Neutral Citation Number: [2011] EWHC 2454 (QB)

Case No: HQ10X022389

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2011

Before :

THE HONOURABLE MR JUSTICE NICOL

- -

Between :

Rio Ferdinand	**Claimant**
- and -	
MGN Limited	**Defendant**

- -
- -

Hugh Tomlinson QC and Sara Mansoori (instructed by **Simons Muirhead Burton**) for the **Claimant**
Gavin Millar QC and Yuli Takatsuki (instructed by **Reynolds Porter Chamberlain LLP)** for the **Defendant**

Hearing dates: 4th , 5th , 6th July 2011(Redacted Version)

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Judgment

Mr Justice Nicol:

1. On 25th April 2010 the *Sunday Mirror* published an article under the headline "My Affair with England Captain Rio". In very similar terms the article also appeared on the website www.mirror.co.uk between 25th and 30th April 2010. The Defendant is the publisher of the newspaper and website. The Claimant is the well known footballer, Rio Ferdinand. He claims that the article in both formats was an unjustified infringement of his right to privacy, a misuse of his private information and a breach of confidence. The Defendant defends its publications as a legitimate exercise of its right of freedom of expression.

2. The article gave an account of the Claimant's relationship with Ms Carly Storey. They had met in 1996 or 1997 when he was a teenager and she was 17. They drifted apart from 2000, when the Claimant moved to Leeds United, until 2002. In 2002 they resumed contact via phone and text messages and also met up. The last time they met was in May 2005. They were not then in contact for nearly 2 years. They resumed contact in October 2007 and continued to have frequent text message exchanges until some time in 2009. After a gap of several months the Claimant and Ms Storey exchanged text messages in December 2009 and January 2010. They did not meet again. On 5th February 2010 the Claimant was appointed captain of the England football team in replacement for John Terry. On 6th February Ms Storey sent him a text concerning this appointment. The Claimant sent her a short response the same day. There was no further contact between them.

3. The article said more about the relationship between the two of them. I shall need to come back to this.

4. The Defendant did not contact the Claimant about its proposed article in advance of publication. He did not have the opportunity, which he said he would otherwise have taken, to apply for an injunction to prevent its publication. It is admitted that the newspaper has a circulation of about 1.4 million and a readership of about 4 million. The readership of the website was agreed to have been substantial until the Defendant voluntarily (and without admitting any obligation to do so) took it down.

5. On 28th June 2011 (and so the week before the trial began) Eady J. made orders temporarily restricting public access to specified parts of the Statements of Case, an unredacted version of the article, a confidential schedule to the Claimant's witness statement, the text messages which had passed between the Claimant and Ms Storey and which had been disclosed in the action, the skeleton arguments and Ms Storey's witness statement until the trial. With minor changes I continued those orders until judgment. Having heard full argument, Eady J. also considered that in principle the trial should be divided into a public and private parts. He rejected the Defendant's argument that the widespread dissemination of the newspaper and online article rendered further restriction unnecessary. He left open for further argument at trial where precisely the line should be drawn between the public and private parts.

6. I was not willing to re-open the argument of principle, but I heard further submissions as to how the division should be made. I made clear that my decision that restricting public access to part of the trial was a temporary measure and would not necessarily be reflected in my judgment.

7. The Claimant gave evidence and was cross examined in both public and private sessions. There were two other witnesses. Justin Rigby, the Claimant's public relations agent, gave evidence on his behalf. Nicholas Owens, a senior reporter at the *Sunday Mirror,* gave evidence for the Defendant. Their evidence was exclusively given in the public part of the proceedings.

8. Carly Storey had provided a witness statement and, I was told, she had been expected to give evidence for the Defendant. However, shortly before the trial she went abroad and was unavailable. Her witness statement was admitted as hearsay evidence. Of course the weight that I could give to it had to reflect the fact that its contents had not been subject to cross examination.

9. On 19th July 2011 the Court of Appeal gave judgment in *Christopher Hutcheson (formerly known as 'KGM') v News Group Newspapers Ltd* [2011] EWCA Civ 808. I invited the parties to make submissions in writing as to its impact on the present case. The Claimant and the Defendant did so on 28th July (in the Defendant's case supplementing a letter dated 22nd July) and the Defendant replied to the Claimant's submissions on 4th August 2011. I have taken all of these into account.

Further detail about the Defendant's article

10. In order to make my decision comprehensible it is necessary to say more about the article which the Defendant published. On the front page of the *Sunday Mirror* there was a trail [redacted] and photographs of the heads of the Claimant and Ms Storey.

