

## Interim Injunctions and the overlap between privacy and libel\*

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In the recent case of *Terry (previously 'LNS') v Persons Unknown*<sup>1</sup> the court addressed the inter-relationship between two principles: the principle that the court may grant an interim injunction to restrain a threatened misuse of private information where the claimant can show that his claim is (at least) more likely than not to succeed, and the rule in *Bonnard v Perryman*,<sup>2</sup> whereby the court almost invariably will not grant an interim injunction to restrain the threatened publication of a libel, that is to say, material which if published may harm the claimant's reputation. The question arose because, although the claim was brought for misuse of private information and concerned information which ostensibly was private to the claimant, the court regarded the claim in substance as one brought to protect reputation. For this reason, the court applied the rule in *Bonnard v Perryman* and dismissed the application for an interim injunction.

In this article we argue that if the rule in *Bonnard v Perryman* is to operate as it did in *Terry* as a bar to interim injunctive relief in cases where the information at issue is private to an individual claimant but if published would also be apt to damage his or her reputation, the rule needs to be modified if a claimant under such circumstances is to have a meaningful, effective right to respect for private life under Article 8 of the European Convention on Human Rights (ECHR).

### The Different Rules Governing the Grant of Interim Injunctions in Defamation and Misuse of Private Information

Until recently the legal regimes governing the grant of interim injunctions in defamation cases and in misuse of private information (formerly breach of confidence) cases have operated, by and large, independently and in parallel.

In defamation cases—where the gist of the claim is that the words at issue are alleged to be *defamatory* (ie tending to injure the reputation) of the claimant and, as such, presumed to be *false*—the common law rule in *Bonnard v Perryman* has long governed the availability or, more accurately, the non-availability of interim injunctive relief. The essential principle is that the court will not grant an interim injunction unless it is satisfied that if the words were published and the claimant sued for defamation a jury would be perverse to reject the claimant's case at trial. The rule stands as an exception to the general practice governing applications for interim injunctions in civil proceedings established in *American Cyanamid Co v Ethicon Ltd*,<sup>3</sup> whereby the court

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<sup>1</sup> [2010] EWHC 119 (QB); [2010] EMLR 16 (29 January 2010).

<sup>2</sup> [1891] 2 Ch 269 (CA).

<sup>3</sup> [1975] AC 396 (HL).

considers whether there is a serious issue to be tried and, if so, where the balance of convenience or justice lies. The principle in *Bonnard* precludes consideration of the balance of justice and confers on the court little if any discretion. In the post-Human Rights Act 1998 (HRA) era the rule in *Bonnard* has survived intact. In *Greene v Associated Newspapers Ltd*<sup>4</sup> it withstood a challenge mounted on the footing that sections 6 and 12 HRA taken together required a judge considering an application for an interim injunction in a defamation case to ask himself whether the claimant was ‘more likely than not’ to be able to establish at trial that publication should not be allowed.<sup>5</sup> In reaching this conclusion the Court of Appeal indicated that it was content to assume that a person’s right to protect his/her reputation was among the rights guaranteed by Article 8 ECHR.<sup>6</sup>

In breach of confidence cases—where, traditionally, the predicate of the claim is that the information at issue is *confidential* and *true*—the position, by contrast, is generally governed by *American Cyanamid*: the court has the power to grant an interim injunction restraining disclosure if that is where the balance of justice lies. In pre-HRA cases, including claims for breach of confidence, however, where ‘the decision on [the] application for an interlocutory injunction would be the equivalent of giving final judgment and, in particular, where the subject matter of the application ... was the transmission of a broadcast or the publication of an article the impact and value of which depended on the timing of the transmission or publication’, the *American Cyanamid* test was deemed inappropriate and the court was required to assess the relative strength of the parties’ cases before deciding whether an injunction should be granted.<sup>7</sup> Since the coming into force of the HRA and the designation of breach of confidence as the appropriate vehicle for the recognition of individuals’ Article 8 ECHR privacy rights in the form of the new tort of misuse of private information<sup>8</sup>, the court’s power to grant an interim injunction in any case where the ‘relief ... if granted, might affect the exercise of the Convention right to freedom of expression’ has been circumscribed by section 12 HRA. Section 12(3) of the Act was interpreted by the House of Lords in *Cream Holdings Ltd v Banerjee*<sup>9</sup> to mean that, in order to obtain an interim injunction, the claimant must ordinarily show (at least) that his claim is more likely than not to succeed at trial.

