Case No: HC13A02048 and HC13064405

Neutral Citation Number: [2014] EWHC 1580 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2014

Before :

MR JUSTICE MANN

- -

Between :

(1) Sarah Hannon **(2) Daniel Dufour**	**Claimants**
- and -	
(1) News Group Newspapers Limited **(2) Commissioner of Police of the Metropolis**	**Defendants**

- -
- -

Hugh Tomlinson QC and **Kirsten Sjøvoll** (instructed by **Atkins Thomson**) for the **Claimants**
Antony White QC and **Catrin Evans** (instructed by **Wiggin LLP**) for the **First Defendant**
Jacob Dean (instructed by **Directorate of Legal Services**) for the **Second Defendant**

Hearing dates: 6th May 2014

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Judgment

Mr Justice Mann :

Introduction

1. These are two applications of a similar nature to strike out these two actions, each of which is based on a claim that the claimant's rights to privacy (putting it shortly) and confidentiality have been infringed by the act of the first defendant's newspaper (the Sun) paying a policeman for information which was then used as the basis of the publication of a sensationalist story about each of them.

2. The basis of the application in outline is that the claims, if they existed, ought to have been brought in defamation, if brought at all, and that defamation claims are either statute barred or an abuse of process, that any damages for any other damage would be minimal if not nominal, and that the privacy claims are flawed because there was no reasonable expectation of privacy in the circumstances of these cases. The applications are brought before NGN has served its Defences, though the Metropolitan Police Commissioner, as second defendant, has served Defences making extensive admissions.

The claims - generally

3. The claims are both claims of the same nature although on entirely different facts. They are claims based on breach of confidentiality and privacy rights. In each case, and for the purposes of the applications, the pleaded facts are to be assumed to be true, though of course there has as yet been no finding or determination in relation to any of them. Each of the claims is said to have been brought when the claimants were made aware of an alleged wrongful disclosure of information by a police officer, having been thus made aware by police officers involved in an investigation known as Operation Elveden.

4. Certain confidentiality points arise. Much of the meat of the factual allegations made in these cases is contained in "Confidential Schedules" to the Particulars of Claim. The appropriateness of confidentiality in relation to those matters, at least in this case, is in my view highly questionable. These applications have been conducted in open court with no reporting constraints other than those necessary to avoid prejudice to a forthcoming criminal prosecution, and free reference was made to those factual matters during the debate. They concern articles which have been published in the national press, and in one case (the Hannon case) the substance has been substantially aired in a crown court trial which was extensively reported. I shall continue to make free reference to all the relevant material, and shall formally revisit the appropriateness of maintaining confidentiality in the pleaded factual matter (in the Particulars of Claim) after this judgment is delivered. However, the identities of the journalist and policeman said to be involved in each of these cases will remain confidential (in a separate schedule). Different confidentiality constraints apply in those instances.

5. In these applications the defendant applicant was represented by Mr Antony White QC and the claimants by Mr Hugh Tomlinson QC.

Dufour

6. Mr Dufour is an airline captain with Air Canada. On 16th April 2009 he was First Officer on an Air Canada flight due to depart from Heathrow Airport. Shortly before take-off police officers boarded the flight and asked all three officers to take a breathalyser test. Mr Dufour was told that the test was positive and he was taken to Heathrow Police Station so that blood tests could be taken. He was driven away from the plane discreetly in an unmarked car. He was then released on bail pending the outcome of the blood tests, and while waiting for those (for several weeks) he could not work. On his return to the UK and the police station he was told that his results were at the legal limit of 20mg of alcohol per 100ml of blood and was about to be charged. It was then realised that that level was lower - it was below, and not at or above, the permitted limit, and he was released without charge.

7. It is alleged that a Sun journalist wrongfully paid a police officer for this information and as a result the Sun was able to find out about and report the incident. On 27th April it published an article under the headline: "Armed Cops lift off Boozy Pilot" which contains what (in the light of the assumed facts) would be a sensationalised account of events which describes the pilot being "hauled off" the plane, that security staff had smelt drink on the breath of Mr Dufour, that he was led off the plane in front of stunned passengers (said not to be true), that he had been drinking the night before and that he was amazed to be still over the limit in the middle of the next day.

8. Mr Dufour alleges that the police officer was guilty of a breach of confidence and misused private information, giving rise to a breach of Mr Dufour's rights under Article 8 of the Human Rights Convention. The same is alleged against the journalist, and against NGN as his employer. NGN has not pleaded a Defence. The Metropolitan Police Commissioner has pleaded a Defence, which makes certain admissions and does not take the points which are now taken by NGN.

9. Some of the details of the Particulars of Claim are important. They are as follows:

"4. The Claimant had a reasonable expectation of confidentiality and privacy in respect of the following information ("the Claimant's Information"):

(1) Information concerning the Claimant's arrest and detention including the details, reasons for and the nature of the arrest;

(2) Information regarding the events the night before the Claimant's arrest;

(3) The date to which the Claimant was bailed.

(4) Information regarding the Claimant's blood/alcohol levels and the results of his blood and breathalyser tests;"

10. Remedies are dealt with in paragraph 15 to 18. So far as the details are important to this application they are as follows

"15. By reason of the above matters, the claimant has suffered loss, distress, anxiety, humiliation and damage to his reputation.

16. The Claimant will rely on the following in support of his claim for general and aggravated damages against both Defendants:

(1) the Claimant is a private individual who does not and has never courted publicity for his private life;

(2) The Claimant suffered the humiliation of having his reputation sullied in the national press. The Article was read by family and friends in Canada as well as in the UK and because of the continued publication of the Article, that humiliation continues to

date;[the reference to continued publication is a reference to the continued availability of the article on the newspaper's website]

(3) The circumstances of the events leading up to the Claimant's arrest were particularly distressing and humiliating given the Claimant's profession;

(4) the Claimant was extremely embarrassed by the events leading up to the arrest and the arrest itself;

(5) The fact that as a result of the Defendants' actions, the Claimant was plainly identified as the pilot in question, not only in the UK but in Canada;

(6) The provision of information by a public official, in a position of trust, to a national newspaper;"

11. The pleading goes on to give particulars of matters said to give rise to aggravated damages; I do not need to set out that detail here. Paragraph 18 of the pleading makes an alternative claim to damages calculated by reference to the actual financial value of the information obtained and misused.

Hannon

12. Miss Hannon is a model. On 26th March 2009 she took a flight from Bangalore to London with her then boyfriend, Mr Melia. She fell asleep and while she was asleep there was evidence that her boyfriend behaved inappropriately with another passenger (a Ms Irby). When she awoke she was reported as reacting badly to this and had to be calmed down by the aircrew. The result of all this was that the police were involved when the plane landed and all three were removed from the plane by the police (Miss Hannon's case is that left voluntarily and was not actually removed). Mr Melia and Miss Irby were charged with being drunk on an aircraft. Although she was removed (or, on her case, left voluntarily) at the same time, Miss Hannon was arrested but not so charged. At her trial many months later Ms Irby was found not guilty, apparently on the footing that the prosecution had failed to prove that the aircraft was in British territorial airspace when the events occurred. Mr Melia then changed his plea to not guilty and was

acquitted. Although Miss Hannon was not charged, she was identified and referred to during the crown court proceedings.

13. On 6th April 2009 (a few days after the incident) the Sun published a story about this, under the headline "Cover Girl Rages as Fella Romps on Jet". It asserted that Miss Hannon "went mad" and had to be calmed down by the crew after she awoke to find out what Mr Melia was up to, that she "started screaming" (the truth of which is disputed) and that she and the other two were arrested at the end of the flight by armed police. In this action it is alleged that a Sun journalist paid a Metropolitan Police officer for supplying information about the event, and that as a result the Sun was able to publish the article. The publication is said to be a breach of confidence, an unjustified infringement of the Claimant's right to privacy and a misuse of her private information.

