Neutral Citation Number: [2015] EWCA Civ 1176

Case No: A2/2014/2190

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE QUEEN'S BENCH DIVISION
MR JUSTICE DINGEMANS

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2015

Before :

MASTER OF THE ROLLS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE BEAN

- -

Between :

WELLER AND ORS	**Claimants/ Respondents**
- and -	
ASSOCIATED NEWSPAPERS LIMITED	**Defendant/ Appellant**

- -
- -

David Sherborne and Julian Santos (instructed by **Clintons**) for the **Claimants/Respondents**
Antony White QC and Catrin Evans (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant/Appellant**

Hearing dates : 27 & 28/11/2015

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Approved Judgment

Master of the Rolls:

1. The claimants are the children of Paul Weller, the well known musician and former member of the "Jam" and "Style Council". Their claim is in respect of an article which was published online on 21 October 2012 by Associated Newspapers Limited, as publishers of the Mail Online. The article was headed "a family day out" and showed seven photographs of Paul Weller and the claimants ("the Photographs").

2. The Photographs were taken on 16 October 2012 by an unnamed photographer in Santa Monica, Los Angeles, California. They were of Paul Weller and the children out shopping in the street and relaxing in a café. Dylan was aged 16 at the time. The two other children were the twins John Paul and Bowie who were then aged 10 months.

3. The article was illustrated with seven photographs which showed the faces of Dylan and the twins. The claimants say that the Photographs should have been pixelated. In these proceedings they claim damages for misuse of private information and breach of the Data Protection Act 1998 ("the DPA") and an injunction.

4. In a reserved judgment given on 16 April 2014, Dingemans J found that the defendant was liable for misuse of private information and/or for breach of the DPA. In a subsequent judgment given on 12 June 2014, he granted an injunction restraining the defendant from further publishing the Photographs which are the subject of this litigation. He also awarded damages of £5,000 to Dylan and £2,500 each to John Paul and Bowie.

5. With the permission of Laws LJ, the defendant appeals against (i) the finding that the defendant was liable in misuse of private information and for breach of the DPA (although the argument on the latter added nothing to the argument on the former) and (ii) the grant of the injunction. In summary, the defendant's case in relation to (i) is that the judge was wrong to hold that the claimants had a reasonable expectation of privacy in relation to the unpixelated images of their faces contained in the Photographs. Mr White QC submits that the appeal against this holding raises two important issues. The first is whether the publication of an "innocuous" photograph of a child taken in a public street without consent gives rise to a reasonable expectation of privacy in relation to the image shown, merely because the person is identifiable whilst he or she is out and about with other family members, but where nothing inherently private is shown. The second issue is the effect of foreign law on the assessment of reasonable expectation of privacy. This issue arises because the taking and publishing of the Photographs would have been lawful according to the law of California. Before I examine the law and how the judge dealt with the legal issues that he had to determine, I need to set out the relevant facts.

A. THE FACTS

6. The text of the article is set out at para 6 of the judgment below: [2014] EWHC 1163 (QB). There has been no complaint about any aspect of it. The Photographs are described in detail at paras 7 to 13 of the judgment.

7. The judge heard evidence from Mr Weller, Hannah Weller (his wife), Claire Moon (his manager and personal assistant) and Dylan. He said that they all gave honest

evidence. At para 84, he recorded that Mr Weller "appreciated that the paparazzi and press liked to publish material about him because of what he did for a living, but he still regarded himself as a private person when not performing". He had given interviews over the years and said that on occasions this had included biographical details about him and his family. He had avoided giving in depth interviews about his private life. He responded to questions rather than volunteering information about his family life. He denied promoting his image as a devoted father.

8. Claire Moon said that he had agreed to do interviews in the past, but it was not something that he enjoyed doing or actively sought. He was essentially a private person despite his success in the music industry. She said that he had refused offers to feature in various magazines. She did not think that it assisted his image to be known as some sort of super dad.

9. At the time of the trial, Dylan was 17 years of age. Although she had grown up in the UK, she had been living in Los Angeles with her mother for the past 4 years or so. She was still very close to her father, but only saw him on average 3 or 4 times a year when he was touring in the US or when she was on holiday in the UK. She said that her father had always kept her out of the media spotlight and that she had never been to a "red carpet event" or to celebrity parties. When she was about 14 years old, she had joined a modelling agency for a year during which she did one modelling shoot for Teen Vogue. A photograph of her was published in the 24 February 2011 edition of the magazine. Mr Weller said that this was a controlled environment for a photograph to be taken and published. It differed from the environment in which photographs were taken by paparazzi in the street. Dylan had set up a Twitter account in August 2010, but she had not used it and did not know the password. She had started using Instagram about 2 and a half years before the trial. She said that her followers were either direct friends or friends of persons she had known.

10. Mr Weller said that on 16 October 2012 he became aware of a paparazzo taking photographs when they were in a car park. In response to a request to stop, the photographer said: "no I respect you its fine, they'll pixelate the photographs of the kids". Mr Weller did not at any time give his consent to the taking of the Photographs.

11. The judge said at para 125 that Mr Weller considered that:

> "his children being followed; pictures being taken despite his asking for them not to be taken; photographs being published in a national newspaper without consent and without any attempt to hide or disguise their faces; was completely wrong. He said that just because a father is well known doesn't mean that the children should be…the primary objective in bringing this claim on behalf of the children was to ensure that it never happened again."

12. The judge also recorded Mr Weller's concerns about the increased security risk created by the publication of the Photographs (para 126). He said that there might be threats when the children were out with nanny, granny or aunty. He had never said anything to give an indication that he would consent to photographs of his children being published in newspapers (para 130). He said that Dylan was "not a model in

any meaningful sense" (para 133). There had been no consent to the publication of the Photographs (para 135). He and Hannah Weller had general concerns about security in relation to their children. They had the normal concerns of any parent for the safety and security of their children heightened by the fact that Paul Weller was well known. The main purpose in bringing the proceedings was to attempt to ensure that the children were left alone as they grew up (para 136).