Readers were directed to the story which appeared over two of the inside pages. There the story was published under the headline "My affair with England captain Rio" and in large type a quotation from Ms Storey, [redacted]

11. The article itself, which was written by Gary Anderson, began by quoting what the England manger, Fabio Capello, had said when appointing the Claimant as captain in place of John Terry, "I ask always that the captain is an example to the young, for the children, for the fans…a role model outside the game - in life as well." It described how the Claimant and Ms Storey had met when they were teenagers and continued on and off for 13 years until, it was alleged, the Claimant had ceased contact with her on becoming the England captain in February 2010.

12. In the article Ms Storey said that the relationship became a sexual one within a few weeks, but said they drifted apart in 2000 when the Claimant met Rebecca Ellison. He and Ms Ellison began to live together in Yorkshire when he moved from West Ham United to Leeds United. In 2002 the Claimant played for England in the World Cup competition. He moved to Manchester United.

13. The article went on to describe how Ms Storey and the Claimant got back in touch in 2002. Again the relationship was a sexual one, with at least 10 meetings, usually in London hotels. The last occasion was in May 2005. In the article Ms Storey alleged that the Claimant had misled her about his relationship with Ms Ellison. Ms Storey said she was very upset when she learned through the press that Ms Ellison was pregnant with the Claimant's first son and Ms Storey said she avoided him for 18 months. The Claimant became engaged to Ms Ellison in July 2007.

14. In October 2007, according to the article, the Claimant contacted Ms Storey again and suggested that they meet up again. [redacted] at the Grove Hotel, Herts… At the time the England squad were holed up there ahead of a vital Euro 2008 qualifier against Estonia on the 13th."

15. In the article Ms Storey said that she did not show up because she had been going through bad depression and did not feel good about herself and didn't want the Claimant to see her in that state. [redacted] She said that the Claimant tried to arrange another meeting just before an important league match [redacted] but then cancelled because of the security arrangements in place at the hotel. Details were given of other attempted meetings [redacted].

16. The Claimant married Ms Ellison in June 2009, [redacted]

17. Following his appointment as England captain, Ms Storey said the Claimant sent one brief text but after that the phone went dead and she had no further contact with him.

18. In a separate box, there was an additional piece under the heading, "Rio Reformed". It said,

> "Rio Ferdinand earned a reputation in his early career as a football bad boy with driving convictions, sex scandals and a missed drugs test ban.

> But when he was about to become a father in 2006, he vowed to change his ways, saying, 'I've strayed in the past but I'm going to be a family man now. My priority now is Rebecca, the baby and having a stable family life.'
>
> Rio also recognised that failing to consign his wild man ways to the past could harm his career playing for Man United under Sir Alex Ferguson, 'You have to take charge of your conduct and the way you live outside football or you'll be out of the door,' he said.
>
> Rio set about transforming his image. He signed up as the Prince's Trust patron and in 2008 announced plans for his own charity, The Rio Ferdinand Live the Dream Foundation to help disadvantaged youngsters. [redacted] He also invested in a record label and became the face of his own celebrity life style magazine #5. Recently he was described as a 'role model' in press releases for Dead Man Running - a film starring rapper 50 cent which he helped finance.
>
> [redacted.]"

19. Among the illustrations for the article were 5 screen shots of some of the texts and a photograph of Ms Storey and the Claimant together in 1997.

20. The online version of the article was in virtually the same terms except that it did not include the photograph of the Claimant and Ms Storey or screen shots of any of the text messages.

Further evidence in relation to the article

21. The Claimant disputed whether he and Ms Storey had met as many as 10 times in the period 2002-2005, he said he thought it was only a couple of times. The exact number does not matter. In his opening note, Mr Tomlinson said that for present purposes the court could accept that it was not just one casual encounter.

22. [redacted].

23. The article had said that the Claimant sent texts to Ms Storey in October 2009. That is not borne out by the phone records. However, further text messages were exchanged in January 2010. [redacted]

24. The Claimant noted that the text from Ms Storey on 6th February 2010 had said, "Oh my you taking over jt what a joke, maybe its time I cashed in seen as you want 2 blank me." The Claimant's response had been to text, "Wot chattin about". A week later Ms Storey had replied "Sorry I sent you that text the other day it was supposed 2 be a joke, I can see that it might of upset you and I didn't mean 4 that, I hope al is good anyway. Remember always friends." Ms Storey says that she contacted the well known publicity agent, Max Clifford in late February 2010. She was in due course paid £16,000 by the Defendant for the information which appeared in the article.

