of which the sponsor or the public may disapprove.

33. I infer that the business partners are engaged in the promotions of LNS for sponsorship deals, and that their business interest is to protect LNS's reputation. I am left in serious doubt as to whether the information sourced through the business partners is full and frank.
34. I am also troubled by the two documents signed by the other person. The other person is also a famous person, but not in the world of sport, and not as famous as LNS. The impression conveyed by the evidence is that the Relationship was one between equals. But the Confidentiality agreement signed by the other person is similar in form to one that an employer might require to be signed by someone providing services, such as a personal assistant. It includes the words "In order to assist you..." It refers to a consideration of £1, but I am left wondering whether that was the only consideration. I do not feel confident that the two documents signed by the other person express the other person's personal wishes, as opposed to what the other person has been willing to agree to at the request of LNS, for whatever reason. I have no information about the other person's views about the Relationship and the present state of it.
35. There is little explanation of how the business partners came to be talking to the other person at all. There is no explanation before me of the circumstances surrounding the obtaining of the documents signed by, or the information attributed to, the other person. Such circumstances may be highly relevant to the credibility and weight of the evidence in the other person's words: "I do not want such information disclosed".
36. An explanation was advanced orally by Mr Spearman for why LNS did not make a statement personally. It is that this application is urgent, and the applicant has professional engagements which made it impossible in the time available for LNS to give first hand evidence. I can accept that explanation in principle, but with a number of reservations. First, that is not an explanation of why it is sourced through the business partners, and not given directly to the solicitors in the usual way. Second, it is not an explanation why the other person has not made a statement, but has expressed what are said to be the other person's wishes through a formal confidentiality agreement and side letter. Third, I must decide the case on the evidence that is before me: I cannot assume that the evidence before me carries the same weight as it would carry, if it had been given directly by LNS and by the other person. Fourth, since the only explanation for the form of the evidence is its urgency, I would expect an undertaking that at any return date LNS, and the other person will submit witness statements made by them personally. If either LNS or the other person is unwilling to do that, I would expect a substantive explanation for why not. And if at that stage LNS continues to ask the court to have regard to the Art 8 rights of the interested persons, I would expect similar evidence, or similar explanation, in respect of the first interested person. Mr Spearman did not have an opportunity at the hearing to address me on all of these points.
37. I return below to the position of the other person and the interested persons.

THE CONTENT OF THE EVIDENCE

38. The solicitor's exhibit gives a brief summary of LNS's position and status in life, both the professional, and the family status. It gives a summary of such facts as are admitted relating to the Relationship, and some information about the position in life of the other person, both professional and personal. It refers to a dispute between the other person and another person. It records that LNS and the other person

“have each only discussed the relationship with a very small number of people, in confidence. [LNS] has not told [the interested person] about [LNS's] relationship. Accordingly the original source or sources of the stories that have been circulating ... in other words the 'person or persons unknown' who are the Respondent ... have acted in clear breach of confidence in passing on the information they have received as [LNS] contends they must have done”.

39. As noted above, the solicitor states that LNS has “a number of high profile sponsorship or endorsement deals for companies including” three very well known brand names. One brand is associated with sport, one with consumer goods and one with a financial institution. There is no evidence of whether the sponsors are expected to take any, and if so what, view or course of action, if the fact of the Relationship, and limited details of it, were published.
40. The solicitor gives examples of instances where LNS has “encouraged or at least condoned publicity about aspects of [LNS's] private life”. This part of the exhibit is directed towards making the full disclosure which is required of an applicant for relief which is not made on notice to a respondent.
41. Much of this information demonstrates a conscientious effort on the part of the lawyers to fulfil the duty of full and frank disclosure. The evidence is that the collection of this material has been carried out by a trainee solicitor. It is not attributed to the business partners.
42. Much of this information is such that it would not cause me to pause for one moment, if I was otherwise of the view that the order sought ought to be made.
43. But Mr Spearman properly drew my attention to information about which he submitted I could take a view less favourable to LNS. He submitted that I should not regard this particular information as giving rise to a possible defence, but he was right to draw my attention to it. One reason he submitted that it should not be considered relevant is that it dates from a time in the past. It includes of one particular interview that LNS gave to a national newspaper. In that interview LNS made statements about other relationships which LNS had been involved in which had some attributes which may be common to the Relationship. This is one basis upon which I take the view that the Respondent, or a newspaper publisher to whom notice of the order was given, could found a submission that there is a public interest defence. Again I make clear that I am not deciding that that

submission would succeed. There is force in Mr Spearman's point as to the date of the interview.

44. But I am not satisfied, on the information and submissions before me, that the applicant is likely to succeed on this point. The burden under HRA s.12(3) lies on the applicant, and LNS has not discharged the burden on the present application.
45. The solicitor's exhibit then recounts the events which precipitated this application. It is not stated whether these events were recounted to the solicitor directly, or through one of the business partners. On 18 and 19 January the other person received telephone calls from the person with whom the other person is in dispute. In the light of those calls the other person understood that the media had photographs of the other person and LNS relevant to the Relationship. Nothing is stated as to what might be in the photographs. Early on 20 January 2010 BP1 received a call from another prominent sportsperson. As a result of that and another conversation with the same person BP1 understood that everyone in that sport "are talking about it". Later on 20 January 2010 LNS received calls from another person connected with the sport. He said that he had heard rumours of the Relationship and that the person who had told him was a journalist at the News of the World. LNS telephoned him back in the evening, and he was evasive when asked if there was a journalist.
46. At 2pm on Thursday 21 January 2010 LNS was informed by a person responsible for Communications that "the News of the World are seeking to publish a story this Sunday 24 January... they (meaning the paper or the media generally) are 'all over it'". A similar message was communicated to LNS shortly afterwards by a person responsible for security.
47. The solicitor's exhibit goes on to say:

"As a result of these conversations [LNS] knows that the rumour is rife within the [relevant sporting] community, but does not know the origin of the rumour"... [and that there are a lot of people in that] "world who know about the fact and at least some detail of the [Relationship]. This category includes but is not limited to players, former players and agents".

BREACH OF CONFIDENCE

48. No Claim Form had been issued before the application was made to me. But Mr Spearman has prepared a very full skeleton argument. Pages 5 to 24 set out in some details the two causes of action upon which he relies. They are breach of confidence and misuse of private information. I can set out the elements of those two causes of action briefly.
49. A breach of confidence occurs where (i) information has the necessary quality of confidence, (ii) it has been imparted in circumstances importing an obligation of confidence to the claimant and (iii) unauthorised use or disclosure is threatened. A duty of confidence arises when information comes to the knowledge of a person, in

circumstances where he has notice, or is held to have agreed, that the information is confidential.