13. At paras 137 to 144, the judge described the circumstances in which the Photographs became available to the defendant. Elizabeth Hazelton was the deputy UK editor of Mail Online. She said that she noted that the Photographs had been taken in a public place and would have concluded that there was "nothing about them which concerned her in regards to privacy". She had noted from the accompanying caption that the pictures had come from Los Angeles "which would've meant that there were no problems". Mail Online became aware of the Photographs through a picture agency. The agency posted photographs to be purchased and used by the media to, among others, Mail Online. The Photographs were captioned *"Paul Weller with twins in LA".* The caption said "*Legendary British musician Paul Weller and his wife Hannah Andrews and twin sons John Paul and Bowie are spotted out for a walk and a coffee and do some shopping on the 16th October 2012 in Venice, California".* The judge found that Mail Online knew that the Photographs had been taken without consent because of the wording of the caption and the use of the word "spotted". It was not, however, aware of the "harassment" by the photographer of Dylan at the café or the promise made by the photographer to ensure that the children's faces were pixelated in any publication (para 161).

14. At paras 145 to 147, the judge recorded the defendant's commercial concerns. Martin Clarke (whose evidence the judge accepted) said that Mail Online faced intense competition from global competitors all of which were based in the US who enjoyed the right to relatively unfettered free speech which was enshrined in the US Constitution. Celebrity stories were important to Mail Online "because of the public interest in free speech and because show business or celebrity stories are popular and generate revenue through digital advertising spend which was critical to Mail Online's commercial model."

B. THE LAW

15. The correct general approach to the question whether a publication is in breach of a person's privacy rights has been considered on many occasions both in our domestic courts and in Strasbourg. The House of Lords decision in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 is a good starting point. It established that a two stage test should be applied in these cases. The first stage is to ask "whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy". If the person did not have such an expectation, the claim for misuse of private information, which is effectively a breach of article 8 of the European Convention on Human Rights ("the Convention"), fails. If he or she did have such an expectation, then the court has to conduct the balancing exercise of weighing the person's privacy rights under article 8 of the Convention against the publisher's right to freedom of expression under article 10 of the Convention. The balancing exercise was described by Lord Steyn in *Re S* [2005] 1 AC 593 at para 17 as "an intense focus on the comparative importance of the specific rights being claimed".

C. REASONABLE EXPECTATION OF PRIVACY

C1. Generally

16. In *Murray v MGN* [2008] EWCA Civ 446, [2009] Ch 481, this court said:

> "35 ….. so far as the relevant principles to be derived from *Campbell* are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.
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> 36 As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They 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."

17. This approach was recently endorsed by the Supreme Court in *In re JR 38* [2015] UKSC 42, [2015] 3 WLR 155 at para 88 per Lord Toulson.

18. The taking of photographs in a public street must be taken to be one of the ordinary incidents of living in a free community: *Hosking v Runting* [2003] 3 NZLR 385 para 138. It is not, however, in dispute that a person's privacy rights may be infringed even in relation to things done in a public place. In *Campbell,* for example, photographs were taken of the claimant as she was in the street outside the clinic where she had been receiving therapy. All of the information about the claimant's addiction and attendance at the clinic was private and confidential. The majority of the House of Lords in *Campbell* held that the publishing of photographs taken of the claimant in the circumstances of that case was in breach of her reasonable expectation of privacy. Baroness Hale said:

> "154 Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have

> not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it. (This was the view of Randerson J in *Hosking v Runting* [2003] 3 NZLR 385, which concerned a similarly innocuous outing; see now the decision of the Court of Appeal, 25 March 2004.)
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> 155. But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place, which will have been entirely recognisable to anyone who knew the locality. A picture is 'worth a thousand words' because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her from going back to the same place again."

C2. Reasonable expectation of privacy and foreign law

19. A question arises from time to time (and arises in the present case) whether the local law (the law of the place where the photograph was taken) should be taken into account in determining whether an individual has a reasonable expectation of privacy as a matter of English law. In *Douglas v Hello (No 3)* [2005] EWCA Civ 595, [2006] QB 125, the Court of Appeal had to decide whether the use of photographs taken at a wedding in New York (which was permitted by the law of New York) was authorised as a matter of English law. The court said that it would be necessary to have regard to the law of New York in deciding whether the claimants had a reasonable expectation of privacy in relation to the photograph.

C3. The position of children

20. In *JR 38* at para 95, Lord Toulson said that the fact that the appellant in that case was a child at the relevant time was not a reason for departing from the test of whether there was a reasonable (or legitimate) expectation of privacy, but it was a potentially relevant factor in its application. In the case of a child too young to have a sufficient idea of privacy, the question whether a child in any particular circumstances has a

reasonable expectation of privacy must be determined by the court taking an objective view of the matter including the reasonable expectation of the parents as to whether the child's life in a public place should remain private.

21. In *Murray* at first instance, Patten J addressed the problem of how to determine the reasonable expectation of a child (particularly a very young child) in a passage which was substantially approved by this court in *Murray* at para 38 and by implication by the majority in *JR 38* at para 96. He said:

> "……The question whether a child in any particular circumstances has a reasonable expectation for (sic) privacy must be determined by the Court taking an objective view of the matter including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private. Ultimately it will be a matter of judgment for the Court with every case depending upon its own facts. The point that needs to be emphasized is that the assessment of the impact of the taking and the subsequent publication of the photograph on the child cannot be limited by whether the child was physically aware of the photograph being taken or published or personally affected by it. The Court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing."

22. At para 38 in *Murray*, this court said:

> "Thus, for example, if the parents of a child courted publicity by procuring the publication of photographs of the child in order to promote their own interests, the position would or might be quite different from a case like this, where the parents have taken care to keep their children out of the public gaze."