25. The Claimant said, without challenge, that he would change his mobile phone from time to time and it is agreed that he did so around the end of February 2010. The Claimant said that this was nothing to do with cutting off contact with Ms Storey.

There had previously been gaps in their phone or text contacts. Thus, there had been no exchanges for several months at the end of 2009. The interval between their texts at the beginning of February and the appearance of the article at the end of April was considerably shorter. I agree with the Claimant in this regard. That interval is too short to draw an inference that the Claimant had terminated contact with Ms Storey out of concern for the impact which the relationship might have on his professional career.

26. The Claimant accepts that there is no legal obligation for a person to notify someone in advance of publishing private information - see *Mosley v UK* App. No. 48009/08, judgment of 20th May 2011, but it was striking that the Defendant had not done so in this case although that would be common practice in the media industry. The witness statement of Mr Rigby, the Claimant's publicity agent went further. He said that he had been tipped off about a possible story, but when he spoke to the journalist in question, Nick Owens, on 24th April 2010 (i.e. the day before the story was published) he denied that the newspaper had a story on the Claimant. Mr Rigby was referring to Nicholas Owens. I gave leave to the Defendant to adduce evidence from him in reply. Mr Owens' witness statement said that he could not recall this conversation with Mr Rigby. If asked, he would have said that *he* was not working on a story on the Claimant, but he would definitely not have said that the *newspaper* did not have a story on him. Journalists often worked on their own stories of which Mr Owens was unaware. In cross examination Mr Rigby candidly accepted that he could not be certain about the conversation and whether Mr Owens had been referring only to what he personally was working on or whether he was speaking more generally about the paper as a whole. In these circumstances, Mr Tomlinson QC, on behalf of the Claimant, properly did not press the argument that the Defendant had positively misled Mr Rigby.

27. Mr Tomlinson did observe that there was a complete dearth of evidence as to how the story had come to be published, what had been the editorial considerations behind it or why the Claimant had not been asked to comment before publication. Mr Millar responded that the questions of whether there was public interest in the article and whether the Defendant's freedom of expression should prevail over any claim that the Claimant might have to preserve his privacy were matters to be decided objectively. He submitted that the views of the journalist and editors were not relevant to these issues - see *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at [135]-[137].

Press publicity concerning the Claimant's private life before publication of the Defendant's article

28. At least before 2006 the Claimant seems to have had something of a wild reputation. In 2000, he and some friends went for a holiday to Ayia Napa in Cyprus. They met up with some women and the Claimant allowed himself to be filmed having sex with one of them. The incident received widespread publicity and the film itself (which the Claimant says was stolen) was also, without his consent, made widely available. The Claimant was also, apparently, disqualified from driving for being over the prescribed alcohol limit. In 2003 he missed a drugs test and was banned from playing football for his teams for several months in consequence.

29. Between 2002 and 2006 numerous articles were published (some by the Defendant, some by other newspapers) alleging that the Claimant had had affairs with other

women and had been "cheating" on his long term partner, Ms Ellison. The Claimant makes the point that none of these had been published with his consent or co-operation. There was no evidence that he had. But they were part of the reputation which he had gained by the time Ms Ellison was pregnant with their first child.

30. On 29th January 2006 the *News of the World* published a lengthy interview with the Claimant. In his evidence, the Claimant explained that the interview had been set up by his commercial agent who dealt with endorsements and the media. He accepted that the quotes in the article came from him. In that article, the Claimant said, "I've strayed in the past – but I'm going to be a family man now." He admitted "succumbing" to other women during his five year relationship with Rebecca Ellison and saying, "I'm not proud of it … You do get girls coming on to you and sometimes I admit that I have succumbed. You are a young guy and there are temptations. Yeah, I've made mistakes – show me someone who hasn't". The article continued, "But the Man United defender – who has been linked to a string of other beauties including model Holly Maguire – reckons he's tackled his infidelity and is ready to grow up and take on the responsibility of fatherhood. 'I think everyone has seen over the last few years how I have matured. … The key when you make mistakes is to learn from them. My priority now is Rebecca, the baby and having a stable family life.'" The headline to the article (for which, of course, the Claimant was not responsible) said "I've been a cheat before … but I'll be a great dad." On his behalf, Mr Tomlinson realistically accepted that the Claimant had been speaking of having affairs in the past and his intention to mend his ways in the future including in relation to his past infidelities towards Ms Ellison. In his cross examination the Claimant accepted that the references to a stable family life and fatherhood, did not conjure up the image of someone having extra-marital affairs, quite the opposite.