50. Public interest and public domain are the most common justifications for publishing information which was or is confidential. Public domain applies where there has been sufficient prior publication so that there is nothing left which an injunction can, or should, protect. Public domain is not always a justification for publication of confidential information. In some cases repetition of a publication already made may inflict harm that ought to be prevented.
51. Where there is a confidential relationship the test is “not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached” (*Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776; [2008] Ch 57 [68]) . That case concerned an unauthorised disclosure by an employee of a travel journal, in breach of contract.
52. I am not satisfied that LNS is likely to establish that there has been a breach of a duty of confidence owed to LNS under this cause of action. There is insufficient evidence as to what LNS and the other person have each told to whom and in what circumstances. In so far as details of the Relationship are concerned, it may well be that *if* either of them has told details, then I would infer that those details were likely to have been communicated in confidence. But the evidence before me does not identify any details which are said to be known by anyone other than LNS and the other person, from which I would draw the inference that there has been a breach of confidence of which LNS can complain. The evidence goes no further than to make it likely that LNS will establish that the fact of the Relationship is known to persons other than the two parties to it. There is no evidence that any photographs there may be were produced or disclosed in confidence. In *X v Persons Unknown* [2006] EWHC 2783 (QB); [2009] EMLR 290 the information in question was about the applicants’ marriage and was allegedly disseminated to the media by unknown friends. As Eady J put it in that case, at [38], some facts about the existence or otherwise of a relationship between two persons are “naturally accessible to outsiders”. And outsiders can draw inferences from such facts. I do not know enough about the other person’s view of it to conclude whether or not it is likely that the other person would have disclosed information only in confidence.
53. I shall consider below possible defences, and whether, if I were satisfied that LNS would succeed on liability, I would also be satisfied that he would be likely to obtain a permanent injunction restraining publication. What applies to misuse of private information in this connection also applies to breach of confidence.

MISUSE OF PRIVATE INFORMATION

54. The second cause of action relied on by Mr Spearman is misuse of private information. Here he is on somewhat stronger ground.
55. At a trial of a claim for misuse of private information a claimant must first establish that he has a reasonable expectation of privacy in relation to the information of which disclosure is threatened. That is “whether a reasonable person of ordinary

sensibilities would feel if he or she was placed in the same position as the claimant and faced the same publicity” in all the circumstances. These include “the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher”: see *Murray v Express Newspapers* [2008] EWCA Civ 446; [2008] Fam Law 732 [24], [36], [52]. That case concerned photographs of a young child in a public place taken covertly and published without the parents’ permission. Photographs attract special protection because they can be much more intrusive and informative than words: *Douglas v Hello! (No 3)* [2006] QB 125. That case concerned photographs taken surreptitiously at a wedding party.

56. If there is such a reasonable expectation, the next question is whether there is a justification for the disclosure, eg public interest and public domain, as set out in Art 8(2) and 10, and whether a permanent injunction would be a necessary and proportionate remedy, having regard to Art 10. As noted in *Murray* [21], in *Campbell v MGN Ltd* [2004] 2 AC 457 [36] it was accepted on Ms Campbell’s behalf that falsehoods she had told entitled the newspaper to publish the fact that she was addicted to drugs. There is no corresponding concession in the present case.
57. Arts 8 and 10 provide as follows:

Article 8 Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ..., for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 Freedom of expression

1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.....

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society,...., for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality

of the judiciary.

58. HRA s12 will apply at any trial, just as it applies at the interim application stage. It reads:

“12 Freedom of expression

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

(2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied—

(a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which— (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code”.

59. Mr Spearman cites in his skeleton argument the provisions of the PCC Code as follows:

“3 *Privacy

(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.

(ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of

information.

(iii) It is unacceptable to photograph individuals in private places without their consent.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

The public interest

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined to:

(i) Detecting or exposing crime or serious impropriety.

(ii) Protecting public health and safety.

(iii) Preventing the public from being misled by an action or statement of an individual or organisation.

2. There is a public interest in freedom of expression itself.

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.

4. The PCC will consider the extent to which material is already in the public domain, or will become so.

5. In cases involving children under 16, editors must demonstrate an exceptional public interest to over-ride the normally paramount interest of the child”.

60. In a section of his Skeleton Argument addressed to fulfilling an applicant’s duty to the court to draw attention to possible defences, Mr Spearman referred to the need to prevent the public from being misled. He wrote this:

“In the present case the applicant has made claims [about LNS’s conduct...] and it could be argued that he cannot complain if the true position is exposed. However the court has to have regard not only to [LNS’s] Art 8 rights but also those of [the other person] and [the interested persons], and it is submitted that it would be an unduly heavy price for them to pay to the end of correcting any false public image that the applicant may have cultivated. In addition, the question for the court is not so much whether there is a contrast or contradiction between the position ... which was stated at the time and that which prevails now, but whether previous claims that were false and misleading at the time when they

were made”.

61. Mr Spearman reminds me, and I accept, that in relation to misuse of private information, there is a conflict between rights under Art 8 and 10, and I must follow the course set out in *Re S (A Child) (Identification: Restriction on Publication)* [2004] UKHL47; [2005] 1 AC 593. That case concerned the reporting of a trial of a parent charged with murder of a son. Lord Steyn said at [17]:

“First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test”.

62. I also have in mind that there is a public interest in naming individuals in some circumstances. For example, in relation to a report of a trial, in the same case Lord Steyn said at para 34:

".....it is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

63. Similar statements have been made in *In re BBC* [2009] UKHL 34; [2009] 3 WLR 142 para 25-26 (also a case about reporting of criminal proceedings) by Lord Hope of Craighead and 65-66 by Lord Brown of Eaton-under-Heywood. Lord Hope said:

“25. Lord Pannick suggested it would be open to the BBC to raise the issue of general interest without mentioning D's name or in any other way disclosing his identity. But I think that Mr Millar was right when he said that the BBC should not be required to restrict the scope of their programme in this way. The freedom of the press to exercise its own judgment in the presentation of journalistic material has been emphasised by the Strasbourg court. In *Jersild v Denmark* (1994) 19 EHRR 1, the court said, at para 31, that it was not for it, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. It recalled that article 10 protects not only the substance of the ideas and the information expressed but also the form in which they are conveyed. In essence article 10 leaves it for journalists to decide what details it is necessary to reproduce to ensure credibility: see *Fressoz and Roire v France* (1999) 31 EHRR

28, para 54. So the BBC are entitled to say that the question whether D's identity needs to be disclosed to give weight to the message that the programme is intended to convey is for them to judge. As Lord Hoffmann said in *Campbell v MGN Ltd* [2004] 2 AC 457, para 59, judges are not newspaper editors. They are not broadcasting editors either. The issue as to where the balance is to be struck between the competing rights must be approached on this basis.