14. She pleads a damages claim in similar terms to Mr Dufour:

> "17. By reason of the above matters, the Claimant has suffered loss, distress, anxiety, humiliation, damaged her reputation.
>
> 18. The Claimant will rely on the following in support of her claim for general and aggravated damages as against both Defendants:
>
> (1) The claimant is a private individual who does not and has never courted publicity for her private life;
>
> (2) The claimant suffered humiliation both on the aircraft and at the police station and the Defendants by publishing the article in the national press intruded further into her private life. The humiliation continues to date;
>
> (3) The particularly humiliating and distressing circumstances of the events leading up to the Claimant's arrest.

(4) The claimant was extremely embarrassed by the events leading up to the arrest and the arrest itself. She told nobody about what had happened and refused to speak to journalists about the incident;"

15. Like Mr Dufour, she seeks alternative damages on the "user principle". She also complains about the continuing publication of the article on the Sun's website.

The nature of the applications and what has to be established

16. The present applications seek to strike out the claims as being an abuse of process. The abuse is said to be bringing these actions in their present form when they should have been brought in defamation (in which case they would have been statute barred), if at all; any residual claims based on re-publication within the limitation period would be de minimis and not properly brought for that reason; the claimants were not really concerned about reputation anyway; and in the circumstances there was no reasonable expectation of privacy in relation to the events in question (and in particular in the fact of an arrest and its circumstances). In those circumstances the applications have to be made on the footing that the primary facts pleaded are all true, and to argue from there that even those facts mean that the proceedings are an abuse for the reasons just given. NGN would have to establish that, on the basis of those facts, the claim is unarguable as a matter of law, or an abuse.

17. This is a high hurdle to surmount. If the claims remain at the level of the arguable, and not plainly improper, then the application will fail. I have to bear in mind that this is not a full trial, so if it is the case that a given point is fact sensitive and requires the attention that a full trial would give it, then the application will fail (in relation to that point). It is also the case that serious points of law are often (though not always) more appropriately dealt with at a trial and not in interim applications such as this. NGN's application will fail were I to determine that there is sufficient merit in the claim to make it not plainly demurrable or abusive (for the reasons given above), without it being necessary for the claimants to go further and establish that they ought actually to win on the points in question. This means that I do not necessarily have to decide the legal points that arise either way. If the claim is plainly bad then I can decide that and strike the actions out. But if they are not plainly bad I can (and, unless they are points which can be safely determined either way without a full trial hearing I should) determine merely that the first defendant is not clearly right about them, in which case the matters have to go to trial.

Whether the present claims (so far as they are good) lie solely in defamation

18. As appears from the above, the present claims have been brought under the principles applicable to breach of confidence and breach of privacy rights. They have not been brought in defamation. NGN submits that they could only be brought in defamation for the reasons appearing below, or alternatively such parts as should have been brought in defamation should be struck out of the pleadings. The principal practical effect of that is that the claims could now not be brought in respect of the principal publications because of limitation - any defamation claim would have had to have been brought over three years ago because of the one year limitation period applicable to defamation claims. Any claim arising out of continued publication in the last year would be too small to be properly brought. Furthermore, if and insofar as defamation is the proper cause of action a range of defences (such as justification) would have been available to NGN.

19. Mr White's case on this point involves him establishing the following propositions to the standard or extent referred to above (bearing in mind the nature of this application):

> (i) These are cases in which the real nub of the claim is damage to reputation.
>
> (ii) A claim involving damage to reputation lies only in defamation (apart from exceptions which he accepts and which are not relevant here). Such a claim cannot be framed in breach of confidence or infringement of privacy obligations (as here).
>
> (iii) These claims are therefore bound to fail because they have not been, and cannot now be, re-cast (because of limitation issues); alternatively, those parts which depend on suing for damage to reputation ought to be struck out, leaving a rump which is not worth suing for.

Whether the claims are really claims for damage to reputation

20. This point turns on the pleaded cases. Mr White pointed to the very significant position occupied by the reputation claims in the paragraphs that I have set out above, and submitted that they demonstrated that this case was really and in substance all about reputation. Mr Tomlinson accepted that part of the claims were about reputation, but there were other claims as well.

21. So far as Mr Dufour is concerned, it is right to say that the claim is heavily weighted by reputational matters. While there is a claim in respect of other matters, including humiliation, the humiliation that is pleaded in paragraph 16(2) arises from the effect of

the events on his reputation, so it comes back to that. Sub-paragraphs (3) and (4) do not, taken by themselves, claim to have been caused by the alleged wrongful acquisition of information about the arrest and subsequent reporting of it - they refer to the effect on Mr Dufour of the circumstances of the arrest themselves. If, as seems fair, they are taken to be matters that were exacerbated by the breach of confidence and privacy, and subsequent reporting, then to a significant extent they are likely to come back to reputational matters. Sub-paragraph (5) is consistent with the relevant damage being damage to his reputation, though not articulated as such, and is also consistent with a claim to damages arising merely out of the disclosure of information itself.

22. Looking at those claims overall, it is apparent that there is a heavy reputational element to them, though that does not describe the essence of the claim. However, despite that emphasis there are other claims as well, and they are not de minimis. In my view it is not possible to describe the "nub" or reality of this claim as a claim based on damage to reputation only.

23. If the same process is carried out in relation to the Hannon claim, the same can be said. There is a large reputational element in the claim. In reality the humiliation that is at the heart of the claim must be based on damage to reputation. The same can be said of the public element of the embarrassment which would have been enhanced by the publication of what was in any event an embarrassing event (paragraph 18(5)), though I accept that not all the enhanced embarrassment (enhanced because of the publication) can necessarily be ascribed to reputational damage. Accordingly it is again not true to say that the "nub" or reality of this claim is that it is confined to a reputational claim.

24. It follows that Mr White's first point is not made out.

Whether damage to reputation can be the subject of a confidence or privacy claim

25. Mr White's next point involves a consideration of important features of a claim based on breach of confidence or breach of privacy rights. It is a point which turns out not to be covered by a clear statement of principle in the authorities but which he says can be gleaned from the authorities generally and from underlying principle. If he is right as to the clarity with which the point can be demonstrated then he would be entitled to succeed in relation to the reputational elements of this claim. However, bearing in mind that this point is being taken not at a trial, in the light of clearly established facts, but at an early state in these proceedings, I must approach a determination of it with all the caution that numerous authorities have indicated should be applied to consideration of such matters of principle on interim applications.

26. His point is this. He accepts that the confidence and privacy claims flow from Article 8 of the Human Rights Convention, brought into UK law by the Human Rights Act 1998 in the manner provided by that Act. However, so does defamation - the protection given by that tort, too, is an aspect of private life which is addressed by Article 8. Reputation is an aspect of private life which is protected by, or engaged by, Article 8, but the only legal cause of action which protects reputation is defamation. Damage to reputation is not protected by confidence or privacy claims, but only by defamation. The correct interaction between Article 8's protection of reputation and Article 10, which protects free speech, is achieved by the careful limits on a defamation action, under which (inter alia) justification is a complete defence. That interaction has been forged over the years in the law of defamation and the interests of each side have been balanced by the carefully developed law of defamation. That being the case, the court should not allow a party to sidestep or circumvent the protections provided by the law of defamation (including the reduced limitation period of one year) by framing a claim for damage to reputation in a different cause of action.