We say that these legal regimes have historically operated independently of one another ‘by and large’ because there have been a handful of cases in which the court has had occasion to consider the two together. In this line of authority the court has taken the view that a claim for (what is really) defamation has been dressed up in the guise of another cause of action, breach of confidence<sup>10</sup> for instance, in an attempt to get round the rule in *Bonnard v Perryman* and take advantage of the relatively beneficent *American Cyanamid* or section 12 HRA regime.<sup>11</sup> Applications for interim injunctions in which the court has formed the view that this is what the

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<sup>4</sup> [2004] EWCA Civ 1462; [2005] QB 972.

<sup>5</sup> ie to ask himself the question the HRA would require him to ask if it were a claim for breach of confidence or misuse of private information; see *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253.

<sup>6</sup> *Greene* (n 4) para 68.

<sup>7</sup> *Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 (CA).

<sup>8</sup> *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, paras 14, 17.

<sup>9</sup> *Cream Holdings* (n 5); see in particular Lord Nicholls, paras 20–23.

<sup>10</sup> See *Service Corp International plc v Channel Four* [1999] EMLR 83 and *Tillery Valley Foods Ltd v Channel Four* [2004] EWHC 1075 (Ch).

<sup>11</sup> More generally on this topic, see *Fraser v Evans* [1969] 1 QB 349 (CA) and *Gulf Oil (GB) Ltd v Page* [1987] Ch 327 (CA), both of which are analysed by Tugendhat J in *Terry* (n 1) 74–88.

applicant is up to have been characterised as an abuse of process and dismissed. The proposition that such conduct amounts to an abuse of process received the endorsement of the Court of Appeal in *McKennitt v Ash*:<sup>12</sup>

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 allegation and that was done to avoid the rules of the tort of defamation, then objection 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*: a matter, it will be recalled that exercised this court in *Woodward v Hutchins*.

### Recent Developments in the Law

Recently, though, there have been two developments in the law of defamation and misuse of private information which have blurred the distinctions between the two causes of action.

The first is the extension of the law of misuse of private information to information that is *confidential/private* and *false*. In *McKennitt v Ash*, the Court of Appeal ruled that, for the purposes of a claim for misuse of private information, the fact that some of the private information at issue was false (or might be false) was not fatal to the claim. Buxton LJ, with whom Latham LJ agreed, held that, 'provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the defendant cannot deprive the claimant of his article 8 protection simply by demonstrating that the matter is untrue'.<sup>13</sup> Meanwhile Longmore LJ stated that:

The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry.<sup>14</sup>

The second is the authoritative decision of the United Kingdom Supreme Court,<sup>15</sup> in light of the (reasonably) clear and consistent jurisprudence of the European Court of Human Rights (ECtHR),<sup>16</sup> that the right to protection of reputation is a right that falls within the scope of Article 8 ECHR.

The question is what if any consequences these developments have for the court's approach to interim injunctive relief in misuse of private information and defamation cases. If, for example, false information can properly be the subject of a claim for misuse of private information, how should the court approach an application for an interim injunction where the claimant contends that the private, intrusive information that is about to be published about him is false? And if reputation is an Article 8 right, can it be right that the court should determine an application for an interim injunction to restrain the publication of material which if published would be injurious to the claimant's reputation without investigating, evaluating or striking the balance between the parties' competing Article 8 and Article 10 claims, without subjecting the parties' asserted

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<sup>12</sup> [2008] QB 73, para 79 *per* Buxton LJ.

<sup>13</sup> para 80.

<sup>14</sup> para 86.

<sup>15</sup> *In re Guardian News and Media Ltd & Others* [2010] UKSC 1; [2010] 2 WLR 325, paras 39–42.

<sup>16</sup> See eg *Europapress Holding DOO v Croatia* [2010] EMLR 10, para 58.

rights to the ‘intense focus on the comparative importance of the specific rights being claimed in the individual case’ mandated by the House of Lords in *Re S (A Child)*<sup>17</sup>?