26. Will the revealing of D's identity in connection with the proposed programme pursue a legitimate aim? I would answer that question in the affirmative.”

64. Lord Brown said at [66] that the short answer to Mr Pannick’s submission was to be found in para 34 of Lord Steyn's speech in *In re S (A Child)* [2005] 1 AC:

“such a programme would indeed be ‘very much disembodied’ and have a substantially lesser impact upon its audience”.

65. As I indicated in my summary of the evidence, the evidence of the existence of such a threat is limited to one reference to unspecified photographs on 18 or 19 January, and to an inference from the interest of the media in the story. That is not enough for me to be satisfied that there is a real threat to publish photographs or details in respect of which LNS has a reasonable expectation of privacy.

66. The court is being asked by LNS to have regard to the Art 8 rights of the other person and the interested persons. Respect for the dignity and autonomy of the individuals concerned requires that, if practicable, they should speak for themselves. There is no suggestion that the first interested person is unwell or otherwise abnormally susceptible, or not in a position to address this matter. If it is not practicable or just that the other person or anyone else should not give evidence personally, the court should know why. The evidence does include a statement that LNS has not told one of the interested persons about the Relationship. That is not the same as saying that person does not know about. I do not find it credible that rumours that have circulated as widely as the rumours in this case are said to have circulated have not yet reached the ears of at least the first interested person. If they have not yet got that far, they surely will do very soon.

67. As to any other interested person, in my view LNS is not well placed to represent their interests. LNS lacks the necessary independence to do that. It is relevant to this, and to other aspects of this case, that I infer that LNS enjoys the very large earnings which comparable sporting professionals are well known to enjoy. Financial constraints cannot be invoked to justify omitting to take any steps that justice requires should be taken.

68. I accept that LNS has shown a real threat exists to publish information about the fact of the Relationship, and no doubt some unspecified details. But I am not satisfied that LNS is likely to succeed in establishing that publication of the fact of the Relationship (and possibly some relatively unintrusive details), should not be

allowed.

69. As to any threat to publish intrusive details of the Relationship, or photographs relating to the Relationship, I am not satisfied that there is a real threat. But if there were, then that seems to me to be a different level of speech from disclosing the fact of the Relationship and details which are at a low level of intrusiveness. If there were a threat to publish any intrusive details of the Relationship, or photographs relating to the Relationship, then I would be satisfied that LNS would be likely to establish at trial that publication should *not* be allowed to that extent.
70. There is a further reason why I am unable to be satisfied that LNS is likely to establish that publication should not be allowed. This reason relates to an uncertainty in the law of misuse of private information (and for that matter the law of confidence). The uncertainty is the extent to which, if at all, the belief of a person threatening to make a publication in the media is relevant on the issue of public interest.
71. Eady J referred to this point in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); [2008] EMLR 679 (the trial of a claim about a report of clandestine sado-masochistic activities). He said:

“135 As the law stands, it seems clear that it is for the court to decide whether a particular publication was in the public interest. This may require further explanation. It is important to have in mind that some authorities (here and in Strasbourg) have in recent years placed emphasis on the need to make due allowance for editorial judgment and also for a wide discretion so far as taste and modes of expression are concerned: see e.g. *Jameel (Mohammed) v Wall Street Journal Spri* [2007] 1 AC 359 at [31]-[33] in the context of privilege in the law of defamation, where Lord Bingham made these observations:

"31 The necessary precondition of reliance on qualified privilege in this context is that the matter published should be one of public interest. In the present case the subject matter of the article complained of was of undoubted public interest. But that is not always, perhaps not usually, so. It has been repeatedly and rightly said that what engages the interest of the public may not be material which engages the public interest.

32 Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicholls proposed [in *Reynolds v Times Newspapers Ltd*], at p 202, a test of responsible journalism, a test repeated in *Bonnick v Morris* [2003] 1 AC 300, 309. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord

Hobhouse observed with characteristic pungency, at p 238, 'No public interest is served by publishing or communicating misinformation.' But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.

33 Lord Nicholls, at p 205, listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege. Lord Nicholls recognised, at pp 202-203, inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner."''

72. Also relevant to an argument that the belief of the journalist may be relevant to a defence are the PCC Code (Public Interest, para 3) and, where the Data Protection Act might apply, to s32(1)(b) and 55(2)(d). The passage in s.32 reads:

“Personal data which are processed only for the special purposes [journalism, literature and art] are exempt from any provision to which the subsection relates if ... (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes”.

73. The Data Protection Act might well apply to a newspaper publication, and in particular to an online publication. If that Act did apply, it would be anomalous if the public interest defence under s.32 required the court to have regard to the reasonable belief of the journalist, but that the same defence under the general law did not. I cannot decide that any reasonable belief on the part of a journalist or editor would be irrelevant without hearing argument for that proposition, if it is to be advanced.

DEFAMATION

74. I raised with Mr Spearman whether the facts LNS relies on in this case should not be regarded as constituting a cause of action in defamation. In *Letang v Cooper* [1965] 1 QB 232 Diplock L.J. stated a well known and much followed dictum:

"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

75. A libel or slander is commonly defined as the publication in permanent or spoken form (as the case may be) of words referring to the claimant that would tend to lower the claimant in the estimation of right thinking people generally.

76. As I have already indicated, although the words which the NGN, and/or other media, are allegedly threatening to publish are not yet known, it is very likely that there will be an arguable case that they are defamatory in that sense.

77. Of course, LNS would not choose to sue in defamation because Mr Spearman recognises that any person or media intending to publish this story is likely to do so in words for which he will be able to say that he has a defence in law, under one or other of the defences available in defamation. If so, applying the rule in *Bonnard v Perryman*, no interim injunction could be granted.

78. The relationship between defamation and the new cause of action of misuse of private information is not yet clear. Breach of confidence was also a developing cause of action in and from the 1970s. Some remarks have been made, in cases in confidence and in conspiracy, about the relationship between those causes of action and defamation.

79. Mr Spearman submits that the substantive law of defamation has also come under challenge on the grounds that none of the defences in defamation appear to allow for the ultimate balancing test. If the defence is established, no regard is paid to the impact of publication on the reputation of the claimant. He cites Clayton and Tomlinson on the Law of Human Rights, 2nd Edn at §12.19, where the editors say that the English courts have effectively avoided engaging directly with the extent to which

“the tort of defamation – which has developed to take account of Article 10 rights of defendants - may now have to be further adapted to take into account the Article 8 rights of claimants”.