23. The court then proceeded to explain why it considered that the fact that the claimant was a child was of greater significance than the judge had thought. At para 45, it said:

> "The courts have recognised the importance of the rights of children in many different contexts and so too has the international community: see eg R v Central Independent Television Plc [1994] Fam 194 per Hoffmann LJ at 204-5 and the United Nations Convention on the Rights of the Child, to which the United Kingdom is a party. More specifically, clause 6 of the Press Complaints Commission Editors' Code of Practice contains this sentence under the heading "Children": "(v) Editors must not use the fame, notoriety or position of the parent or guardian as sole justification for publishing details of a child's private life." There is also a publication called The Editors' Codebook, which refers to the Code and to the above statement. Although it is true that the Codebook states (at page 51) in a section headed 'Intrusion' that the Press Complaints

> Commission has ruled that the mere publication of a child's image cannot breach the Code when it is taken in a public place and is unaccompanied by any private details or materials which might embarrass or inconvenience the child, which is particularly unlikely in the case of babies or very young children, it seems to us that everything must depend on the circumstances."

24. Then at para 46:

> "So, for example, in *Tugendhat and Christie* on *The Law of Privacy and the Media* the authors note at paragraph 13.128 (in connection with a complaint made by Mr and Mrs Blair) that the PCC has stated that:
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> > "the acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person."
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> It seems to us to be at least arguable that a similar approach should be adopted to photographs. If a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the media, so too should the child of a famous parent. In our opinion it is at least arguable that a child of 'ordinary' parents could reasonably expect that the press would not target him and publish photographs of him. The same is true of David, especially since on the alleged facts here the Photograph would not have been taken or published if he had not been the son of JK Rowling."

25. Finally:

> "55 We recognise that there may well be circumstances in which there will be no reasonable expectation of privacy, even after *Von Hannover*. However, as we see it all will (as ever) depend upon the facts of the particular case. The judge suggests that a distinction can be drawn between a child (or an adult) engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. This is on the basis that the first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends and that, on the test deployed in *Von Hannover*, publicity of such activities is intrusive and can adversely affect the exercise of such social activities. We agree with the judge that that is indeed the basis of the ECtHR's approach but we do not agree that it is possible to draw a clear distinction in principle between the two kinds of activity. Thus, an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as adversely to affect such activities in the future.

> 56 We do not share the predisposition identified by the judge in [66] that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends upon the circumstances. The position of an adult may be very different from that of a child. In this appeal we are concerned only with the question whether David, as a small child, had a reasonable expectation of privacy, not with the question whether his parents would have had such an expectation. Moreover, we are concerned with the context of this case, which was not for example a single photograph taken of David which was for some reason subsequently published.
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> 57 It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child. That is the context in which the photographs of David were taken."

26. The special position of children was highlighted by this court in *K v News Group Newspapers Ltd* [2011] EWCA Civ 439, [2011] 1 WLR 1827. In this case, the claimant, who was married with teenage children, was a well known personality working in the entertainment industry, He had an affair which the defendants wished to disclose in a newspaper. The claimant obtained an interim injunction on the footing that he was likely to establish at trial that publication should not be allowed. Ward LJ gave the leading judgment. He said:

> "17 The position of the appellant's wife is equally clear: she opposes publicity. Then there are the children. The purpose of the injunction is both to preserve the stability of the family while the appellant and his wife pursue a reconciliation and to save the children the ordeal of playground ridicule when that would inevitably follow publicity. They are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment…"

27. As for Strasbourg jurisprudence in relation to photographs of children, it is sufficient to refer to *Reklos v Greece* [2009] EMLR 290 in which the ECtHR stated that there was no protection where a photograph of a child is taken in the context of an activity that is likely to be recorded or reported in a public manner. At para 37, the court said:

> "Moreover, the court would emphasise that in the present case the applicants' son did not knowingly or accidentally lay himself open to the possibility of having his photograph taken in the context of an activity that was likely to be recorded in a public manner. On the contrary, the photographs were taken in

> a place that was accessible only to the doctors and nurses of the clinic and the boy's image, recorded by a deliberate act of the photographer was the sole subject of the offending photographs."

28. And at para 40:

> "As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case (see [37] above) obtaining consent of the person concerned at the time the picture is taken and not simply if and when it is published."

29. Drawing the strands of the case law together, I consider that the following points can be made. First, a child does not have a separate right to privacy merely by virtue of being a child. Secondly, however, although the broad approach that must be adopted to answering the question whether there is a reasonable expectation of privacy is the same for children and adults, there are several considerations which are relevant to children (but not to adults) which may mean that in a particular case a child has a reasonable expectation of privacy where an adult does not.

30. Thirdly, in the case of children (as in the case of adults) all the circumstances of the case should be taken into account in deciding whether there is a reasonable expectation of privacy. These should include the factors listed at para 36 of *Murray.* It is, therefore, necessary to consider in general terms how those factors should be applied specifically in the case of children. I shall take each factor in turn.

Attributes of the claimant

31. A person's age is an important attribute. I refer to the passage in the judgment of Patten J which I have set out at para 22 above. As he noted, the test of reasonable expectation of privacy cannot be applied literally to a very young child who has no obvious sensitivity to any invasion of privacy. The solution that he devised (now approved) is consistent with the unique characteristics of a child's article 8 right: that the autonomy it protects is qualified by the fact that very young children lack the capacity to exercise it and both the parents (in how they choose to conduct their family life with the child) and the court (in considering the impact an intrusion may have on the child) step in. It is also worth mentioning that the sensitivity of children develops as they age. An older child may be able to exercise his autonomy in a similar way to adults and, in the words of Tugendhat J in *Spelman v Express Newspapers* [2012] EWHC 355 (QB) at para 55, they may create "a personality and public profile of their own". An older child is likely to have a greater perception of his own privacy and his experience of an interference with it might well be more significant than for a younger child. These differences are of some relevance in the present case: two of the claimants were 10 months of age at the material time; the third was a 16 year old girl.