In *RST v UVW* Tugendhat J identified the nature of the problem:<sup>18</sup>

At some point, the court will have to grapple again with the question of where the principle of *Bonnard v Perryman* applies, and where it does not, when an application is made on the basis of privacy, but it is an application to restrain the publication of material which is arguably defamatory. The court will have to decide how the rule in *Bonnard v Perryman* is to be applied in the light of such authorities as are then available as to the status of reputation as an Article 8 right and, if it is an Article 8 right, how the exercise of the ultimate balancing exercise referred to in *Re S* is to be applied on an interlocutory application.

The opportunity was not long in coming. As it happened, it fell to the same judge to grapple with the question that had been identified.

### ***Terry (previously ‘LNS’) v Persons Unknown***

The claimant, as it turned out after his application for an injunction was dismissed, was the professional footballer John Terry (JT), a married man, the Chelsea FC captain and (at the time) captain of the England football team. He applied for an interim injunction, without giving prior notice of his intended application to any respondent,<sup>19</sup> seeking to prohibit ‘persons unknown’ from publishing ‘information or purported information’ and documents in four defined categories, as follows: (1) the fact that JT had an intimate personal relationship with ‘another person’, that is to say, a woman who was not his wife (and who we now know was Vanessa Perroncel (VP), the ex-girlfriend of a Chelsea team-mate); (2) details of that relationship, including the fact that VP had become pregnant and that JT had contributed to the cost of VP terminating the pregnancy; (3) information leading to the identification of JT or VP; and (4) any photographs evidencing or relating to the fact or details of these matters. JT’s claim was for breach of confidence and misuse of private information.

The application came before Tugendhat J on 22 January 2010. The judge granted a temporary injunction in the terms sought pending delivery of his decision. He gave his decision refusing an interim injunction a week later. At paragraph 6 of his judgment the judge noted that JT ‘accepts the truth of certain information which is sought to be protected by the draft order’ before commenting somewhat acerbically, ‘I do not know whether or not [the applicant] considers that those matters were acceptable for a person in [his] position in life’.

Tugendhat J summarised his reasons for reaching the conclusion that he did at paragraph 149 of his judgment. So far as concerns the topic under consideration in this article, they were as follows:

- (i) there was insufficient evidence of a threat to publish photographs or sensitive details of the relationship between JT and VP (ie the matters forming the subject of categories (2) and (4));

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<sup>17</sup> [2005] 1 AC 593, para 17 *per* Lord Steyn.

<sup>18</sup> [2009] EWHC 2448 (QB); [2010] EMLR 13 (11 September 2009), para 33.

<sup>19</sup> In consequence of which no respondent appeared or was represented at the hearing of the application.

- (ii) there was a threat to publish information about the fact of the relationship (ie the matters forming the subject of categories (1) and (3)), but he was not satisfied that JT was likely to establish at trial that publication should not be allowed (ie the test in section 12(3) HRA had not been made out on the evidence before the court);
- (iii) this was so principally<sup>20</sup> because it was likely that the nub of JT's complaint was to protect his reputation, in particular with sponsors, and so (a) the rule in *Bonnard v Perryman* precluded the grant of an injunction and (b) in any event damages would be an adequate remedy for JT;
- (iv) he was not satisfied that JT was likely to establish that there had been a breach of a duty of confidence owed to him;
- (v) having regard to the extent to which it would be in the public interest for the material to be published, but without having heard any respondent including the media, he was not satisfied that JT was likely to succeed in defeating a defence that it would be in the public interest for there to be publication; and
- (vi) he did not consider that an interim injunction was necessary or proportionate having regard to the degree of the interference with the private life of JT that would occur in the event of publication of the fact of the relationship, or that JT could rely in this case on the alleged risk of interference with the private life of anyone else.

At paragraphs 95 and 123 of his judgment Tugendhat J expanded upon his reasoning regarding reason (iii) (the reputation/defamation issue) as follows:

[93] On the evidence available to me now, I have reached the view that it is likely that the nub of [JT]'s complaint in this case is the protection of reputation, and not of any other aspect of [JT]'s private life. I note that in the evidence the most [JT] is said to have expressed is 'grave concern over the possibility of intrusion into [his] private life'. There is no mention of any personal distress ... It does not seem likely to me that the concern expressed on [JT]'s behalf for the private lives of [VP] and [other] interested persons is altruistic. This claim is essentially a business matter for [JT]. This is why the assembling of the evidence has been put into the hands of the business partners and not of the solicitors. My present view is that the real basis for the concern of [JT] is likely to be the impact of any adverse publicity upon the business of earning sponsorship and similar income ...