80. A challenge to the defence of absolute privilege on that basis failed in Strasbourg: *A v United Kingdom* (Application 35373/97) (2002) 36 EHRR 917 [88], [103]. I accept that it might be argued that a similar challenge in respect of the defences of justification, fair comment, and qualified privilege could also be mounted. The point in relation to Justification is that the defendant is free to say anything that is true, however harmful or distressing even if there is no public interest or public benefit. See Lord Denning MR's statement in *Fraser v Evans* [1969] 1 QB 349, 360-1, and the citation by Lord Nichols from Littledale J, set out below. But I note that the harshness of this rule has been tempered by the recent development of the law against harassment. Reputation is an Art 8 right. So the argument is that

English law requires reform along the lines of what was recommended by The Select Committee of the House of Lords on the Law of Defamation in 1843. The Committee recommended that the defendant who pleads justification should also have to establish “it was for the benefit of the community that the words should be spoken”. Or there is the model of French law, which has imported from Arts 8 and 10 the concepts of legitimate aim and proportionality. In the case of a defence of justification, the reputation of a successful claimant can be vindicated by an award of damages if the words are not true. In the case of a successful defence of common law and statutory qualified privilege, a claimant has no means of vindicating his reputation at all. It is not just that damages are not an adequate remedy: there is no remedy in damages and no declaration of falsity.

81. I mention this point at this stage, because I am addressing the substantive law. The main challenge to the HRA compatibility of the law of defamation has been in relation to the rule in *Bonnard v Perryman* in interim applications, which I address below. But the criticisms that are made of that rule (and which were made unsuccessfully in *Greene v Associated*) are ones which logically relate also to the substantive law. However, as Mr Spearman rightly accepted, a judge at first instance is bound by existing authority. So I must apply the law of defamation as it is.

82. In *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at p192 Lord Nicholls said:

“... as Littledale J said in *M'Pherson v Daniels* (1829) 10 B & C 263, 272, “the law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess”. Truth, is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification. With the minor exception of proceedings to which the Rehabilitation of Offenders Act 1974 applies, this defence is of universal application in civil proceedings. It avails a defendant even if he was acting spitefully.”

83. In *Fraser* Lord Denning MR said this in relation to interim injunctions at pp360-1, but it applies as much to a trial:

“The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest.... The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. As the court said in that case :

“The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done.”

There is no wrong done if it is true, or if it is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication".

84. Lord Denning went on to say at p362:

"It was said: Seeing that no injunction should be granted in respect of the defamatory aspect of the article, likewise no injunction should be granted in respect of the breach of confidence. The plaintiff should not be able to avoid the salutary rule of law in libel by framing the case in breach of confidence. Reliance was placed on *Sim v. H. J. Heinz Co. Ltd.* I do not think it necessary to rule on this point today. I can well see that there may be cases where it would be wrong to grant an injunction on breach of confidence when it would not be granted on libel: but I can equally well see that there are some cases of breach of confidence which are defamatory, where the court might intervene, even though the defendant says he intends to justify."

85. In *Gulf Oil (GB) Ltd v Page* [1987] Ch 327 the Court of Appeal granted an injunction in conspiracy to restrain the publication of words that were true. After citing the first of the passages from *Fraser* set out above, Parker LJ said at p333:

"It is true that there is no wrong done if what is published is true provided that it is not published in pursuance of a combination and even if it is, there is still no wrong unless the sole or dominant purpose of the combination and publication is to injure the plaintiff. If, however, there is both combination and purpose or dominant purpose to injure, there *is* a wrong done. When a plaintiff sues in conspiracy there is, therefore, a potential wrong even if it is admitted, as it is in the present case, that the publication is true and thus that there is no question of a cause of action in defamation. In such a case the court can, and in my view should, proceed on the same principles as it would in the case of any other tort.

... I have no doubt that the court would scrutinise with the greatest care any case where a cause of action in conspiracy was joined to a cause of action in defamation and would require to be satisfied that such joinder was not merely an attempt to circumvent the rule in defamation".

86. At p 334 Ralph Gibson LJ said:

"Although that principle, which is applied in defamation cases, is not directly applicable in its terms to a case where the basis of claim is conspiracy to inflict deliberate damage without any just cause, nevertheless it seems to me that that

principle, namely the individual and the public interest in the right of free speech, is a matter of great importance in the consideration of the question whether in the exercise of the court's discretion an interlocutory injunction should be made and, if yes, what should be the extent of any restriction upon publication of any statement pending trial.”

87. Browne-Wilkinson LJ agreed with both judgments.
88. It appears to me, in particular from the judgement of Ralph Gibson LJ, that it is a matter for the court to decide whether the principle of free speech prevails or not, and that it does not depend solely upon the choice of the claimant as to his cause of action.
89. There have been a number of other references to the point in the interval, and in a number of cases injunctions have been refused on this basis, where the claim was brought in some cause of action other than defamation. Examples are given in *Duncan & Neill on Defamation* (3rd ed) in the footnotes to para 24.10. The most recent observations of the Court of Appeal on this point are to be found in *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73. At [79] Buxton LJ said:
- “If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process.”
90. The reference to falsity in that passage is because the claimant in that case contested the truth of the book’s allegations. The point would have had more force, not less, if the claimant admitted the truth of the allegations, and was attempting to protect an undeserved reputation by recourse to the cause of action in misuse of private information, at least where there was a public interest in her not doing so.
91. Mr Spearman relied on the following passages from the judgment of Longmore LJ, who had expressed his entire agreement with Buxton LJ at [83]:
- “85. ... It was then said that there was no right of privacy in relation to false statements, in respect of which the tort of defamation was, in any event, available.
- 86 This argument, in my judgment, is untenable. The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry”.
92. Mr Spearman submits that:

“In light of the latter decision, claimants have been able to sidestep the problems which might otherwise be presented by the Rule [in *Bonnard v Perryman*] by bringing (and seeking interim injunctions in) claims for misuse of private information in respect of allegations which concern private or personal activities even if they also adversely affect rights of reputation, contending that, in that context, the truth or falsity of the allegations is irrelevant: see, for example, *WER v REW* [2009] EMLR 304. As in the case of claims brought in reliance on other causes of action (such as under the Protection of Harassment Act 1997: see *Gatley* [on Libel and Slander 11th ed], §27.17 and the cases there cited) this is an entirely legitimate tactic, provided that the claim is brought genuinely and not merely to circumvent the Rule”.