The nature of the activity and the place where it happened

32. It is convenient to take these together. These are undeniably important factors to be considered when deciding whether a person has a reasonable expectation of privacy. But do they have particular relevance in the case of children? There are two respects in which they do. First, certain (usually very young) children do not choose to be in a particular place or interact in a private or public way with other people. The passage at para 37 in *Reklos* suggests that the circumstances of that case could be distinguished from circumstances where a child "knowingly or accidentally lay[s] himself open to the possibility of having his photograph taken in the context of an activity that was likely to be recorded or reported in a public manner". When a person goes out in public, he assumes certain risks. But it cannot reasonably be said that young children, even when they are in public, lay themselves open to the possibility of their privacy being invaded.

33. Secondly, it is parents who usually exercise this decision-making for young children. Thus, if parents choose to bring a young child onto the red carpet at a premiere or awards night, it would be difficult to see how the child would have a reasonable expectation of privacy or article 8 would be engaged. In such circumstances, the parents have made a choice about the child's family life and the types of interactions that it will involve. A child's reasonable expectation of privacy must be seen in the light of the way in which his family life is conducted.

The nature and purpose of the intrusion

34. Whilst the nature and purpose of the intrusion should be considered from a reasonable child's point of view, the court's approach to consideration of these factors is generally no different from the approach it takes to considering an adult's reasonable expectation. Thus in *JR 38,* the majority took into account the fact that the photographs of the child participating in serious rioting were for the purpose of identifying those involved. This was the decisive reason why the majority decided that the applicant did not have a reasonable expectation of privacy and article 8 was not engaged.

Consent

35. As occurred in *Murray*, the parents' lack of consent, if it was known to the publishers, will carry particular weight. This is unsurprising especially in cases involving young children who cannot give or withhold their consent. In these cases, it is the parents who make the decision on their behalf and set the context for a child's family life.

Effect on the claimant

36. There is little discussion in the authorities about the effect of a publication on a child as a factor in applying the reasonable expectation of privacy test. This may be because the effect of a publication on a child is usually highly material to the court's balancing of a child's article 8 rights against the publisher's article 10 rights at the second stage: see, for example, *AAA v Associated Newspapers Ltd* [2013] EMLR 2 (Nicola Davies J) at paras 10 to 20 and *K* at paras 14 to 19. But it is also a factor to be considered at the first stage. It is true that there is no discussion of this in the judgments of the majority in *JR 38.* But Lord Toulson did cite with apparent approval the passage in the judgment of Patten J in *Murray* to which I have referred which discussed the impact of the publication on the child in the context of an application of

the reasonable expectation of privacy test. Assessment of this impact, Patten J explained, "cannot be limited by whether the child was physically aware" of the photograph being taken, published or whether the child is personally affected by it.

37. Interference with a child's article 8 rights may also give rise to greater security concerns than it would in the case of an adult. In *Douglas v Hello (No 3)* [2005] EWCA Civ 595 at para 84, Lord Phillips MR said that photographs were a "particularly intrusive" violation of one's privacy. Where a child has a famous parent, this security and safety concern is arguably heightened even further. The concerns about the potential for bullying and embarrassment mentioned by Ward LJ in *K* are also relevant in this context.

38. These considerations must be taken into account in determining whether a child's article 8 rights are engaged by a publication. This is consistent with how a court must approach any decision which affects a child's rights. It requires the court to accord primacy to a child's best interests Not to consider harm to, or impact on, a child until the balancing stage would be at odds with this approach.

D. THE BALANCING EXERCISE

39. I wish to make three points in relation to the balancing exercise in a case involving children. First, the fact that a child's article 8 right is engaged as a result of the application of the first stage test does not automatically mean that any article 10 rights will be trumped by the need to consider the best interests of a child. Holding that a child has a reasonable expectation of privacy does not mean that they have a guarantee of privacy. The balancing exercise must always be undertaken in children cases as in adult cases.

40. Secondly, however, although a child's right is not a trump card in the balancing exercise, the primacy of the best interests of a child means that, where a child's interests would be adversely affected, they must be given considerable weight. It might require very powerful article 10 rights (for example, exceptional reasons in the public interest) to outweigh a child's article 8 rights where publication would be harmful to the child.

41. Thirdly, the court does not necessarily require evidence of the harm that may be caused to a child by an invasion of privacy. It makes a judgment applying common sense and its own experience In *K*, Ward LJ concluded (without evidence) that the children in that case were "bound to be harmed" because the invasion of privacy "would undermine the family as a whole and because the playground is a cruel place".

42. *K* is a good example of how the court conducts the balancing exercise in children cases. Having cited para 46 of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 1 WLR 148, Ward LJ said:

> "19. …… However this learning must, with respect, be read and understood in the context in which it is sought to be applied. It is clear that the interests of children do not automatically take precedence over the Convention rights of others. It is clear also that, when in a case such as this the court is deciding where the balance lies between the article 10 rights

> of the media and the Article 8 rights of those whose privacy would be invaded by publication, it should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests. Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.
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> 20. How then does this approach square with the way Lord Steyn advised in *In Re S* that the ultimate balance should be struck, see [10(4)] above. He was confining himself to articles 8 and 10 and not ranging more widely to take note of the other Convention rights of children. He expressed his opinion long before *Neulinger* called for a reappraisal of the position. In any event, the emphasis he added makes it clear that he was concerned strictly with the balance between article 10 and article 8 "*as such*", i.e. where the only rights in balance were those conferred by articles 8 and 10. If, as he requires, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary, then the additional rights of children are to be placed in the scale. The question then is whether the force of the article 10 considerations outweigh them given what I have said in paragraph 19.
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> 21. Here there is no political edge to the publication. The organisation of the economic, social and political life of the country, so crucial to democracy, is not enhanced by publication. The intellectual, artistic or personal development of members of society is not stunted by ignorance of the sexual frolics of figures known to the public. As Lord Hope said of Miss Campbell (paragraph 120 of *Campbell v MGN Ltd*), "… it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy."