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

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<sup>20</sup> See the structure of paras 124–32 of the judgment.

So, in short, so far as the court's decision in the case was concerned, on the basis of the form and content of the evidence placed before him, Tugendhat J was prepared to draw the inference to which Buxton LJ made reference in *McKennitt v Ash* (at paragraph 79), namely that JT's claim, albeit framed in terms of breach of confidence and misuse of private information, was in truth one for defamation, and in such circumstances, considering himself to be bound<sup>21</sup> by existing authority (*Greene v Associated Newspapers Ltd*) to apply the rule in *Bonnard v Perryman*, he concluded that the application fell to be dismissed.

However, 'before leaving the topic of defamation' and in the context of an observation that 'it is only in limited classes of cases that the law of privacy gives rise to an overlap with the law of defamation', Tugendhat J took the opportunity at paragraph 96 to draw up a taxonomy of factual scenarios in which there would or would not be such an overlap and to identify, where there was an overlap, how it might matter:

In broad terms the cases may be considered in at least four different groups.

The first group of cases, where is no overlap, is where the information cannot be said to be defamatory (eg *Douglas v Hello!*<sup>22</sup>, and *Murray*<sup>23</sup>). It is the law of confidence, privacy and harassment that are likely to govern such cases.

There is a second group of cases where there is an overlap, but where it is unlikely that it could be said that protection of reputation is the nub of the claim. These are cases where the information would in the past have been said to be defamatory even though it related to matters which were involuntary eg disease. There was always a difficulty in fitting such cases into defamation, but it was done because of the absence of any alternative cause of action.

There is a third group of cases where there is an overlap, but no inconsistency. These are cases where the information relates to conduct which is voluntary, and alleged to be seriously unlawful, even if it is personal (eg sexual or financial). The claimant is unlikely to succeed whether at an interim application or (if the allegation is proved) at trial, whether under the law of defamation or the law of privacy.

The fourth group of cases, where it may make a difference which law governs, is where the information relates to conduct which is voluntary, discreditable, and personal (eg sexual or financial) but not unlawful (or not seriously so). In defamation, if the defendant can prove one of the libel defences, he will not have to establish any public interest (except in the case of *Reynolds* privilege, where the law does require consideration of the seriousness of the allegation, including from the point of view of the claimant). But if it is the claimant's choice alone that determines that the only cause of action which the court may take into account is misuse of private information, then the defendant cannot succeed unless he establishes that it comes within the public interest exception (or, perhaps, that he believes that it comes within that exception).

These *obiter* remarks by a judge with arguably peerless knowledge of this area of law are naturally of considerable interest, but it is perhaps significant—and not entirely surprising given the disarrayed state of the

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<sup>21</sup> para 81.

<sup>22</sup> *Douglas v Hello! Ltd (No 3)* [2006] QB 125 (CA).

<sup>23</sup> *Murray v Express Newspapers plc* [2009] Ch 481 (CA).

law—that what Tugendhat J does *not* specifically address is which test would be apposite to an application for interim injunctive relief in each of these four factual scenarios. It seems tolerably clear to us that section 12(3) HRA would supply the relevant test in relation to the first and second groups of cases. But what of the third and fourth groups—section 12(3) HRA or *Bonnard v Perryman*?

## Discussion

The focus of the court in *Terry* on the question of what the claim was ‘really’ about—misuse of private information or protection of reputation—with a view to determining which set of rules governing the grant or refusal of interim injunctive relief was applicable, appears to us to be unsatisfactory. It places a premium on specialist knowledge and clever drafting: on whether an applicant can formulate the evidence in the right way to get the desired result. It also seems to us to invite judicial idiosyncrasy—the question of which set of rules prevails being dependent upon whether the particular judge hearing the application is disposed to take the claim at face value or to look beneath the surface—and as such is a recipe for uncertainty. This does not seem desirable in the interests of justice.

Moreover, the distinctions being drawn by the court in *Terry* between the form of the claim (breach of confidence/misuse of private information) and its perceived substance (defamation) only matter, for the purpose of interim injunctive relief at any rate, because of the discrepancy between the test in *Bonnard v Perryman* and that applicable in non-defamation, freedom of expression cases.<sup>24</sup> Tugendhat J, of course, as a first instance judge, was bound by the Court of Appeal’s decision in *Greene*. But is *Greene* good law? In other words, in light of relevant developments in the substantive law of defamation and misuse of private information since *Greene*, is the rule in *Bonnard v Perryman* sustainable, at least so far as concerns cases involving information that is private to individuals?