27. This point is a serious one, capable of going to the heart of the cause of action in confidence and the newly developing wrong relating to the invasion of privacy. It seems to me that unless the principle can be established with clarity either from a clear and binding authority to that effect, or from clear principle, or from inevitable deduction from a line or lines of authority, it would be wrong for me to reach a decision on it in an application of this nature, in the absence of some real evidence about what happened and what the nature of the damage was in the present cases. There are likely to be several fact sensitive issues and the point is one of very significant importance in an area of developing law. I bear in mind the following statement in the White Book, justified by authority:

> "However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact."
>
> (Civil Procedure para 3.4.2)

28. I have come to the conclusion that Mr White has not established the accuracy of his central proposition (that reputation can only be protected in a defamation claim and not in the claims made in these actions) with sufficient clarity, and that such an important determination is not appropriate in an application of this sort at this stage of the action. Indeed, I think that if I had to decide the point on the material shown to me I would probably be more likely to decide it is wrong, but since it is sufficient for present purposes merely to decide that I cannot say it is right then I will not go that far.

29. Mr White relies on various cases, but before turning to them I deal with the point of principle. I am not satisfied that as a matter of principle it is necessary or appropriate, or even in some cases practically possible, to draw a hard line between the element of privacy or confidence claims which go into what might be called the realms of reputation, and other elements. Take the case of the public disclosure of medical records of a socially embarrassing but historic sexual medical condition affecting a prominent person, in circumstances in which it would never have become known absent a clear invasion of privacy (and assuming no public interest justification or other justification to be available). The effect of that disclosure will cause embarrassment, with the victim knowing that the public at large know about a condition which he/she had every reason to suppose would be kept private, and which he/she would have been entitled to have kept private. There will be some damage to his/her reputation, but that sort of damage is part of the spectrum of public attitudes which the victim was entitled to have been protected from in the first place. Defamation may well not give a remedy for that part of the spectrum because of the availability of justification. It is not clear to me why, as a matter of principle, damage to reputation of this sort should not be within the sort of thing that privacy rights should protect against. A conclusion about that would depend on a close analysis of the new and developing privacy rights, and their interaction with defamation. The first part of that exercise would require a consideration of the jurisprudence as it has been developed so far. That exercise was not conducted in the present case. I was not shown how the authorities have developed the nature of the right. I am not complaining about that - I had quite enough authorities to contend with without them - but the exercise must involve that. When that is set out it becomes clearer why an application of this sort is not the occasion to embark on that exercise.

30. I therefore start from the position that it is not clear as a matter of principle why Mr White's position should be the correct one if one starts from the nature of the privacy right.

31. Mr White did not really develop arguments of such a nature. He stated his proposition and then relied on support from authorities which he said demonstrated that defamation was the sole guardian tort of reputation, even though few of them actually involved a consideration of the developing privacy law and most of them, if they considered interaction at all, involved the interaction between defamation on the one hand and torts other than invasion of privacy on the other.

32. Mr White started with cases in which the court considered that the real cause of action was in defamation but where another wrong was invoked in order to get a remedy which would not be open in defamation. In *Woodward v Hutchins* [1977] 1 WLR 760 a well-

known selection of singers sought to restrain a press relations agent from publishing stories about them which were said to be discreditable. The causes of action relied on were breach of contract, libel and breach of confidence. An injunction to restrain publication for libel and breach of contract was refused at first instance, but one was granted in relation to breach of confidence. That last determination was overturned on appeal. It was done by reference to the rule in *Bonnard v Perryman* to the effect that if justification is to be pleaded to a defamation claim then an interim injunction to restrain publication will not be granted (without actually referring to that case). Lord Denning said (at p764):

> "There is a parallel to be drawn with libel cases. Just as in libel, the courts do not grant an interlocutory injunction to restrain publication of the truth or of fair comment. So also with confidential information. If there is a legitimate ground for supposing that it is in the public interest for it to be disclosed, the courts should not restrain it by an interlocutory injunction, but should leave the complainant to his remedy in damages. Suppose that this case were tried out and the plaintiffs failed in their claim for libel on the ground that all that was said was true. It would seem unlikely that there would be much damages awarded for breach of confidentiality. I cannot help feeling that the plaintiffs' real complaint here is that the words are defamatory: and as they cannot get an interlocutory injunction on that ground, nor should they on confidential information."

33. Lawton LJ said (at p 765):

> "The defendants have intimated that in so far as there is a claim for damages for libel there will be a plea of justification. Sir Peter, on behalf of the plaintiffs, has accepted, in the circumstances of this case at any rate, that it is pointless to make submissions to the court that his clients should be granted an injunction to restrain further publication of the libel.
>
> What then is the position? The allegation of confidentiality is interwoven with the claim for damages for libel and, once that is understood, it seems to me that the balance of convenience is entirely on the side of allowing the publication to go on. The defendants should know and possibly do that, if they fail in their plea of justification, the damages are likely to be heavy. They may be heavier still by reason of the fact that the offence — because that is what libel is — has been made worse by the circumstances in which Mr. Hutchins has come to reveal what he knows about the

> plaintiffs. I find it impossible in this case to extricate the libel aspect from the confidentiality aspect. In those circumstances, it seems to me that it would be wrong to allow this injunction to continue."

34. Bridge LJ agreed with both judgments, and added:

> "If the defendants cannot in due course make good that claim [viz a summary of the stories that they wished to publish], it is quite clear that the plaintiffs will recover very considerable damages for libel, to say nothing of any damages they may recover for breach of confidentiality. But if the defendants substantiate the claim, it is clear that the plaintiffs will recover no damages in libel; and I think that they could only recover nominal damages for the breach of confidentiality, if there was one."

35. Mr White said that this case showed that the court would not grant an injunction based on breach of confidence where an injunction would not have been available to prevent a libel arising out of the same facts; and that this was an example of the court not allowing the rule in *Bonnard v Perryman* to be outflanked by putting the claim in confidence. This was said to support his case that the proper basis for protecting reputation was a defamation action, and that other wrongs could not be used for that purpose. I agree with the first half of what he says about remedies, but do not agree that one can necessarily develop his wider proposition. The case relates to remedies, not the substance of the wrong, and indicates that limits to a remedy in one tort, which have been arrived at as a matter of policy, cannot be side-stepped by framing the claim in another. It did not say anything about the extent to which a particular set of facts was the sole preserve of the one tort rather than the other as a matter of law. It is about remedies, not rights. If anything, the findings of the judges accepted that it was possible that the two wrongs were capable of covering the same field, and were concerned to ensure that, so far as interlocutory remedies were concerned, they were brought into line.

36. I would also observe that this case does not concern the interaction between libel and privacy rights, the latter at that point in time being a long way from their recent development. In *McKennitt v Ash* [2008] QB 73 Buxton LJ observed of this case:

> "33 This case dates back to an era when the Convention had not invaded the consciousness of English lawyers. I bear well in mind the warning of Lord Woolf CJ in A v B plc [2003] QB 195, para 9 that "authorities which relate to the action for breach of

> confidence prior to the coming into force of the 1998 Act ... are largely of historic interest only".

37. One must therefore be very cautious before applying what is said in this case in a general way which would catch the developing privacy jurisprudence. The same applies to a number of the other authorities cited by Mr White.

38. Next Mr White turned to *Khashoggi v Smith* CA, unreported, 15th January 1980 of which I have seen an official transcript. That case involved an attempt to prevent a housekeeper from disclosing allegedly confidential information acquired during her employment. Mr White drew attention to this passage from the judgment of Sir David Cairns at pages 15-16:

> "But when it is apprehended that what a former employee has disclosed, or is about to disclose, and what others to whom it has been disclosed are threatening to publish, consists in part of allegations of criminal conduct of a serious character, then in my judgment no action will lie on the basis that the employee learned of such conduct in confidence as distinct from an action for defamation on the basis that the allegations are untrue. It seems to me that there is a fundamental distinction between the two types of action, in that in the one case the plaintiff is saying 'Untrue and defamatory statements have been made about me,' and in the other case of the plaintiff is saying: 'Statements which are about to be published about events which have happened and have been disclosed as a result of breach of confidence.'
>
> For this reason and also because it seems that a great part of the story in relation to alleged criminal conduct has already been made public at the trial at the Central Criminal Court, I consider that the plaintiff is not entitled to an injunction in respect of those matters."