E. THE JUDGMENT

43. The judge dealt with the test of reasonable expectation of privacy at paras 150 to 172. He did so by reference to the relevant factors identified in para 36 of the judgment in *Murray*. As regards the relevant attributes of the claimants, he said that they were the images of "each of their faces, showing a range of emotions and engagement as the children are on a shopping and café trip with their father". The photographs were published with the children's surnames. At para 152, he said: "the authorities have established that a person's image constitutes one of the chief attributes of his or her personality". At para 153, he said that the difference in reaction and interest shown by the twins captured on the photographs "part demonstrates that". The photographs of Dylan showed her in various states of emotion.

44. As regards the nature of the activity in which the claimants were engaged, they were "on a private family trip out with their father. The activity was an afternoon trip of shopping and having a drink at a café" (para 156).

45. As for the place at which it was happening, "the private family activity was carried out in a public place on the street, and partly in a café which was visible from the street and partly situated on the street".

46. As regards the effect on Dylan of being photographed, she said that "she was shocked and that the photographer was extremely threatening and she felt really awkward" (para 162). Dylan's reaction to seeing the publication "was one of real embarrassment at the amount of people that would get to see the photographs and identify them as being of me" (para 163). The judge said that he accepted that Dylan was "genuinely embarrassed by the publication of the photographs, and that she considered the publication to be a real intrusion into her private family time with her father" (para 163).

47. The judge set out his conclusions on whether there was a reasonable expectation of privacy as follows:

> "170. In my judgment the photographs were published in circumstances where Dylan, Bowie and John Paul had a reasonable expectation of privacy. This was because the photographs showed their faces, one of the chief attributes of their respective personalities, as they were on a family trip out with their father going shopping and to a café and they were identified by surname."
>
> 171. The photographs were different in nature from crowd shots of the street showing unknown children. The photographs showed how Dylan, Bowie and John Paul looked, as children of Paul Weller. The photographs also showed how Dylan, Bowie and John Paul looked on a family day out with their father.
>
> 172. Although it was lawful to take the photographs of the Claimants, and it would have been lawful to publish them in California, this did not prevent the Claimants having a reasonable expectation of privacy in relation to their publication in this jurisdiction. Whether the publication is unlawful depends on the outcome of the ultimate balancing test, below."

48. His conclusion on the balancing test was:

> "182 In my judgment the balance comes down in favour of finding that the article 8 rights override the article 10 rights engaged. These were photographs showing the expressions on faces of children, on a family afternoon out with their father. Publishing photographs of the children's faces, and the range of emotions that were displayed, and identifying them by

> surname, was an important engagement of their article 8 rights, even though such a publication would have been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed. The balance of the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case. I consider that, although the interpretation of the Editors' Code is not for me, this conclusion is consistent with the approach set out in the Editors' Code which recognises that private activities can take place in public, and that editors should not use a parent's position as sole justification for the publication of details of a child's private life. "

F. THE APPELLANT'S CASE

F1. The appellant's case on reasonable expectation of privacy

49. The following is the barest summary of Mr White's submissions. He submits that the judge's conclusion on the issue of reasonable expectation of privacy is unsustainable. The factors on which the judge relied did not establish such an expectation. It is not actionable to publish an innocuous photograph of a named person taken without that person's consent in a public place because English law does not recognise an image right: see *Campbell* per Baroness Hale and *OBG Ltd v Allan* [2008] 1 AC 1 at para 293 per Lord Walker.

50. Moreover, contrary to what the judge appears to have decided, children enjoy no general right to privacy simply by reason of their age: *Spelman* at para 53. The only two cases in which a child claimant has succeeded in establishing a reasonable expectation of privacy by reason of being a child were *AAA* and *Murray.* But both of these cases had special features not present in the instant case. In the former, the subject of the articles in question was the suspicion that the child depicted in the photograph was the illegitimate child of the Mayor of London. The photograph of the child was published solely to encourage speculation as to the child's paternity because of alleged physical similarities. The depiction of the child in the context of the accompanying text raised welfare considerations in relation to the child which were not present in the present case. In the latter, the mother of the infant claimant had made it clear that no photographs were to be taken of her child and the context was the persistent harassment of the mother (JK Rowling) by the press.

51. Mr White submits that, although the judge referred to the threshold of seriousness before article 8 is engaged when he set out the legal principles at para 27 of his judgment, he did not expressly apply it when giving the reasons for his decision at paras 170 to 172. If he had properly taken into account the threshold of seriousness and/or the question of the impact of the publication of the photographs, he could not have held that the publication of images merely of identifiable children's faces while they were out shopping in a public place with their father created a reasonable expectation of privacy.

52. It was all the more important properly to take into account the threshold of seriousness in the circumstances of this case because (i) there was no evidence of

harm or serious effect on the claimants; (ii) the twins were not and could not have been aware that they were being photographed; (iii) most of the photographs did not show the twins' faces clearly or at all and they would not have been recognisable to anyone but family and friends; (iv) even if, as the judge found, the twins' faces displayed a "range of emotions", this did not reflect any anxiety on their part; (v) the judge found that Dylan was embarrassed by the publication, but he failed sufficiently to take into account that Dylan was in any event relatively experienced in having her photograph taken and published and that this reaction was more to do with her lack of control over the photographs than whether her private life was being intruded upon.