In our view, there are good reasons to think not. We highlight the following points:

- (i) If the information that an applicant for an interim injunction wishes to prevent publication of is private to the applicant and its publication is liable to be intrusive in some serious way<sup>25</sup> such that his Article 8 rights are engaged, why should it matter—for the purpose of stage 1 of the *Re S* analysis at any rate—whether the information is also true, false, defamatory or possesses a mixture of these qualities? Surely the question at stage 1 ought simply to be ‘are the applicant’s Article 8 rights engaged?’ or ‘is the threatened publication liable to be intrusive?’, regardless of whether the information at issue also is or is alleged to be true, false, defamatory or otherwise. Such considerations might well be relevant at *Re S* stage 2, the process of ‘parallel analysis’ whereby the court seeks to determine where the balance between Article 8 and Article 10 ought to be struck, taking into account all the circumstances. But as the law stands (ie the law as applied in *Terry*), if upon an application for interim injunctive relief the

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<sup>24</sup> s 12(3) HRA, as interpreted in *Cream Holdings Ltd v Banerjee* (n 5).

<sup>25</sup> In relation to ‘seriousness’, see *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414; [2010] EMLR 1, para 22 *per* Laws LJ.

analysis at stage 1 is that the information in question is private but also happens to be defamatory, the court is apparently barred *ab initio* from giving any effect at all to the applicant's Article 8 rights.

- (ii) Further, and in any event, the UK Supreme Court has now ruled definitively that protection of reputation falls within the scope of an individual's rights under Article 8. This development of itself would appear to suggest that where an individual asks the court to give effect to his Article 8 rights by granting an interim injunction to prevent the publication of words which if published would damage his reputation, an application which would also necessarily engage Article 10, the court ought to follow the approach mandated by the House of Lords in *Re S* and evaluate and strike the balance between those competing rights, including by subjecting 'the comparative importance of the specific rights being claimed in the individual case' to 'an intense focus'.
- (iii) In this regard, although the Court of Appeal in *Greene* indicated that it was content to proceed on the assumption that a person's right to protect his/her reputation was among the rights guaranteed by Article 8, that assumption was not followed through in any meaningful way in the court's judgment. In particular, the court made no attempt to reconcile its decision to uphold the rule in *Bonnard v Perryman* with the approach mandated for 'conflicting rights' cases by the House of Lords in *Re S*. The House of Lords' decision in *Re S*, it may be observed, was handed down (on 28 October 2004) only after argument had concluded in *Greene* in the Court of Appeal (21 October 2004), but before the court had delivered its judgment (5 November 2004).<sup>26</sup> In such circumstances, and against the backdrop of the law generally in this field being in a state of rapid flux at this time, the Court of Appeal in *Greene* might certainly be forgiven if, with the benefit of hindsight, it appears that it failed to apply *Re S* correctly.
- (iv) The ECHR is concerned to guarantee rights that are practical and effective, not theoretical or illusory.<sup>27</sup> In practical terms, pre-publication injunctive relief is the most important remedy in cases concerning the disclosure of private information. In this area of law, prevention is always likely to be better (ie more effective) than cure. As Eady J put the matter in *Mosley v News Group Newspapers Ltd*: 'Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain.'<sup>28</sup> Damages or some other form of financial compensation after the event will very rarely be an adequate remedy. Turning again to Eady J in the *Mosley* case: 'It has to be recognised that no amount of damages can fully compensate the claimant for the damage done. He is hardly exaggerating when he says that his life is ruined. What can be achieved by a monetary award in the circumstances is

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<sup>26</sup> See paras 79–81 of the Court of Appeal's judgment, in which the court referred to this sequence of events.

<sup>27</sup> See eg *Von Hannover v Germany* (2005) 40 EHRR 1, para 71: 'Lastly, the Court reiterates that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.' See also ECHR Art 13 (the right to an effective remedy): 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.'