39. These dicta do not support Mr White's Case. They point out that there is a distinction between the effects of the law of confidence and defamation, but they do not determine that damage to reputation is the sole concern of the one rather than the other, and they certainly do not say anything about the interaction between defamation and the modern law of privacy. I bear in mind that privacy is being developed out of the law of confidentiality, but emphasise the word "developed".

40. Roskill LJ referred to *Woodward v Hutchins* and described the ratio of that case as follows:

> "The ratio of the decision was that the allegations in the libel action – and there was a libel action as well as an action for breach of confidentiality – were closely interwoven with the allegations in the claim for breach of confidentiality, and that as the defendants propose to justify the alleged libel so that no injunction would be granted to restrain their publication, it would not be right to restrain the alleged breach of confidentiality which involved the same factual matters.
>
> In the present case there is no libel action, actual or threatened. But as Mr Leggatt forcibly pointed out yesterday afternoon, the defendants cannot be in a worse position merely because the plaintiff has not, in the present case, threatened or indeed brought a libel action."

41. These remarks again point up the appropriateness of applying the same constraints on remedies to the same factual situation irrespective of the cause of action deployed. They do not go to the contents of each cause of action or determine that any particular areas of damage are the sole preserve of one or the other.

42. In *Gulf Oil v Page* [1987] Ch 327 a plaintiff brought proceedings alleging a conspiracy to injure and sought an interlocutory injunction restraining the display of an airborne sign that was critical of the claimant. The injunction was refused at first instance on the grounds that the truth of the words was not in issue and in libel an injunction would not be granted if the statement was to be justified at trial (*Bonnard v Perryman*). This determination was challenged on appeal on the footing that the principle had no application to a conspiracy to injure (which was the basis of the claim). The challenge succeeded. Parker LJ held that there was a strong inference that the purpose of the display of the sign was to inflict the maximum possible damage on the plaintiff (page 332H-333A). The libel principle in *Bonnard v Perryman* was not an answer.

> "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." (page 333F-H).

43. Thus far the decision seems to be against Mr White's proposition. Parker LJ (with whom Sir Nicholas Browne-Wilkinson VC agreed) seems to be allowing a case in a tort other than defamation in a case about statements made, and where the statement was true so that a defamation claim could not be brought. While he does not articulate any part of the damage as being damage to reputation, that must surely have been part of the claim. Mr White submitted that the case demonstrated that there would be no cause of action for damage to reputation other than one brought in libel in the normal case, and that conspiracy was an exception to this rule. I find it impossible to spell this out of the case, and the passage just cited, and in particular its reference to "any other tort" seems to me to be against it.

44. There is a significant reference to the interaction with libel at page 333h-334B, where Parker LJ says:

> "The prospect that this would open the floodgates and reverse the principle applicable in libel actions is, in my view, unreal. A plaintiff in an action against the author and publisher of a newspaper article, for example, might well establish a combination, but it appears to me that it would only be in the rarest case that sufficient evidence of a dominant purpose to injure could be made out to warrant the grant of interlocutory relief, and 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."

45. This suggests that in terms of remedy the court would look to see if there was a dressing up of a claim that was in reality a claim in libel, and if there was to treat it as such <u>for the purposes of the rule about interlocutory relief</u>. It does not say that if the claim could be brought in libel there could be no other claim, and it certainly does not say that where the

claim could not be brought in libel (because the statement was true) there could be no claim because reputational claims lie in libel only.

46. Mr White's case gains no support from any other part of this case. The case is, if anything, authority which contradicts his proposition.

47. Mr White pointed to several other cases in which the courts are said to have refused to allow interim injunctions sought on a basis other than defamation when it was said that the heart of the matter was really defamation.

48. In *Service Corporation International plc v Channel Four Television* [1999] EMLR 83 Lightman J had to consider an application for an interlocutory injunction to restrain a broadcast, based on copyright. In considering the causes of action Lightman J said (at page 89):

> "The plaintiff's claim that they are entitled to this relief on three grounds and I must consider each in turn. But before I do so I should consider the cause of action which is now disclaimed, and which was the initial basis of complaint, namely defamation. The reason that defamation is not and cannot be invoked is because no interlocutory injunction could be granted on this ground in view of the defendants' plain and obvious intention to plead to any such claim the defence of justification. The invocation of other causes of action is necessary if there is to be any arguable claim to an interlocutory injunction. The rule prohibiting the grant of an injunction where the claim is in defamation does not extend to claims based on other causes of action despite the fact that a claim in defamation might also have been brought, but if the claim based on some other cause of action is in reality a claim brought to protect the plaintiffs' reputation and the reliance on the other cause of action is merely a device to circumvent the rule, the overriding need to protect freedom of speech requires that the same rule be applied: see *Microdata v Rivendale* [1992] FSR 681 and *Gulf Oil v Page* [1987] 1 Ch 327 at 334. I have great difficulty in seeing the three alternative claims made in this case as other than attempts to circumvent the rule and to seek protection for the plaintiffs' reputation."

49. This statement is really geared to remedies rather than the content of rights. It says (as do other cases) that the need to protect free speech requires that the *Bonnard v Perryman* rule be applied outside the sphere of defamation if, looking at the matter realistically, a cause of action other than defamation is invoked in order to try to get round the *Bonnard* rule. The court looks to substance rather than technicality, and will not be deflected from applying *Bonnard* where the substance is defamation even if the cause of action is not expressed as such. It says nothing, expressly or by implication, about the exclusive operation of defamation where reputational points are in issue. In fact if anything the inference is the other way. Lightman J seems to have been prepared to assume that there could be parallel claims in defamation and some other tort - " … claims based on other causes of action despite the fact that a claim in defamation might also have been brought …".

50. In *Tillery Valley Foods v Channel Four Television* [2004] EWHC 1075 (Ch) a food company sought to restrain a broadcast on the basis of confidentiality unless it was given a right of informed reply. The claim was not brought in defamation, and privacy was disclaimed as the basis of the action. I held that the basis of a claim in confidentiality had not been established - paragraph 14. Having considered other matters I concluded:

> " The truth of this matter is that this case is not about confidentiality at all. So far as Tillery has a claim it will be a claim based on the fact (if it be a fact) that the reporting is inaccurate and contains falsehoods. If and insofar as the reporting turns out to be accurate (as to which I can, of course, say nothing) then it cannot have a legitimate complaint in law. If it is inaccurate it will have a claim for the damage caused by that falsehood. In other words this is really a defamation action in disguise. It is not surprising that it cannot be squashed into the law of confidence. And even if it could, since the reality would still be that of a defamation action with parallel claims based on other wrongs , it would have been appropriate to apply the rule in *Bonnardv Perryman* to any claim for an interlocutory injunction, as was held by Lightman J in Service Corporation International plc v Channel Four Television …"

51. This is even further from helping Mr White. The reason that the only potential claim was in defamation lay in the fact that there was no relevant confidential information whose disclosure was threatened. Lack of confidentiality was the bar. My remarks indicated that in the light of that the claim was a defamation claim or nothing.