93. I accept that submission in so far as it relates to harassment: it is entirely consistent with *Gulf Oil*. But I do not accept that the court in *McKennitt* was overruling earlier decisions of that court, or distinguishing the decisions of the House of Lords, made in cases which were not referred in the judgments in *McKennitt*.
94. I do not read Longmore LJ as saying anything different from what the court had said in *Gulf Oil*. He did not address his own remarks to an attempt to circumvent or avoid the rule in defamation.
95. On the evidence available to me now, I have reached the view that it is likely that the nub of LNS’s complaint in this case is the protection of reputation, and not of any other aspect of LNS’s private life. I note that in the evidence the most LNS is said to have expressed is “grave concern over the possibility of intrusion into [LNS’s] private life”. There is no mention of any personal distress. As to personal attributes, LNS appears to have a very robust personality, as one might expect of a leading professional sportsman. It does not seem likely to me that the concern expressed on [LNS’s] behalf for the private lives of the other person and the interested persons is altruistic. This claim is essentially a business matter for LNS. That is why the assembling of the evidence has been put into the hands of the business partners and not of the solicitors. My present view is that the real basis for the concern of LNS is likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income.
96. Before leaving the topic of defamation, I note that it is only in limited classes of cases that the law of privacy gives rise to an overlap with the law of defamation. In broad terms the cases may be considered in at least four different groups. The first group of cases, where there is no overlap, is where the information cannot be said to be defamatory (eg *Douglas v Hello!*, and *Murray*). It is the law of confidence, privacy and harassment that are likely to govern such cases. There is a second group of cases where there is an overlap, but where it is unlikely that it could be said that protection of reputation is the nub of the claim. These are cases where the information would in the past have been said to be defamatory even though it related to matters which were involuntary eg disease. There was always a difficulty in fitting such cases into defamation, but it was done because of the

absence of any alternative cause of action. There is a third group of cases where there is an overlap, but no inconsistency. These are cases where the information relates to conduct which is voluntary, and alleged to be seriously unlawful, even if it is personal (eg sexual or financial). The claimant is unlikely to succeed whether at an interim application or (if the allegation is proved) at trial, whether under the law of defamation or the law of privacy. The fourth group of cases, where it may make a difference which law governs, is where the information relates to conduct which is voluntary, discreditable, and personal (eg sexual or financial) but not unlawful (or not seriously so). In defamation, if the defendant can prove one of the libel defences, he will not have to establish any public interest (except in the case of *Reynolds* privilege, where the law does require consideration of the seriousness of the allegation, including from the point of view of the claimant). But if it is the claimant's choice alone that determines that the only cause of action which the court may take into account is misuse of private information, then the defendant cannot succeed unless he establishes that it comes within the public interest exception (or, perhaps, that he believes that it comes within that exception).

THE SOCIAL UTILITY OF THE THREATENED SPEECH

97. Mr Spearman submits that the level of social utility of the threatened speech is very low. He refers to the area of private life to which it relates, and to the fact it is not suggested that there has been any unlawful activity by LNS. He cites at length from Eady J's decision in *Mosley* [124]-[134]. I accepted that there could be details and photographs which I could without more decide were of no social utility. But I have not found that there is a threat to publish such material. So this section relates to publication of the fact of the Relationship.
98. It is of course one of the essential features of the protection of private life, and Art 8 in particular, that it enables people to live freely according to their own choices. Art 8 even promotes freedom of speech, as well as of conduct, since much speech can only be conducted freely if the parties are in private.
99. Mr Spearman appeared to me to be submitting that conduct of one person in private must be unlawful, before another person should be permitted to criticise it in public. Otherwise the speech is not capable of contributing to a debate in a democratic society. Therefore I should attribute little value to the threatened speech in the present case when considering the balance between Art 8 and Art 10.
100. If that is what Mr Spearman is submitting, I do not accept that the law has reached that point, or that Eady J was saying that it had. As I read the passages Mr Spearman cited to me, Eady J was primarily directing his attention to the excesses of the defendant in that case. This appears from his use of the words "hound" and "carte blanche" ([127], [128]). In *X v Persons Unknown* [25] Eady J gave as examples of a public interest speech "for the purpose of revealing (say) criminal misconduct or antisocial behaviour". And in *Mosley* Eady J was giving a judgment after hearing submissions from the defendant.
101. It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have. That is not the issue. The issue is what the judge should prohibit one person from saying publicly about another. If

the judge is not permitted to hear from the other side, there is a danger that by default he will give more weight than he would wish to the views of the applicant or himself.

102. By not giving notice, the applicant has deprived me of the opportunity to hear the case for the other side, including as to the social utility of whatever it is that the media might be threatening to say about the applicant. In *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, at p 989 Sir John Donaldson MR (as he then was) said:

“The "media," to use a term which comprises not only the newspapers, but also television and radio, are an essential foundation of any democracy. In exposing crime, anti-social behaviour and hypocrisy and in campaigning for reform and propagating the view of minorities, they perform an invaluable function.”

103. This expresses part of the reason why I am not able to form a view on the material before me as to the social utility of the speech that might be in question here, and why that must be left to argument, if the application for an injunction to restrain the threatened speech is opposed.

104. There is much public debate as to what conduct is or is not socially harmful. Not all conduct that is socially harmful is unlawful, and there is often said to be much inconsistency in the law. For example, some commentators contrast the law on consumption of alcohol with that on other intoxicating substances. The fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discouraged. There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged. That is why sponsors may be sensitive to the public image of those sportspersons whom they pay to promote their products. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong. Both the law, and what are, and are not, acceptable standards of lawful behaviour have changed very considerably over the years, particularly in the last half century or so. During that time these changes (or, as many people would say, this progress) have been achieved as a result of public discussion and criticism of those engaged in what were, at the time, lawful activities. The modern concept of public opinion emerged with the production of relatively cheap newspapers in the seventeenth century. Before that there was no medium through which public debate could be conducted. It is as a result of public discussion and debate, that public opinion develops. Recent examples in the financial field include insider dealing and dealing in works of art which have been acquired lawfully but in debateable circumstances (eg taken indiscriminately but lawfully from sites of archaeological interest). Examples in the field of personal behaviour include some of the new offences created by the Sexual Offences Act 2003, and the increased protection given to employees, both financially and in terms of privacy and harassment. Exploitation of weaker persons by those who are richer and more powerful commonly occurs in private places, including within families. Those who are

exploited do not always protest, or welcome protest by outsiders. They may believe that they have more to fear than to hope from the outcome of a protest.

105. I emphasise that I have expressed no view of the social utility of the speech in question here, because I have heard no argument from any opponent of the injunction sought.

OPEN JUSTICE

106. Open justice is one of the oldest principles of English law, going back to before Magna Carta. It is now set out in CPR39, and in Art 6, in terms which it is unnecessary to repeat here. In *R v Legal Aid Board ex p Kaim Todner* [1999] 1 QB 966 Lord Woolf MR gave reasons for open justice at p 977:

“The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.”