<sup>28</sup> [2008] EWHC 1777 (QB); [2008] EMLR 20, para 209.

limited.<sup>29</sup> The proposition that interim injunctive relief is the most important remedy in the Article 8 context also lies at the heart of Mr Mosley's pending application to the ECtHR against the UK.<sup>30</sup> His complaint is that

the UK has violated its positive obligations under Article 8 of the Convention by failing to impose a legal duty on the *News of the World* to notify him in advance in order to allow him the opportunity to seek an interim injunction and thus prevent publication of the materials ... Under Article 13 ... there was no effective domestic remedy open to him. Although the court found a serious breach of his right to respect for privacy and he was awarded damages, this award was not able to restore his privacy to him. He contended that only the possibility to seek an interim injunction prior to publication could constitute an effective remedy in his case.<sup>31</sup>

In terms of the adequacy of damages as a remedy, it is unclear why similar considerations should not in principle apply to information which if published would injure reputation. As Lord Nicholls remarked in *Reynolds v Times Newspapers Ltd*, 'Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever.'<sup>32</sup> See also the observation of Bingham LJ (as he then was) in *Slipper v BBC* that 'Defamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs'.<sup>33</sup> Can hidden springs polluted by a libel ever be completely decontaminated by an award of damages?

- (v) Balance and proportionality lie at the heart of the ECHR and its jurisprudence and the way in which the Convention and its jurisprudence are applied by the courts in this country. The ECtHR jurisprudence eschews mechanical tests and rigid bars to relief of the type embodied in *Bonnard v Perryman*. This was the very point of the approach espoused by Lord Steyn in *Re S*.
- (vi) The possibility of the rule in *Bonnard v Perryman* being revisited and revised has been raised by Eady J extrajudicially on two occasions. In a speech entitled '*Privacy and the Press: Where are we now?*' given on 1 December 2009,<sup>34</sup> Eady J posed the question:

Will the rule in *Bonnard v Perryman* survive scrutiny in the light of the Strasbourg jurisprudence, given that its effect is to build in an automatic priority for Article 10? Is it justifiable to have one test for interlocutory injunctions in a privacy context, governed by s 12(3) of the Human Rights Act, and another for libel cases, governed by *Bonnard v Perryman*? Each of these rules is concerned to afford the appropriate degree of recognition for rights now regarded, apparently, as being under the protection of Article 8.

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<sup>29</sup> *Ibid*, para 236.

<sup>30</sup> *Mosley v UK* (App no 48009/08) lodged 28 September 2008.

<sup>31</sup> This argument appears to have found some favour with the House of Commons Culture, Media and Sport Select Committee which, in its Report on Press Standards, Privacy and Libel published on 24 February 2010, recommended that the Press Complaints Commission amend its Code to include a requirement that in cases involving individual privacy and breach of confidence journalists should notify the subject of their articles prior to publication subject to a 'public interest' test, although it ruled out making pre-notification mandatory.

<sup>32</sup> [2001] 1 AC 127, 201 *per* Lord Nicholls.

<sup>33</sup> [1991] 1 QB 283, 300.

<sup>34</sup> [www.judiciary.gov.uk/docs/speeches/eady-j-justice-conf.pdf](http://www.judiciary.gov.uk/docs/speeches/eady-j-justice-conf.pdf).

Furthermore, in another speech given at the University of Hertfordshire on 10 November 2009,<sup>35</sup> Eady J put matters this way:

I noted earlier that the House of Lords has never had occasion to consider *Bonnard v Perryman*. It may well be, if the opportunity arises, that the approach in *Greene v Associated Newspapers* will be endorsed by the new Supreme Court. But it has to be remembered that s 12(3) and *Bonnard v Perryman* are both to be regarded, in terms of the European Convention, as attempts to strike a balance between competing rights. Both address situations where a defendant's Article 10 rights come into conflict (at least potentially) with the rights of the complainant. Moreover, in recent years it has come to be recognised in Strasbourg that not only the right to privacy but also the right to reputation falls under the general protection of Article 8: see *Radio France v France* (2005) 40 EHRR 29 and *Pfeifer v Austria* (2009) 48 EHRR 8. In any event, the right to reputation had always been expressly recognised in Article 12 of the Universal Declaration of Human Rights and, more recently, in Article 17(1) of the International Covenant on Civil and Political Rights of 1996.