52. Next Mr White turned to *Terry v Persons Unknown* [2010] EMLR 16 in which a well-known footballer sought an interim injunction which he based on misuse of confidential information. Tugendhat J found that there was insufficient material to found an action in confidence or privacy, and went on to consider the matter on the footing that the likely publication (whose content was not then known) was likely to be defamatory but was also likely to be sought to be justified by the publisher. He concluded that the nub of the complaint was protection of reputation and not any other aspect of the claimant's private life (paragraph 95) so the rule in *Bonnard v Perryman* applied to preclude the grant of an injunction. Mr White described this as a case in which the court refused an injunction on the *Bonnard v Perryman* basis to a claim based in confidence. That is true to only a limited extent. It is the case that the claimant sought to bring his case in confidence but the judge held that that case was not sustainable on that basis - see paragraph 52. He also held that a claim based on privacy would not result in a prohibition on publication - see paragraphs 65 ff and paragraph 149. His decision therefore amounted to a refusal to grant an injunction in respect of those claims. In a later section of his judgment entitled "Defamation" he posed the question of whether or not the claim should really be regarded as constituting a cause of action in defamation and acknowledged the acceptance of counsel that that would not generate an interlocutory injunction because the likely defences would have given rise to a *Bonnard v Perryman* answer. At paragraph 95 (within that section) he expressed the view that the nub of the claim was the protection of reputation, but did not at that point indicate the significance of that conclusion. That came in paragraph 123, where he said:

> "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."

53. What he is therefore doing is, again, looking to the substance of the matter and the remedy. He was not applying the *Bonnard v Perryman* rule to an action based in confidence. He had already indicated that the confidence claim failed. What he was doing was suggesting another potentially sustainable way of putting the claim and refusing an injunction in relation to that matter. That does not advance Mr White's case that a claim for injury to reputation can only be made within a defamation claim and not within a confidence or privacy claim. Furthermore, if one looks carefully at the judge's section on defamation (which cites some of the cases to which I refer in this judgment) it is more inconsistent with that thesis than it is consistent with it. The section is too long to set out here, but there are various paragraphs which seem to me to presuppose the potentially concurrent operation of defamation and other wrongs (including breach of confidence and infringement of privacy) without suggesting that reputational claims separated the first from the others - see e.g. paragraphs 90 and 93, and the citation in

paragraph 84. The most it does is to reinforce the principle, already established, that framing a claim in a cause of action other than defamation does not enable a claimant to evade the effect of *Bonnard v Perryman* if the nub of the claim is a complaint about the falsity of allegations and it is brought in an alternative way to avoid the rules of the tort of defamation. This is the remedies point identified above and does not assist Mr White.

54. In *Lonrho v Al Fayed (No 5)* [1993] 1 WLR 1489 a claimant sought to amend a conspiracy claim, based on arrangements to publish defamatory statements, by adding a claim for damage to reputation and feelings. The Court of Appeal held that such a claim could not be made in conspiracy. This case gets closer to what Mr White submits, because it goes to the question of the existence of a cause of action not remedies for what could be parallel causes of action. However, it does not clearly demonstrate the principle which Mr White seeks to invoke. It is a case which deals with the tensions between the cause of action which it was sought to assert (conspiracy) on the one hand and the rules of defamation on the other. It acknowledges that there are other torts in which damage to reputation can be claimed for (malicious prosecution and false imprisonment), so the rule about reputation and defamation cannot be said to be absolute. Since there are exceptions it would not be right to read the decision as closing the door to other exceptions, particularly among newly discovered wrongs such as infringement of privacy rights and the associated developing law of confidence.

55. Having cited *Foaminol Laboratories Ltd v British Plastics Ltd* [1941] 2 All ER 393 in which it was said:

> "a claim for mere loss of reputation is the proper subject of an action for defamation, and cannot ordinarily be sustained by means of any other form of action" (my emphasis - it suggests exceptions)

Dillon LJ said:

> "In my judgment, if the plaintiffs want to claim damages for injury to reputation or injury to feelings, they must do so in an action for defamation, not in this very different form of action. Injury to reputation and to feelings is, with very limited exceptions, a field of its own and the established principles in that field are not to be side-stepped by alleging a different cause of action. Justification, truth, is an absolute defence to an action for defamation and it would, in my judgment, be lamentable if a plaintiff could recover damages against defendants who had combined to tell the truth about the plaintiff and so had destroyed his unwarranted

> reputation. But that would be the consequence if damages for injury to reputation and injury to feelings could be claimed in a "lawful means" conspiracy action. To tell the truth would be wrongful. I see no difference in this regard between general reputation and commercial or business reputation." (1496C-E).

56. It appears that it was an important part of his reasoning that it would mean that "to tell the truth would be wrongful" if the cause of action were allowed. However, it is irrelevant to an action based on privacy whether or not the disclosure is true or not (see *McKennitt v Ash* [2008] QB 73 at page 83, per Longmore LJ). A large number of claims based in privacy will necessarily be based on the exploitation of information which is private but true. Accordingly, in addition to the fact that it would be wrong to apply Dillon LJ's dicta to a wrong which had not yet received judicial attention, its own internal reasoning would not be applicable to that wrong. Telling the truth in a privacy case can be wrongful.

57. Stuart-Smith LJ came to a similar conclusion:

> "An individual can sue for injury to reputation, and a trading company can sue for injury to its business reputation but, in my judgment, to do so it must sue in defamation. I think this follows as a matter of principle and also on authority. The reason in principle is that no one has a right to a reputation which is unmerited. Accordingly one can only suffer an injury to reputation if what is said is false. In defamation the falsity of the libel or slander is presumed; but justification is a complete defence. In malicious falsehood, the plaintiff has to prove that the statement is false." (1502G-H)

58. Like Dillon LJ, he relied on the New Zealand decision in *Bell-Booth Group Ltd v Attorney General* [1989] 3 NZLR 148 in which there were alternative cases in defamation and negligence, and it was held that negligence could not operate in that sort of case. He considered other material. However, once again he was not considering the interaction between defamation and privacy (or confidentiality, from which privacy rights are said to spring). I do not think his statements should be taken as binding for the purposes of this later developing wrong.

59. Evans LJ also rejected the claim, but his reasoning seemed to be more closely based on what the law of conspiracy permitted, though he did make some wider statements. He said:

> "Third, the question whether damages for loss of reputation, or loss of business reputation, can be recovered in these proceedings, where defamation is not alleged, seems to me to involve two issues, one a question of law and the other largely a matter of semantics. The question of law is whether damage of that kind is sufficient to establish the cause of action in conspiracy upon which the plaintiffs rely. In my judgment it is not. Such damages are not pecuniary loss, in the sense which I have described, and it follows that they form no part of the factual situation which entitles the plaintiffs to the remedy they seek. Nor can such damages be recovered parasitically, in my judgment, in addition to damages for pecuniary loss, for the reasons given by Dillon and Stuart-Smith LJJ. Conversely, the factual situation which gives a remedy in respect of loss of reputation is the cause of action in defamation which the plaintiffs conspicuously fail to assert…. More prosaically, damage of that kind is part of the factual situation which establishes a cause of action in defamation, but not in other torts, including negligence (Bell-Booth Group Ltd. v. Attorney-General) and "lawful means" conspiracy (here)." (1509A-D)

60. Once again I do not think these remarks should be applied to developing wrongs.

61. He went on:

> "The same conclusion is justified on wider grounds. If damages for loss of reputation could be recovered by alleging and proving a "lawful means" conspiracy, then it would be unlawful to combine with another person in order to tell the truth about the plaintiff with the object of depriving him of a reputation which he enjoys but does not deserve. The implications are far-reaching, and this result could only be prevented by introducing, for example, a defence of justification and other safeguards which have evolved as part of the law of defamation. In other words, "lawful means" conspiracy should not exist as a separate tort for damage of this kind." (1509E-F)

This returns the debate to the particular elements of conspiracy, which are not the same as the elements of a privacy/confidentiality claim. It also relies on the developed safeguards which apply to defamation in order to reconcile the tort with the requirements of free speech. Separate, but related, free speech reconciliations are being and have been developed in relation to privacy. It is not necessary to prevent claims for reputation in privacy claims in order to preserve that balance in a way which is appropriate for defamation, when that balance can be achieved by means directly related to privacy claims.