107. The opening words of that citation are particularly apt here, because it seems that claimants' advisers have come under the impression that extensive derogations from open justice should be routine in claims for misuse of private information.
108. There is of course an obvious difficulty in at the same time complying with the principle of open justice and giving an effective remedy for threatened misuse of private information. But as was stated in *Re S*, there is no presumptive priority between ECHR rights. That applies as much to tensions between Art 6 and Art 8 as it does to tensions between Art 8 and Art 10. Art 8 does not have a presumptive priority over Art 6 and open justice. Each derogation from Art 6 and open justice must be justified on the particular facts of the case, in accordance with the intense scrutiny required. And it is not just open justice that is in issue: it is the right of a person affected by a court order, in particular a respondent, to be heard before the order is made. Apart from HRA s.12, that requirement is set out twice in the CPR, once in CPR 25.3(1), (3), cited above, and again in CPR PD 25 para 4.3(3):

“(3) except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application”.

109. Secrecy may be essential in the case of a respondent who, if tipped off, is likely to defeat the purposes of an application by publishing the material before he can be shown to have had notice of the injunction, or before it can be granted. It is less easy to show the need for such secrecy where the person targeted by the application is a national newspaper. There may be a need to work out ways to address the problems which arise in such cases, but giving privacy claimants comprehensive derogations from Art 6 and Art 10 cannot be the answer.

THE OMISSION TO GIVE NOTICE

110. The fact that no notice of this application has been given means that no one but the applicant knows what occurred last Friday, or why I did what I have done. All the factors mentioned by Lord Woolf are relevant in this case.
111. Mr Spearman submitted that “there are compelling reasons why the respondent should not be notified” in this case. He submits that because there is no present means of identifying and so serving the Respondent the requirement is satisfied.
112. However, he rightly drew to my attention that the position is not as simple as that. Eady J has considered this point in *X v Persons Unknown*. He said at [18]:

“18 It is not for me to lay down practice directions, but what I can say is that a proper consideration for the Article 10 rights of media publishers, and indeed their rights under Article 6 as well, would require that where a litigant intends to serve a prohibitory injunction upon one or more of them, in reliance on the *Spycatcher* principle, those individual publishers should be given a realistic opportunity to be heard on the appropriateness or otherwise of granting the injunction, and upon the scope of its terms.

19 The point of principle for which Mr Caldecott contends [I interpolate that Mr Caldecott was acting for one of the media defendants] can be encapsulated in the terms of the draft placed before the court for this hearing, which obviously mirrors closely the provisions contained in section 12 of the Human Rights:

'A claimant, who applies for an interim order restraining a defendant from publishing allegedly private or confidential information, should give advance notice of the application and of the injunctive relief sought to any non-party on whom the claimant intends to serve the order so as to bind that party by application of the Spycatcher principle ... unless:

(a) The claimant has no reason to believe that the non-party has or may have an existing specific interest in the outcome of the application; or

(b) The claimant is unable to notify the non-party having taken all practicable steps to do so; or

(c) There are compelling reasons why the non-party should not be notified”

113. The first reason advanced for not notifying anyone of the application is that LNS “does not know of any media organisation which has a specific interest in the story”.

114. I cannot accept that explanation. The evidence shows that NGN were intending to publish a story about LNS on the Sunday. It is said that LNS did not know what the story would be about. Mr Spearman submits that in these circumstances LNS had no reason to believe that NGN had an existing specific interest in the outcome of the application. In my judgment the interest that NGN did show in publishing a story meant that they should have been given notice. They have in fact confirmed their interest in the outcome of the application by communicating subsequently with my clerk. I presume that this followed notice of my order being given to NGN very shortly after I had made the order last Friday. And while I was considering my judgment NGN gave notice of an application to vary or discharge the order I had made. That was listed this morning. In the event it was not pursued, pending the handing down of this judgment.

115. I have also received a communication from The Guardian. Gillian Phillips is Director of Editorial Legal Services to Guardian News Media Ltd. She wrote to the solicitors to LNS on 25 January. She wrote that notice was given to them on the Friday evening. The applicant’s advisers are very experienced in this field, and they would have anticipated what the letter says, namely that this “is not necessarily a matter that GNM would have any particular interest in reporting”. But they gave notice to GNM, and GNM are well known to have an interest in reporting on matters relating to the administration of justice. The letter raises in detail points which Mr Spearman had drawn to my attention, and which I would in any event have addressed in this judgment. But the letter illustrates the importance of open justice in a case such as the present one. And the care and thoroughness with which the letter is drafted would have been of great assistance to the court, if the authorities referred to had not already been cited to by Mr Spearman.

116. What the letter adds is what I take to be a reference to the experience of that newspaper, namely that there have been a number of applications for orders which have been granted with the substantial derogations from the rules sought in this case. Gillian Phillips writes:

“It appears to me that this latest order is symptomatic of a trend whereby this sort of order is (1) sought against persons unknown by which I deduce that no one was heard in opposition to the injunction request. No advance notice was given to the media; (2) immediately served on the legal

departments of the national media, who are not defendants to the action; (3) dispenses with any obligation to serve evidence in support; (4) protects an anonymous claimant”.

117. In their letter in reply, solicitors for the applicant set out at some length the “compelling reasons” for not have given notice. I do not recite them here. The reasons are generic to the type of claim, and not specific to any fact of this case. They are largely discussed in this judgment. There is an applicant’s dilemma: if he gives notice to the media he reveals the very information which he is seeking to keep secret, none, or only some, of which may already be known to the newspaper to which notice is given, and he confirms as fact what may be already known only as rumour. (I observe that the dilemma may not arise in all privacy cases, for example in cases such as *Murray*). The letter proposes what might be a way forward. In response to The Guardian’s request for sight of the evidence, the solicitors ask for undertakings that the information be kept secure and not disclosed.
118. The second reason Mr Spearman advanced for not giving notice was based on what Sir Charles Gray said in *WER v REW* 2009] EWHC 1029 (QB); [2009] EML:R 17, 304. At [18] Sir Charles Gray referred to Eady J’s judgement in *X v Persons Unknown* at [19] and said:
- “I can well understand why Mr Partington read those words of Eady J as in effect obliging a claimant such as the present claimant to notify in advance all those media defendants intended to be served with the injunction. However, I have been provided today with information by Mr Spearman about the facts of *X v Persons unknown*. As is apparent from its title, it was a case where the claimants themselves were unaware of the identity of the individual defendants whom they sued. As I understand it, the claimants limited their notification of the application to non-parties to third-party to a selected number who had shown some interest in the story. In those circumstances, it appears to me (and I hope I do not misapprehend what the judge said) that Eady J cannot have been contemplating an obligation being imposed on individual claimants, who may be of limited means, to arrange through their legal advisers to serve what might be a substantial body of evidence on a large number of media non-parties. It seems to me that the obligation to serve them must, as a matter of common sense and economy, be confined to those media organisations whom the claimant has reason to believe have displayed an interest in publishing the story which the claimant is seeking to injunct.”
119. But LNS is not of limited means, and in any event I have held that on the evidence before me NGN had shown a sufficient interest.
120. Mr Partington is the solicitor to Mirror Group, which is another publisher who might be expected to have an interest in this story, although there is no evidence