The question therefore arises as to why a different test should be applied to reputation cases from that laid down by Parliament for those concerning protection of privacy. What is the reason why it is, and should remain, more difficult to obtain an injunction to protect reputation than to protect another aspect of human dignity and autonomy, even though both are covered by Article 8? It *may* prove to be a sufficient answer as a matter of public policy that, in the case of defamation, damages are more often likely to provide an adequate remedy, whereas in privacy cases they are not. But the question at least needs to be addressed overtly ...

The question has thus to be asked at some stage why a different test should be applied at the early and often critical stage of considering prior restraint. It is a very important issue of public policy. It is not for me to argue for one position or the other. But the question of principle needs to be addressed and resolved. [Meanwhile] the current distinction can be seen as a significant reason why infringement of privacy is proving for the moment, at least numerically, to be much more popular than libel.

## Conclusions

The rule in *Bonnard v Perryman* is not a jurisprudential sacred cow that needs to be culled,<sup>36</sup> but it seems reasonably clear that certain parts of it need to be sacrificed. We propose the following: if

- (a) the information at issue is recognisably private such as to engage an individual claimant's Article 8 right to respect for private life (regardless of whether it is also true, false, defamatory or otherwise), or
- (b) the information at issue is defamatory of an individual claimant such as to engage his Article 8 right to protection of reputation as an aspect of his right to respect for private life,<sup>37</sup>

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<sup>35</sup> [www.judiciary.gov.uk/docs/speeches/justice-eady-univ-of-hertfordshire-101109.pdf](http://www.judiciary.gov.uk/docs/speeches/justice-eady-univ-of-hertfordshire-101109.pdf).

<sup>36</sup> In the sense contemplated by the House of Lords in *R v Lambert* [2002] 2 AC 545, para 6.

<sup>37</sup> While formulation (b) is certainly supported by the decision of the Supreme Court in *In re Guardian News and Media Ltd & Others* [2010] 2 WLR 325 and the underlying Strasbourg jurisprudence, we recognise that this may be to define the category of defamatory information to which s 12(3) HRA ought to apply too widely. We accept that it may be appropriate for the category to be confined to 'defamatory information which is private in character and whose publication would be intrusive (eg sexual or financial)'.

the applicable test for the grant or refusal of interim injunctive relief ought to be that provided for in section 12(3) HRA as interpreted by the House of Lords in *Cream Holdings Ltd v Banerjee*. For the avoidance of doubt, because corporations do not have Article 8 rights (in any sense that is meaningful to this analysis, at any rate<sup>38</sup>), we see no reason why the test in *Bonnard v Perryman* needs to be modified in defamation cases where the claimant is a corporation.

This is not, we might add, intended to be a charter for more injunctions. There is no particular reason to think that if the new rule identified above were introduced more interim injunction applications would succeed. For instance, as Tugendhat J observed in connection with his ‘third group of cases’ ‘where the information relates to conduct which is voluntary, and alleged to be seriously unlawful, even if it is personal’, whether the application for an interim injunction was brought under the (current) law of defamation or misuse of private information was unlikely to make a difference to the result of the application: ‘The claimant is unlikely to succeed whether at an interim application or (if the allegation is proved) at trial, whether under the law of defamation or the law of privacy.’ Moreover, albeit that the *Terry* application on its facts fell into the more difficult ‘fourth group of cases’ ‘where the information relates to conduct which is voluntary, discreditable, and personal ... but not unlawful (or not seriously so)’ and so ‘where’, according to Tugendhat J, ‘it may make a difference which law governs’, regardless of the defamation/*Bonnard v Perryman* angle, ie if the only relevant law had been misuse of private information, the application would still have been dismissed.<sup>39</sup>

In summary, our argument is that the court ought to have the power in all cases where an individual’s Article 8 rights are engaged to weigh up the relative merits of the parties’ positions, conflicting rights and competing submissions, and decide where the balance ought to be struck to do justice, in the public interest. Were the new rule to be adopted, we imagine that truth (or asserted truth) would remain an important factor in cases where the information at issue is defamatory of the applicant. But we believe that in cases where the applicant’s Article 8 rights are engaged, the asserted truth of the information at issue should no longer be a complete answer to an application for interim injunctive relief.

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<sup>38</sup> See eg *Hays plc v Hartley* [2010] EWHC 1068 (QB), para 25.

<sup>39</sup> See *Terry* (n 1) paras 124–32.