62. Accordingly I do not consider that this case compels me to find that Mr White's case is correct (at least on an application of this nature). Mr Tomlinson also submitted that these remarks were not binding because they were obiter. I do not need to consider that point. He was right to point out that apparently the *Gulf Oil* case was not cited, but I doubt if anything turns on that for the purposes of this application.

63. Mr White also placed reliance on *McKennitt v Ash* (supra). This was a case which investigated the privacy claim which was made in that case. Most of what is said there is irrelevant to the present matter, but at paragraph 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. That might be so at the interlocutory stage in an attempt to avoid the rule in Bonnard v Perryman [1891] 2 Ch 269: a matter, it will be recalled, that exercised this court in Woodward v Hutchins…
>
> 80 That however is not this case."

64. Mr White asserted that since the nub of the two claims before me was a claim based on reputational damages, the nub of the claim lay in defamation and that this passage applied. I disagree. I have already dealt with the assertion as to the nub of the claim, and the point fails for that reason, but in my view the passage does not clearly support him for other reasons. The remarks of Buxton LJ were made in the context of rejecting a submission that the falsity of the published information meant that there could be no claim in confidence. In that context he made his remarks which amount to a reiteration of the remarks made in earlier cases about actions which were really defamation actions disguised in order to avoid the rules applicable to such actions. Buxton LJ did not say

anything about claims concerning reputation generally; he merely referred to defamation actions. It would be taking those remarks too far to translate them so as to have the effect contended for by Mr White.

65. Next Mr White relied on *Mosley v News Group Newspapers Ltd* [2008] EMLR 20. At paragraph 214 Eady J pointed out that that particular claim did not concern injury to reputation, and that it was not brought in libel. In their context those remarks are accurate observations. They cannot be taken to go so far as to rule out the possibility of the recovery of loss of reputation in an action other than a libel action. The point was not canvassed in that case. The same point can be made in relation to paragraph 230, another paragraph which refers to defamation. Paragraph 3 is probably the strongest expression from Mr White's point of view, where Eady J said:

> "The cause of action is breach of confidence and/or the unauthorised disclosure of personal information, said to infringe the claimant's rights of privacy as protected by Art 8 of the European Convention on Human Rights and Fundamental Freedoms (the Convention). There is no claim in defamation and I am thus not directly concerned with any injury to reputation."

66. Mr White would be entitled to rely on the second of those sentences which, by its use of the word "thus", might be thought to equate damages to reputation with defamation. However, the absence of any claim in respect of reputation in that case meant that the point before me did not arise for consideration. The word "directly" also seems to contain some sort of qualification. Accordingly this is not a compelling statement in support of Mr White's principal submission. The real point raised by Mr White was not in issue there, and it is impossible to infer a finding that supports Mr White's case.

67. Thus far the authorities on which Mr White relied do not clearly support his thesis. The most that can be said is that some of them are not inconsistent with it. Mr Tomlinson went on to draw attention so some authorities which he said were positively supportive of the proposition that a reputational claim could be brought in privacy.

68. His first case was *Re Kavanagh* [1949] 2 All ER 264. This was a bankruptcy case involving the partition of the settlement proceeds of a pre-bankruptcy action. Before her bankruptcy the bankrupt had sued her former solicitor for breach of confidence. The claim was pending at the date of her bankruptcy but later settled on terms which involved the defendant paying damages. The bankrupt claimed that the damages were attributable to damage to her reputation and therefore payable to her and not her trustee; the trustee in

bankruptcy argued they were not, and were therefore part of her estate and payable to him. The Divisional Court held that the sum fell to be divided equally. The significance of the case is said to lie in the fact that at no point was it questioned that there could have been a claim for damage to reputation in a breach of confidence case - it was assumed that there could. Therefore, it is said by Mr Tomlinson, one can maintain a claim involving damage to reputation in a privacy claim too.

69. It can be seen that at no point in the case was the point argued. The case was all about the division of the spoils, not whether a reputation-based claim could be brought in the first place. It is no part of the ratio of the case that it could. There was just an underlying assumption. That assumption is comforting to the claimants' cases in the present matters, but it does not demonstrate them to be justifiable in law because the point was simply not debated.

70. In Tugendhat v Christie on The Law of Privacy and the Media, 2nd edition, at paragraph 13.107 the following footnote appears, after a reference to the *Mosley* case.

> "cf *Cumpana and Mazare v Romaina* … in which the ECtHR held that reputation and honour are equally protected by Arts 8 and (10)(2) of the Convention. It would appear to follow that damages for loss of reputation would be available under Art 8 for the unauthorised publication of private facts, whether true or false, in an appropriate case."

71. I was not taken to the case itself, but Mr Tomlinson relied on the content of the footnote. In my view it demonstrates at the very least that it cannot be said with clarity on the authorities that Mr White's position is correct.

72. In *Re Guardian News Media Ltd* [2010] 2 AC 697 the Supreme Court had to consider anonymity questions arising in the context of a challenge to the designation of certain individuals under terrorism legislation. Their Article 8 rights fell to be considered. It was part of the individuals' cases that their reputations were affected by the designation. Lord Rodger of Earlsferry JSC recorded the submission of the press (who were challenging the anonymity) at paragraph 37:

> "37. On behalf of the press, Mr Robertson QC did not dispute that article 8 rights fall within the scope of "the rights of others" in article 10(2). But, under reference to the judgment of the European

> Court of Human Rights in *Karakó v Hungary (Application No 39311/05)* (unreported), given 28 April 2009, he submitted that article 8 does not confer a right to have your reputation protected from being affected by what other people say. So the only article in play in relation to M's reputation was article 10."

73. He expressed a conclusion at paragraph 42:

> "42. In short, in the *Karakó* case the European court was concerned with the application of articles 8 and 10 in a situation where, in the court's view, the applicant had not shown that the attack on his reputation had so seriously interfered with his private life as to undermine his personal integrity. In fact, the court does not mention any specific effects on the applicant's private life. In the present case, however, as already set out at para 21 above, M does explain how he anticipates that his private life would be affected if his identity were revealed. Admittedly, he appears at one point to single out the alleged damage to his reputation. Nevertheless, the court is really being invited to consider the impact of publication of his name on his reputation as a member of the community in which he lives and the effect that this would have on his relationship with other members of that community. In that situation the alleged effect on his reputation should be regarded as one of the reasons why, he contends, a report that identified him would seriously affect his private life. On that basis the report would engage article 8(1)."

74. In that paragraph Lord Rodger clearly expresses the view that the risk to reputation engages Art 8. That would seem to support Mr Tomlinson's case and to contradict Mr White's, but it is right to observe that the engagement of Art 8 is not contrary to the latter's thesis. Indeed it is consistent with it, because he accepts it and goes on to say that the law of defamation is the way in which the English authorities give effect to that Article. However, it is of the essence of Mr White's case that defamation is the sole manner in which Art 8 protects reputation. That would not appear to be borne out by Lord Rodger's paragraph. The engagement of Art 8 does not seem to be based on the fact that the designations were defamatory. It seems to have been because the damage to reputation was sufficient to engage it. That would tend to support Mr Tomlinson's case.

75. I was shown a couple of other authorities which add no weight to the debate on either side for the purposes of this application.