that they did. However, pursuant to his duty to the court Mr Spearman has put before me a letter written by Mr Partington, and addressed to the applicant's solicitors on 9 December 2009. So it does not relate specifically to this case. The letter enclosed a copy of the judgment I had recently handed down in *G and G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB). Mr Partington draws attention to a number of paragraphs of that judgment. He requests that the solicitors who now act for LNS draw the judgment to the attention of any judge to whom they might in future make an application for an injunction. He writes that in the event that Mirror Group is given notice after the event that an order has been made, Mirror Group wishes to be provided, together with the notice, with a full note of what was said at the application. And Mirror Group requests that if the applicant's solicitors apply for derogation from CPR PD 25 para 9, then the solicitors should draw the attention of the judge to Mirror Group's letter. Mr Spearman did as Mr Partington asked. I make no comment here on Mr Partington's interpretation of that judgment.

THE TEST OF LIKELIHOOD

121. In referring above to what I find likely or unlikely I have had in mind the passage cited by Mr Spearman from *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253 [22]. Lord Nichols said:

“There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are *sufficiently favourable to justify such an order being made in the particular circumstances of the case*. As to what degree of likelihood makes the prospects of success "sufficiently favourable", the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ("more likely than not") succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal” (emphasis by Mr Spearman).

122. In granting the limited order on Friday I applied the low threshold referred to in the last sentence. In reaching my decisions set out in this judgment I am applying

the general approach: whether the applicant is more likely than not to succeed at trial.

DEFAMATION AND THE RULE IN *BONNARD v PERRYMAN*

123. Having decided that the nub of this application is a desire to protect what is in substance reputation, it follows that in accordance with *Bonnard v Perryman* no injunction should be granted. I do not know what words any newspaper threatens to publish. But it is likely that whatever is published, the editors will choose words that they will contend are capable of being defended in accordance with the law of defamation.

IF THE PRIVACY RULE APPLIES

124. If I am wrong about that, I turn to consider what I should do on the footing that this is in substance a claim for misuse of private information.
125. I have already concluded that I cannot decide that s.12(3) is satisfied (“likely to establish that publication should not be allowed”), having regard to the potential defence of public interest. It follows from that that no injunction should be granted.
126. But if I am wrong about that, I must consider what I would do as a matter of discretion.
127. This is not a case where, on the evidence before me, the potential adverse consequences are particularly grave. On the evidence, including the attachments to the exhibit, I do not think it likely that LNS regards as particularly sensitive information of the kind that is sought to be protected. As Eady J has observed in *Mosley* [26], different people have different views on matters of conduct. But since the attributes of the applicant are amongst the relevant circumstances, the less sensitive the information is considered by the applicant to be, and the more robust the personality of the applicant, and the wider the information has already spread in the world in which the applicant lives and works, the less the court may find a need to interfere with the freedom of expression of others by means of an injunction. The test includes proportionality. Damages may be an adequate remedy in some cases, if not in all.
128. A threat to publish similar information about a person in different circumstances from LNS might lead the court to take a different view of the gravity of any disclosure. Many applicants would consider that even just the fact of such a relationship to be information of a high order in the scale of private information. And, subject to the public interest in preventing the public from being misled, such information is very often given in a form of speech which attracts a low level of protection in accordance with Strasbourg jurisprudence.
129. In reaching the view that the potential adverse consequences are not particularly grave in the present case, I have also had regard to the fact that there have been considerable developments in the law in recent years, of which the media are well aware. Photographs, and certain classes of sensitive private information are given particular protection by the law, and some of them are identified in para 3(i) of the

PCC Code. NGN, and other newspapers interested in reporting stories such as this one, are aware of that. The position of the interested parties will be known to the editors, and their own PCC Code, as well as the law, requires that regard must be paid to their rights, and to the rights of the other person. Editors are aware that there is a difference between reporting private information on the one hand and, on the other hand, harassment or ‘hounding’ (to use Eady J’s word in *Mosley* [27]). Even where the former is lawful, the latter is not, and may give rise to claims as in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2002] EMLR 78. Mr Spearman has not suggested that NGN cannot be relied on to report any story within reasonable limits as the law now requires. If the law is broken, there is a remedy in damages for the distress that is caused.

130. I accept that the information sought to be protected is not in the public domain in the sense that there is nothing left to be protected. But the evidence is that there has been wide circulation amongst those involved in the sport in question, including agents and others, and not just amongst those directly engaged in the sport. If the injunction ought otherwise be granted, I would not refuse it on this basis. But the fact that the information has become as widely available to so many people, means that an injunction is less necessary or proportionate than would otherwise be the case.
131. Further, if (as I think likely) the real concern of the applicant in this case is the effect of publication upon the sponsorship business, then damages would be an adequate remedy if LNS succeeds at trial.
132. For all these reasons, I shall not renew the injunction I granted last Friday.
133. I turn to consider the form of an order that I would have made, if I had been minded to make any order.

THE NEED FOR A RETURN DATE

134. I would require a return date. And Mr Spearman did not oppose that.
135. On the need for a return date I repeat what I said in *G and G v Wikimedia Foundation* [2009] EWHC 3148 (QB). CPR PD25 para 5.1 says there must be one if the order is made without notice to any other party. There is no reason in the present case why I should order otherwise. Mr Spearman did not contest this when I raised the point.
136. And as stated above, a return date would serve two important purposes in this case, if I granted an injunction. The first is that it would enable the evidence of the applicant and of any other witness to be put before the court in a statement which was made personally. Second, it would enable the court to monitor the progress of any attempts to find a Respondent and to serve him. As Eady J noted in *X v Persons Unknown* [78], it is not consistent with the CPR for litigation to be commenced and for the subsequent steps required of claimant to be deferred indefinitely to suit the interests of the claimant. CPR 1 provides that cases are to be dealt with expeditiously and fairly, and that the court has a duty to manage the case, including by fixing timetables and otherwise controlling the progress of the case, and giving directions to ensure that the trial of a case proceeds quickly and

efficiently. If the Claim Form cannot be served expeditiously, then the action will be at risk of dismissal. Or a substitute defendant who can be served may be added by amendment.