53. Finally, the judge impermissibly declined to follow binding Court of Appeal authority that he had to take into account the law of California in assessing whether the claimants had a reasonable expectation of privacy: *Douglas v Hello (No 3)*. The judge accepted the evidence of the defendant's expert that under California law the claimants would have had no reasonable expectation of privacy and the publication would not have been actionable. Mr White submits that on this ground alone the claimants did not have a reasonable expectation of privacy. Alternatively, he submits that, if the judge did take the law of California into account, he failed to give it any or any sufficient weight when he reached his conclusion, or to explain how he took it into account.

F2 . The appellant's case on the balancing exercise

54. Mr White submits that the judge's conclusion that the claimants' article 8 rights outweighed the defendant's article 10 rights was plainly wrong on the facts as found by him. He made no finding that the claimants were likely to be harmed or suffer any other serious consequence as a result of the publication. Accordingly, the information conveyed by the Photographs could only just have crossed the threshold of seriousness required for the engagement of article 8. Such a low-level engagement was insufficient to outweigh the defendant's article 10 rights, in particular (as accepted by the judge at paras 72 to 76) there is a public interest in freedom of expression itself and in having a vibrant press, which in turn requires the press to be able to compete in the online global news market. The evidence before the judge showed that unpixelated images of the twins were published on a US celebrity website (Zimbio) which is a competitor of the defendant.

55. The article 10 right was all the more powerful in this case when Mr and Mrs Weller admitted that their motive was to be able to control whether and which images and information about their children should be published.

G. CONCLUSION

G1. *Preliminary observations*

56. I shall express my conclusions separately on the application of the two stages of the test. But before doing so, I should reiterate what was said at para 41 of *Murray:*

> "At each stage, the questions to be determined are essentially questions of fact. The question whether there was a reasonable expectation privacy is a question of fact. If there was, the next question involves determining the relevant factors and

> balancing them. As Baroness Hale put it at [157], the weight to be attached to the various considerations is a matter of fact and degree. That is essentially a matter for the trial judge."

57. This is important because, as Mr Sherborne submits, it highlights the height of the hurdle that Mr White has to surmount if this challenge is to succeed. Although the court has identified a number of factors which are relevant to the question whether a claimant has a reasonable expectation of privacy, ultimately the court is called upon to make an evaluative judgment based on certain findings of fact. A reviewing appellate court will not disturb these findings or the judgment unless satisfied that there was no material to support them or they were ones which the court could not reasonably have made. In relation to the balancing exercise, the position is perhaps even more stark. In *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, this court said at para 8 that the balancing exercise "is treated as analogous to the exercise of a 'discretion'. Accordingly, "an appellate court should not intervene unless either the judge has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a judge could reasonably reach".

58. Mr White makes the fair point that this is all very unsatisfactory from the point of view of the editor of organs of the media. How can an editor who is contemplating the publication of photographs of the children of famous people know whether it is safe to publish? The tests are too vague and uncertain of application for an editor to know with a reasonable degree of confidence whether it is safe to publish. The circumstances of cases are infinitely diverse, so that the guidance to be derived from the case law has only limited value. I have sympathy with this concern. But the uncertainty of their application is inherent in the nature of the two stage tests themselves. Nevertheless, I believe that, although no two cases are precisely the same, the body of case law that is now being developed should give editors a reasonably clear idea of what it is safe to publish in most cases.

G2. *Conclusion on reasonable expectation of privacy*

59. I am satisfied that the judge was right (and at least entitled) to conclude that all three claimants had a reasonable expectation that the photographs would not be published.

60. It is true that the photographs were taken of the claimants and their father in a public place. But it is well established in both the domestic and Strasbourg case law that there are some matters about which a person can have a reasonable expectation of privacy notwithstanding that they occur in public.

61. The starting point is the place where the activity happened and the nature of the activity. As the judge said, this was a private family outing. It could have been a family visit to a local park or to a public swimming pool. It happened to be an outing to the shops and to a café which was visible from the street. The essential point is that it was a family activity which belongs to that part of life which is protected by the broader right of personal autonomy recognised in the case law of the Strasbourg court: see *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [2015] AC 1065 per Lord Sumption at para 4. The family element of the activity distinguishes it from Naomi Campbell's popping out to the shops for a bottle of milk and Sir Elton John standing with his driver in a London street, outside the gate to his home wearing

a baseball cap and tracksuit (see *John v Associated Newspapers Ltd* [2006] EMLR 27).

62. It is also relevant that the claimants' parents did not consent to the taking or publishing of the Photographs.

63. But the critical factor which militates in favour of the claimants having a reasonable expectation of privacy in relation to the Photographs is that they are children and that they were identified by their surname. The twins were less than one year old at the time of publication. They did not "knowingly or accidentally lay [themselves] open to the possibility of having [their] photograph taken in the context of an activity that was likely to be recorded or reported in a public manner" (see *Reklos* para 37). Nor did their parents court publicity for them. The position of Dylan is complicated by the fact that, although "she was not a model in any meaningful sense" (to use the words of the judge), she had courted publicity in the Teen Vogue magazine for a period of about one year. Her position is therefore different from that of the twins and this difference must be borne in mind in deciding whether she had a reasonable expectation of privacy in relation to the Photographs. The fact that a child's parent or parents are celebrities or public figures may not, without more, be relied on to argue that the child should have a lower reasonable expectation of privacy. The child's reasonable expectation of privacy cannot be different from that of a child whose parents are not in the public arena, unless the parents have courted publicity for the child. Indeed, the fact that a child's parents are in the public eye means that the child is potentially exposed to a special vulnerability: it could put their safety and security at risk.

64. This brings me to the issue of impact of the publication of the Photographs on the claimants. It is not surprising that there was no evidence in relation to the twins. They were too young. Although the judge did not refer to the potential impact on the twins, at paras 77 and 78 he referred to para 45 of *Murray* and para 19 of the judgment of Ward LJ in *K* and clearly had in mind the need to have regard to the best interests of the child. In my view, this was a relevant factor to bear in mind in deciding whether the twins had a reasonable expectation of privacy in the Photographs. As I have said, they were identified by surname. Children should be protected from the risk of embarrassment and bullying and potentially more serious threats to their safety.