76. I return to the actual application before me which is one based on the proposition that it is sufficiently plain that a claim based on damage to reputation can only be bought in defamation and not on the basis of confidence/privacy, such that the present claim (assuming it can be described as such a claim) is an abuse of process. I should only accede to such a proposition if it is clear as a matter of principle, and at this stage in the action (before any evidence has been heard) that it is correct. Obviously there are some propositions of law which can be taken to be clear enough to justify an averment that a contrary pleading should be struck out as an abuse (or as disclosing no cause of action, or some other parallel description), even at an early stage in the action. However, the present case is not, in my view, one of them. What Mr White would have to establish is that, given the pleaded facts, which are assumed to be true, the legal consequence is inevitable because of the state of the law. It will be apparent from my analysis of the authorities that he has failed to achieve that. I do not think that he has established his proposition either as a matter of basic principle or as a matter which can be drawn from the authorities. He has an argument, but not a sufficiently conclusive one. I have already observed that had I had to express a view on what I saw, I would have been minded to decide the actual point of law against him. However I do not need to go that far, and it would be wrong to do so. It is sufficient for me to find, as I do, that he has not established that the law is as he says it is.

77. The point remains open to be argued at a trial. As a result of a trial two things can happen. The first is that the point can be decided against the determined facts (in particular the facts about the nature of the loss) and the additional subtleties that that will introduce. It may be instructive to assess the nature, if any, of damage to reputation, and to consider the nature of that damage against other aspects of private life which are affected. Furthermore, I would expect there to be a more root and branch analysis of the developing law of privacy (confidence) than I had in the application before me. In saying that I do not intend to be critical. There are sensible limits in the sort of exercise that Mr White sought to conduct, but those limits may sometimes mean that full analysis of authority cannot take place, and in this case, in my view, it did not.

78. In addition to basing his application on the ground I have been hitherto dealing with, Mr White argued the alternative ground that if and insofar as a claim for damage to reputation could be mounted in confidence or privacy, policy required that it be affected by the same restrictions and restraints as would apply to defamation actions. This submission was not fully developed. It was not clear how all the restrictions would operate in relation to a claim thus brought, but one striking submission was made. Mr White submitted that the one year limitation period applicable to defamation would apply to such a claim. Such a limitation period would bar the present claims so far as they were based on reputation. To say that all this is sufficiently clearly correct to be the basis of an application to strike out for abuse of process is a very bold submission. I am afraid it is

not clear at all, and I completely fail to understand how the limitation period in section 4A of the Limitation Act 1980 can apply to the present action, because the section applies to:

> "an action for
>
> (a) libel or slander, or
>
> (b) slander of title, slander of goods or other malicious falsehoods".

None of those descriptions can be made to apply to the present proceedings, and I was shown no legal basis on which they might somehow be made to apply by analogy, or some other indirect manner.

79. This part of Mr White's application therefore also fails.

Whether the damages would be too small to justify the proceedings

80. Mr White advanced the submission that the maximum allowable damages in this case would be so small that it became an abuse of process to run the case - *Jameel v Dow Jones Co Inc* [2005] QB 946. This argument was predicated on the assumption that the main damages lay for damage to reputation arising out of the original publications. If one took those out, either because damages to reputation were not recoverable, or because those particular damages would be statute barred, then what was left was not worth suing for.

81. Since I have not excluded the possibility of recovering for damages to reputation the basic premise of this submission cannot be established so it is unnecessary to consider the point further. In both cases the damage which has flowed from the disclosure and acquisition of private information (assuming it to have been private for these purposes) will have to be considered in the light of the facts found at a trial.

No reasonable expectation of confidence and privacy

82. Mr White's last substantive point is that the claims are bound to fail because in each case the applicants have no reasonable expectation of confidence and privacy. There was one point common to each claim - whether there is a reasonable expectation of privacy in relation to the arrest and the reasons for it. The rest of Mr White's case turned on matters particular to each claim. I shall deal with the arrest point first, because in my view it lies at the heart of the sustainability of these actions. If Mr White is correct then what is left, at least in the Hannon action, may be of little real value.

83. The pleaded cases both aver that each claimant had a reasonable expectation of confidentiality and privacy in respect of the "Claimant's information", which included "information concerning the arrest and detention, including the reasons for and the details and nature of the arrest". It is pleaded that this information was sold by a police officer to a Sun reporter for a specified sum of money. Mr White submitted that that information about the arrest was not something in respect of which the claimants could have a reasonable expectation of privacy.

84. Mr White does not rely on the particular nature of each arrest or the particular attributes of the individuals arrested. His main submissions start from authorities which he says are generally applicable to arrests generally, and therefore raise a serious question of principle applicable way beyond these particular cases.

85. His first, and principal, authority is *Axel Springer AG v Germany* (2012) 55 EHRR 15. This case is really about the interaction between Articles 8 and 10. A German newspaper had published a story or stories about the arrest and conviction of a well-known TV actor, together with photographs, and various restraining-type orders had been issued by the German courts in relation to this. The propriety of these orders came before the ECHR where it was held that the German courts had gone too far. At paragraph 78 of its judgment it embarks on a discussion of "General principles" about freedom of expression and its interaction with Art 8 rights. At paragraph 83 it observed:

> "In order for art 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to the personal enjoyment of the right to respect for private life. The Court has held, moreover, that art 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence."

86. The Court went on to consider the balancing exercise which had to be conducted between the two articles and set out various criteria relevant to that exercise. Having done so it arrived at a heading "Application to the present case". The first paragraph under that heading is particularly relied on by Mr White:

> "(i) Contribution to a debate of general interest.
>
> 96. The Court notes that the articles in question concerned the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence. That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings."

87. Mr White relies on this paragraph as establishing the proposition that the public has an interest in being informed about criminal proceedings, which extends to the stage of arrest. I do not think it says that in such bald terms. It is a qualified paragraph. The level of legitimate interest varies according to a number of factors, and it is not apparent that that degree is absolute to the extent that it applies to every arrest. I also note that the court identifies what it is talking about as "the arrest and conviction", and not just the arrest. It seems to me to be likely that it is talking about the composite event, and it is not apparent to me that it is vesting the fact of the arrest by itself with the degree of legitimate public interest that Mr White seeks to rely on. In this country, at any rate, an arrest is not a "judicial fact", or at least not in the absence of a warrant issued by a judicial authority. One cannot therefore automatically assume that an arrest should be entitled to the same degree of publicity as judicial acts generally are. The last sentence of the paragraph makes it clear that even if matters might justify publicity in some cases, that publicity is not necessarily justified in every case.

88. Mr White sought to bolster his case by relying on *Khashoggi v Smith* (supra) at p6 where Roskill LJ observed:

> "... there cannot be any right of confidence in a case where it is desired to exploit [the housekeeper's] information for investigation

> into the commission of alleged offences, whatever the extent of the confidence was in which that information was first acquired."

89. He said this in the context of considering the maxim that "there is no confidence as to the disclosure of iniquity".

90. Mr White draws attention to the use of the word "alleged", and submits that this acknowledges a public interest in disclosure of otherwise confidential information where it reveals a suspicion or allegation of criminal conduct or other iniquity. Since an arrest is in support of an alleged inquiry, there is no confidentiality in it because there is a suspicion of criminal conduct.

91. In my view these submissions take these remarks too far. The nature of an arrest, and its surrounding facts, introduce subtleties which I am sure Roskill LJ would not have intended to pre-judge.

92. The two authorities which I have just identified are the sum total of the authorities which Mr White relies on for his somewhat striking submission. The general practice of the police is, by and large, not to identify those who have been formally arrested, though the police themselves apparently identify this as a rule of practice rather than a principle of law. Guidance given by the Association of Chief Police Officers of England, Wales and Northern Ireland states:

> "4.3. Although there is no specific law to prevent forces identifying those they have arrested, in practice they give general details of arrests which are designed to be informative but not to identify ... In high-profile cases which may cause major public concern – such as terrorism or murders – forces sometimes provide substantial detail about their investigations without identifying individuals ...
>
> 4.5. If a suspect is released without charge or bailed to reappear at a police station, the fact of the police action occurring is generally released, though the person remains unidentified. Again, this is practice, rather than an approach dictated by any law."