PROHIBITION OF REPORTING THE FACT OF THE ORDER

137. When I queried with Mr Spearman the provision in the draft order prohibiting reports of the fact of the injunction he accepted that it was not necessary. I would not make that part of the order.
138. The reason why, on some occasions, applicants wish for there to be an order restricting reports of the fact that injunction has been granted is in order to prevent the alleged wrongdoer from being tipped off about the proceedings before an injunction could be applied for, or made against him, or before he can be served. In the interval between learning of the intention of the applicant to bring proceedings, and the receipt by the alleged wrongdoer of an injunction binding upon him, the alleged wrongdoer might consider that he or she could disclose the information, and hope to avoid the risk of being in contempt of court. Alternatively, in some cases, the alleged wrongdoer may destroy any evidence which may be needed in order to identify him as the source of the leak. Tipping off of the alleged wrongdoer can thus defeat the purpose of the order.
139. If a prohibition of the disclosure of the making of the injunction is included in an order for the purpose of preventing tipping off, and if the order provides for a return date (as the Practice Direction envisages) then the prohibition on disclosure may normally be expected to expire once the alleged wrongdoer has been served with an injunction, or at the return date (whichever is earlier).
140. There is a standard form of prohibition on disclosure of the making of an injunction in para 20 of the Form of Search Order given in the Practice Direction to CPR Part 25. It reads:

"Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly inform anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 p.m. on the return date or further order of the court."
141. If there ever has been an order which prohibits the disclosure of the fact an the order has been made, and which is expressed to run (as is sought here) for a period which is to continue after service on the respondent, and without a return date, then no example has been cited to me by Mr Spearman. I am not aware of what justification there might be for such an order, although I cannot exclude that there might be a justification in some case. But the grounds for applying for such an order would have be set out in the evidence. No grounds are given in the evidence in this case.
142. There is one unreported case which I recall. It was commenced in 1999 against a known defendant who, it was alleged, was threatening disclose information which the claimant considered to be in breach of confidence and in breach of national

security and which exposed other people to the risk of torture and even death. There was difficulty in serving the defendant, and that was not effected for some six months. In due course the action was settled on the basis of undertakings. The order in force for the period before service contained a number of provisions similar to those sought in the present case to ensure secrecy. There was no record on the court file available to the public. But significantly, there was a return date, and the matter came back before the court on a number of occasions at which the court was able to monitor the continuing need for extensions of time and other derogations from the rules of court. Such cases engaging Arts 2 and 3 are more extreme than those where the risk is to no more than Art 8 rights.

OTHER MATTERS

143. The paragraphs under this head are subject to any further submissions that may be made, since Mr Spearman was not able to address all these points at the hearing last Friday. I accept that the proceedings against Persons Unknown are properly constituted (subject to any further argument that any other party may make). But I would not grant an indefinite extension of time for service. I will hear argument on this from the applicant in due course. But as indicated above, the claim must proceed expeditiously. So in a case such as the present, there may be little point in bringing proceedings against persons unknown, instead of against the newspaper publisher which is the real target.
144. In *Bloomsbury Publishing Group and J.K.Rowling v News Group Newspapers* [2003] EWHC 1205 (Ch); [2003] 1 WLR 1633 an injunction had been granted by Laddie J against persons unknown to prevent a breach of pre-publication embargo on a Harry Potter book. It therefore ran only for a brief period. Sir Andrew Morritt V-C held that there was power to make such an order. He then said at [21]:

“The crucial point, as it seems to me, is that the description used must be sufficiently certain as to identify both those who are included and those who are not. If that test is satisfied then it does not seem to me matter that the description may apply to no one or to more than one person, nor that there is no further element of subsequent identification whether by service or otherwise”.
145. In *X v Persons Unknown* [2006] EWHC 2873 (QB) [68]-[70] Eady J explained a similar order he had made at an earlier hearing. But he went on to say what is cited above in relation to giving notice to the newspapers.
146. If I were to make a substantive order prohibiting any publication, it seems to me that it ought to be limited to restraining publication to the public at large. The information has already circulated widely by word of mouth, and further disclosure in that way cannot be stopped.

147. I would not order the sealing of the whole court file, but at most a confidential schedule.
148. I would require undertakings that at the return date the evidence of the applicant and the other person be in the form of signed statements, or that there be a satisfactory explanation of why it is not.

CONCLUSION

149. I decline to make any order as sought by LNS, who is the only applicant, for the following main reasons:
- i) There is a threat to publish information about the fact of the Relationship, but I am not satisfied that the applicant is likely to establish that publication should not be allowed;
 - ii) I think it likely that the nub of the applicant's complaint is to protect [LNS's] reputation, in particular with sponsors, and so (a) that the rule in *Bonnard v Perryman* precludes the grant of an injunction; and (b) in any event damages would be an adequate remedy for LNS;
 - iii) I am not satisfied that the double hearsay account I have been given of the evidence of LNS and the other person is full and frank (this may not be a criticism of the lawyers or of the individuals concerned, but arises from the fact that their evidence has been collected and reported by non-lawyers: I do not know who is responsible for this);
 - iv) I am not satisfied that the applicant is likely to establish that there has been a breach of a duty of confidence owed to LNS;
 - v) I have had regard to the extent to which it would be in the public interest for the material to be published, but, without having heard the Respondent or the media, I am not satisfied that the applicant is likely to succeed in defeating a defence that it would be in the public interest for there to be a publication;
 - vi) There is insufficient evidence of a threat to publish photographs or sensitive details about the Relationship;
 - vii) Notice has not been given to any newspaper when it should have been, and, as a result, I have not had the benefit of arguments in opposition to the application, which might have assisted me to be satisfied of the matters of which I am not satisfied;
 - viii) I do not consider that an interim injunction is necessary or proportionate having regard to the level of gravity of the interference with the private life of the applicant that would occur in the event that there is a publication of the fact of the Relationship, or that LNS can rely in this case on the interference with the private life of anyone else.
150. I draw particularly to the attention of editors and others what I have said in paras 11, 69 and 129 above. This claim has been brought by LNS alone. I have not had

to determine what may be the rights of any other person who may be referred to in any story that NGN, or another publisher, may be proposing to publish.

151. Subject to any submissions to be made as to the form in which this judgment should be published, I adopt the course set out in *Browne v Associated Newspapers Ltd* [2007] EWCA Civ 295; [2008] 1 QB 103 [5] and [80]-[85], and hand down the judgment in this anonymised form and without the confidential schedule. The contents of this judgment should not pre-empt the publication by any newspaper, if that is what any newspaper decides now to do. Nor should this judgment, by placing information in the public domain, undermine any remedy in damages LNS, or any one else, may ultimately be found to have against any publisher in respect of matters that may be published about the events to which this judgment relates.