65. There was direct evidence about the impact on Dylan. The judge said that she was shocked by the taking of the photographs of her and that she felt threatened (para 162). When she was shown the article, her immediate reaction was "one of real embarrassment at the amount of people that would get to see the photographs and identify them as being of me" (para 163). The judge accepted that the circumstances in which the photographs were taken were upsetting, in particular for Dylan and that she was "genuinely embarrassed by the publication of the photographs and that she considered the publication to be a real intrusion into her private family time with her father" (paras 167 and 168). There has been no challenge to these findings.

66. Subject to the Californian law point, I consider that for all these reasons the judge was entitled to hold that all three claimants had a reasonable expectation of privacy in the Photographs.

67. As regards the Californian law point, I do not find it necessary to decide whether what the Court of Appeal said in *Douglas v Hello (No 3)* is binding on this court. I am prepared to assume that it is. The real issue in this case is whether the judge did take into account the fact that publication would have been lawful in California and, if so, whether he gave it sufficient weight.

68. There is no doubt that in the earlier parts of his judgment, the judge made it clear that he considered that the position under the law of California had to be taken into account. At paras 39 and 40, he recorded what the Court of Appeal said in *Douglas v Hello (No 3).* At paras 41 to 43 he set out the evidence about Californian law and at para 44 said that the controversy was "over the extent to which the law of England and Wales should take into account the evidence of the laws of where the photographs were taken, in deciding whether there is a claim for the misuse of private information". At para 45, he said that "the fact that it was lawful under the laws of California to take the photographs is something that I will take into account when assessing the legal tests in this case". His reference to taking the photographs must be understood as also encompassing publishing them, because he went to say: "however, the fact that it would be lawful to publish the Photographs in California does not, in my judgment, determine either the first or second tests that I have to apply". He said that the relevant act complained of in this case is the publication in England and Wales of photographs of the children with unpixelated faces. Whether that is lawful must be determined in accordance with English law.

69. At para 167, he repeated that it was "relevant to note that the taking of the photographs was lawful under the laws of California". Finally, at para 172 as we have seen, he said: "although it was lawful to take the photographs of the claimants, and it would have been lawful to publish them in California, this did not prevent the claimants from having a reasonable expectation of privacy in relation to their publication in this jurisdiction".

70. In my view, it is clear from these passages that the judge did take into account the fact that it was lawful to take the Photographs under the laws of California and that it would have been lawful to publish them under those laws too. He did not, however, say how much weight he gave to this factor or explain his reasons for giving the weight that he gave. It may be inferred that he did not give it much weight since, if he had done so, it is likely that he would have concluded that the claimants had no reasonable expectation of privacy. In my view, the judge was entitled not to accord substantial weight to the Californian law point. The twins' connection with California was slight, certainly when compared with their parents' connection with England where the Photographs were published and under whose law, for the reasons I have given, the publication constituted a misuse of private information and a breach of article 8 of the Convention. We heard little, if any, argument about the impact of the fact that Dylan was living in California at the material time. On any view, the fact that publication in California would have been lawful according to its laws was not determinative of the reasonable expectation issue.

71. The short answer to the Californian law point is that the weight to be accorded to it was a matter for the judge to decide. It would have been better if the judge had said what weight he was according to it and why. But whatever weight he accorded to it, I do not think that there would have been sufficient grounds for interfering with his decision.

G3. Conclusion on the balancing exercise

72. It is true that the requirement of the publication making a contribution to a debate of general interest is no longer determinative of how the balance should be struck. But it remains one of the five criteria that the court must consider: see *Von Hannover v Germany (No 2)* (2012) 55 EHRR para 109 where the ECtHR described it as an "initial essential criterion". The court said:

> "The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes, but also where it concerned sporting issues or performing artists. However, the rumoured marital difficulties of a president of the republic or the financial difficulties of a famous singer were not deemed to be matters of general interest. "

73. The remaining four criteria are (i) how well known is the person concerned and what is the subject of the report; (ii) the prior conduct of the person concerned; (iii) the content, form and consequences of the publication and (iv) the circumstances in which the photographs were taken. I shall take each of the five criteria in turn.

74. The judge was plainly entitled to find that the publication of the Photographs did not contribute to a current debate of general interest. They simply showed a public figure on a private family outing in a public place.

75. As regards the second criterion, the claimants were all children with no public profiles at all (in the case of the twins) or with a limited public profile (in the case of Dylan). They performed no public functions. They were only of interest to the Mail Online because they are children of a successful musician. Mr Sherborne is right to submit that the article and the Photographs related exclusively to details of their private life and had the sole purpose of satisfying public curiosity.

76. As for the third criterion, there had been no previous publication of the article (or something like it) or the Photographs. The mere fact that Mr Weller had spoken to the media about his family on previous occasions "cannot serve as an argument for depriving [the claimants] of all protection against publication of the [Photographs]": *Von Hannover (No 2)* para 111. Visual images of the twins' faces had not been previously published in the media or the press in this country. At para 178 of his judgment, Dingemans J said:

> "The relevant conduct includes evidence of the parents of the children. The evidence, set out above, showed that Paul Weller had spoken about the twins as a proud father when interviewed by newspapers, and a considerable amount of information had been tweeted about the twins as they were growing up. A photograph of Bowie had been tweeted by Leah, which had been retweeted on a fan website but that had been removed. The photograph had remained on Facebook and on Tumblr until it was discovered in the course of preparations for the

> trial. The twins had been shown in the media as photographed from a distance, but there were no published media photographs showing a full view of their faces. Dylan had been shown in a photograph in Teen Vogue, and in photographs of a book published by her godmother. She had been photographed at an event launching sunglasses, but the image had not been reprinted to any measurable extent."