93. Leveson LJ was more forthright in Chapter 3 of his report on the Inquiry into the Culture, Practices and Ethics of the Press. At paragraph 2.39 he considered the practice in relation to the police briefing the press on suspects, and went on:

> " ... I think that the current guidance in this area needs to be strengthened. For example, I think that it should be made abundantly clear that save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public."

94. In a response to a Law Commission consultation on contempt of court, Colman Treacy LJ and Tugendhat J endorsed what Leveson LJ said and actually adopted his words:

> "5. Question 6.3: A decision by the police to publish the name of a person arrested must be made after consideration of the rights of such persons, including their rights under ECHR Art 8, on a case-by-case basis. The police arrest many people who are never charged. If there were a policy that the police should consistently publish the fact that a person has been arrested, in many cases that information would attract substantial publicity, causing irremediable damage to the person's reputation. Even if the fact that the person was not charged were subsequently published, that would not receive the same publicity, and would not prevent subsequent Internet searches disclosing that the person had been arrested."

95. They then adopted the words I have quoted from the Leveson Report, and went on:

> "It may be that the civil law should be reformed to give a remedy for the publication of prejudicial information, in addition to the law of contempt. But that is beyond the scope of this consultation."

96. It may well be that that very point is within the scope of this action. Mr White invites me to decide that there can be no such claim because there is no privacy in the fact and circumstances of an arrest. If that is correct then one is tempted to wonder why a journalist would pay for the information (which is what I have to assume for the purposes of the application before me), but it is unnecessary to dwell on that. For present purposes it is sufficient for me to observe that the key authority relied on by Mr White (*Axel Springer*) does not support an absolute right of the press to have, and to publish, the fact of an arrest, and its circumstances. At most it supports a submission that, if the facts justify it, that right exists and the countervailing privacy rights do not. As with a large

number of disputes under Convention rights, that is a question of fact and degree, and is highly fact sensitive.

97. I should also record that Mr White made another point, based on contempt. He drew attention to the fact that section 2 of the Contempt of Court Act 1981, which operates in the realms of deterrence of the publication of material which would create a substantial risk of impeding or prejudicing criminal proceedings, deals with the strict liability regime which is applicable to publications made at the time that criminal proceedings are "active". He points out that Schedule 1 paragraph 4 of the Act states that those proceedings are "active" from arrest onwards. He submits that that regime suggests that references to a named person's arrest and its circumstances is lawful subject only to its deployment not falling foul of the strict liability rule imposed by the contempt laws. He says that that is not consistent with any expectation of privacy on the part of an arrested person that his arrest will not be reported unless he is charged or convicted. In accordance with normal principles, it will be for an editor to decide whether a publication should take place or not.

98. It seems to me that this submission assumes too much about section 2. Section 2 has the purpose of assisting in defining and preserving the integrity of criminal proceedings. It is all about contempt, and seeks to define some of the boundaries of the operation of contempt in that context. It is not about anything else, and it makes no assumptions about what other restrictions or permissions might operate in relation to the publicity of facts surrounding the criminal process. For example, it says nothing expressly or impliedly about defamation. By the same token it says nothing about confidence or privacy (as separate rights and obligations). One simply cannot draw the inference that Mr White seeks to draw.

99. Since the question of the confidentiality or privacy of an arrest is likely to be a fact sensitive point, it is almost inevitably not going to be something that can be determined on an application such as the present where the only facts that the court has to go on are the pleaded facts. Mr White's submissions sought to knock out the report of the arrests from the equation and then went about seeking to demonstrate that the other facts which were said to give rise to a claim, flowing from the publicity given as a result of acquiring information about the arrest, was such as to attract no privacy claim either because of their nature or because of other publicity that has been given to the matter. However, since the alleged invasion of privacy or confidentiality arising out of the potentially wrongful acquisition of information about the arrest remains in play in the action, because the claim is at least arguable, then it is, in the main, not necessary to go on and consider the separate merits of other aspects on the footing that the arrest-based claim has gone (because it has not). The significance of the remainder of the reports that are objected to, in confidentiality and privacy terms, must be assessed in the light of the

potentially wrongful original infringements of privacy and confidentiality rights. They also are said to have their own privacy attributes, but I do not need to go into that.

100. It therefore follows that it is not necessary or appropriate for me to consider most of the detail of Mr White's attacks on the other elements of the reporting as an infringement of rights. They all fall to be investigated at a trial. I will, however, mention a couple of matters that concerned me, especially in relation to the Hannon case and to which I have given particularly anxious consideration in terms of the viability of the action.

101. One potentially key distinction between the Dufour case and the Hannon case is the rather more public nature of the central events in the case of the latter when compared with the former. In the case of Mr Dufour (on the assumed facts) his breathalyser test took place in the privacy of the aircraft cockpit and not in the presence of passengers. When he left the aircraft he left discreetly in an unmarked car. No passenger would ever have been aware of what was happening. His preceding conduct in having a drink with friends or colleagues the night before was also essentially a private event. There was nothing public about what happened to Mr Dufour. In the case of Miss Hannon, her personal conduct took place in the presence of a number of other passengers. Whatever it was that happened on the plane it was that conduct that led to her being removed from the plane (if she was) and (once off the plane) being arrested. Mr Tomlinson submitted that her conduct did not take place in a public place. I do not need formally to rule on that submission, but I confess to having been unimpressed by it. It seems to me that an aircraft cabin is no more a private place than the interior of a bus (despite the attempts of the airlines to give a slightly different impression in their advertising). It is a place where members of the public have voluntarily collected together, but they have not done so in the expectation of any privacy. They know that any acts that they perform in that environment will be viewed by people whom they have no control over, and whom they have not invited to that location. It seems to me it is not very different from a street with only a limited number of passers-by. However, I make no determination about this or its significance.

102. The other potentially significant distinction between the two cases is the significant publicity given to the events in the Hannon case, which was not present in the Dufour case. As I have described above, there was a well-publicised criminal trial of Miss Irby, in which Miss Hannon was expressly identified (though it is fair to observe that her identity did not take centre stage and was referred to almost incidentally). That seems to me to be capable of at least going to damages in her case, but again I make no finding in relation to it because it will have to be argued at trial.

103. I mention those points not because they play any part in the logic of my decision, but because they were points in Mr White's favour which, had he got over the other hurdles at which he in fact fell, would have had some merit. Particularly in the Hannon case, had I decided otherwise on the arrest point, they might have posed a more significant difficulty for Miss Hannon. On the other hand, since the events came to the attention of the public originally as a result of disclosure of potentially private or confidential information (on the assumed facts of this application) her claim must be looked at in the round. If there is a possibility that the reporting started from an illegitimate point (wrongfully acquiring information about the arrest) these points may have to be assessed against a finding about that, and that cannot be done until trial. I will therefore say no more about the points.

104. For the sake of completeness also I record that Mr White also made submissions as to the stand-alone legitimacy of publishing stories of the nature of those which they published in these cases. So far as both cases were concerned he submitted that there is a legitimate public interest in the sobriety of pilots and passengers on planes, and submitted that in the Hannon case it would have been permissible to report the "fracas" on the plane, and the only complaint lay in identifying Miss Hannon and that identification was within editorial discretion - see the *Guardian* case (supra), *In re British Broadcasting Corporation* [2010] 1 AC 145 and *Flood v Times Newspapers* [2012] 2 AC 273. The articles could therefore be justified as contributing to debates on matters of public interest and concern. In my view these are all arguments for the trial.

Conclusion

105. It follows from the above that the applications fail and should be dismissed.