77. As regards the fourth criterion, as we have seen, the judge found that Dylan was genuinely embarrassed by the publication of the article and the Photographs. He also accepted that the parents were upset and concerned about the publication and had genuine security concerns as a result.

78. Finally, the judge found that the circumstances in which the Photographs were taken were upsetting and embarrassing for Dylan. Moreover, the judge found that the photographer had been asked to stop and had given assurances about pixelation. Consent was not given for the Photographs to be taken (still less published). As Mr Sherborne put it, the Photographs were taken by the photographer (a) largely illicitly, (b) without consent, (c) despite being asked to stop and where he gave an assurance that any publication would show the faces pixelated and (d) in circumstances where the claimants had been followed and harassed.

79. I accept the submission of Mr Sherborne expressed at para 84 of his skeleton argument:

> "Faced with such an overwhelming imbalance between the children's paramount article 8 rights and [the appellant's] generic (and unaffected) article 10 right, the judge understandably found that the balance came down in favour of the article 8 rights [J182]. Even if there had been a closer contest between the parties' respective rights, the judge would have been bound to follow the principles laid down in **K** and to protect the children's rights in the absence of any 'countervailing reasons of considerable force' displacing them."

H. OVERALL CONCLUSION ON THE MAIN APPEAL

80. For all these reasons, I would dismiss the appeal. The judge was right to hold that (i) the claimants had a reasonable expectation in the privacy of the Photographs and (ii) their article 8 rights outweighed the defendant's article 10 right.

I. THE APPEAL AGAINST THE GRANT OF AN INJUNCTION

81. At para 198 of his judgment, the judge found that there was no evidence that the Mail Online would publish the Photographs again. This finding was made on the basis that they had said that they would not do so in a letter dated 4 December 2012. He said that the assurance given in this letter should be provided by way of an undertaking to the court in order to provide clarity to the parties (para 200).

82. Mail Online refused to provide the undertaking. This refusal gave rise to a second hearing in order to determine what further relief if any should be granted. On 12 June 2014, the judge decided to grant an injunction to restrain further publication of the Photographs. The defendant appeals against this decision.

83. The judge referred to *Proctor v Bailey* (1889) 42 Ch 390 which it was common ground was the leading authority in this area in which Fry LJ said at p 401:

> "Now an injunction is granted for prevention, and where there is no ground for apprehending the repetition of a wrongful act there is no ground for an injunction."

84. At para 7 of his second judgment, the judge said that he had decided to grant an injunction because, although there was no evidence that Mail Online would publish the Photographs again, nevertheless there were "grounds for concern" that there might be future publication. He then set out the three grounds for concern as follows:

> "(1) the letters were written at a time when liability was in dispute and Mail Online continues to contest liability, seeking permission to appeal to contend that it is lawful to publish the pictures. In my judgment, in a case where the claimants have been put to coming to court and proving their case and then establishing that the publication of the pictures is unlawful and the defendants contend that it is lawful, there is at least the beginnings of cause for concern that they will be further published; (2) It is also possible for people to go back on what they have said they will do in letters. An example is the way in which Mail Online corrected, on 9 June 2014 its earlier and apparently unequivocal letter about the form of the draft order which had been sent out in their letter dated 7 May 2014; (3) in the Mail Online's skeleton argument, addressing this point, reference was made to Article 10, but the skeleton argument appeared to show no recognition of the article 8 rights which, for the reasons contained in my judgment dated 16 April 2014, are engaged."

85. Mr White submits that these three grounds for concern were insufficient to justify the grant of an injunction. Taking them in turn, he submits that the first ground is a *non sequitur* and would be a reason for granting an injunction in every case where a media defendant wished to appeal an adverse decision, despite an absence of any evidence of an intention to publish again. The second is a reference to a perfectly proper correction made by Mail Online to its initial comments on the form of the draft order which the claimants had produced following the handing down of the judgment: there was nothing in this suggested correction to support a suspicion that it would go back on the assurance it had given 18 months earlier that it would not republish the Photographs. The third ground of concern is another *non sequitur* as a basis for apprehending that the Mail Online might republish and is irrelevant to the question where there was evidence that repetition was threatened.

86. In my view, there is force in Mr White's criticisms. The judge's decision was, however, an exercise of discretion. It can only, therefore, be successfully challenged

on the familiar grounds for interfering with such a decision. The question is not whether this court would have exercised the discretion in the same way as the judge did, but whether his decision was one that was reasonably open to him.

87. In my view, the judge was entitled to insist that the assurance already offered in the letter of 4 December 2012 be provided by way of an undertaking to the court. As he said at para 198 of the main judgment:

> "This will provide all parties with certainty about what [is] and what is not permitted in circumstances where the letter dated 4 December 2012 was written at a time when liability was denied".

88. The judge cited *Proctor v Bailey* and was well aware of the general principle that an injunction should only be granted if there is reason to apprehend further publication. He applied that principle to the facts of this case. Mail Online maintains that it has no intention of republishing the Photographs, and yet has refused to provide an undertaking to the court. No explanation for this refusal has been provided. This refusal itself gives cause for concern. Mr White submits that to require a media defendant to give an undertaking to the court in the absence of an intention to republish would have serious adverse consequences for freedom of expression. I do not agree. If a defendant has no intention of publishing, then there can be no inhibition on its freedom of expression *in relation to that publication* and it can have no impact on its freedom of expression in relation to any other publication. I acknowledge that the three concerns identified by the judge were not compelling. But in my view he was entitled in the exercise of his discretion to conclude that their cumulative effect was sufficient to justify the granting of an injunction limited to prohibiting republication of the Photographs.

J. CONCLUSION ON THE APPEAL AGAINST THE INJUNCTION

89. For these reasons, I would dismiss this appeal too.

Lord Justice Tomlinson:

90. I agree.

Lord Justice Bean:

91. I also agree.