31. The Claimant published his autobiography, *Rio My Story* in September or October 2006. The dust jacket said,

> "You can't ignore him. Every football fan has an opinion on Rio Ferdinand. He is one of the most gifted footballers these shores have ever produced. Twice breaking the British transfer record and hugely admired, but he courts controversy in equal measure…He has been embroiled in sensational tabloid headlines involving women and partying."

In the course of a section on the Ayia Napa incident, the Claimant wrote

> "The truth is some women will do anything to crack on with footballers and, let's be fair, which young players would pass up the opportunity to take them up on some of their offers? Some birds will buy you drinks all night, strip for you, get shagged with other people in the room and do all sorts of tricks. Some of the stories you hear… I admit I got carried away with it at times but you get older, more responsible and leave that sort of thing behind. You see it for what it's worth – that they aren't interested in you, just the notoriety and fame of being with a footballer, or anyone famous for that matter."

Describing how he and Ms Ellison set up home together when they moved to Yorkshire he said,

> "I was no longer the single lad, another thing which helped curb my lifestyle!"`

In his cross examination the Claimant said that by "lifestyle" he meant clubbing and things that were detrimental to football. He denied that this was meant as a reference to his previous involvement with other women. Whether that was what he intended or not, I consider that this statement would be taken by at least some readers as embracing that aspect of his previous life style and the passage would be understood as meaning that this aspect was also something which the Claimant had abandoned.

In his autobiography the Claimant also commented,

> "I have realised that we do have a responsibility off the field because children look up to us and want to be like us. It took me a long time to understand that."

32. An interview with the Daily Telegraph published on 25th November 2006, said of him,

> "Ferdinand reads all the headlines (besides Beckham and Rooney, he is probably the country's most talked-about player) and he knows his own reputation: loud, arrogant, flashy, with an eye for the ladies and an inability to say no to any kind of party."

He is quoted as saying,

> " 'This year is the first year I didn't go on a proper lads' holiday and just get steaming every night for seven days. Rebecca was heavily pregnant so I went away for a weekend – I drank a fair bit, nothing like as much as I would have done before. It's good man. It's almost like having reins on you'. He thinks again. 'But then it's not like reins because you want to go home and see your baby, be a family.'"

In cross examination the Claimant accepted that he was saying that his priority was his family. There was more in his life than football and the family, but certainly no relations with other women.

33. On 25th March 2008 the Claimant was appointed captain of the England football team by Fabio Capello. This was part of Mr Capello's strategy of trying out different players as captain. The following day the *Mail Online* published a story. It quoted Mr Capello saying the team captain would be a

> "symbol on and off the pitch … I have to know the man, not only the player…He's a symbol of the England team… he has to be a big player but a symbol…A symbol is a good player, a good man and he has to represent the England team in every situation."

The article was published under the headline "Good role model? Rio Ferdinand named England captain despite drug testing and roasting rows." The reference to "roasting", as the second paragraph made clear, was to the incident in Ayia Napa. *Mail Online* commented that "Ferdinand's talent on the pitch has made him the most expensive British player of all time, but his off the field antics have often made the headlines." The Claimant was quoted in the same article as saying,

> "If you can't be forgiven for failings when you were young then that is not a good thing. If you learn from those mistakes then you've every right to aim as high as you want. Since then, I have applied myself to a different level on the pitch, the training field and in my private life as well."

34. In an interview with *The Times* on 20th May 2008 the Claimant was quoted as saying,

> "Getting the captaincy at United and with England against France has had a big impact on what people think about me. I think people now believe my managers would not give me this job if they didn't trust me or didn't think I was responsible, so that makes people believe I am a reformed character.
>
> You mature coming to a club like Manchester United, too, because if you don't grow up here, you won't do it anywhere. The workload of playing so many games means you cannot afford to go out because if you do, you won't be ready on Tuesday or Wednesday. When I left London for Leeds United it was a conscious decision because I was enjoying the finer things rather than football, but I have never done that since joining Manchester United [in 2002]. I've been a good professional in terms of picking the right times to go out. The manager would come down on you if you were misbehaving outside the football club, but there has never been that need with me because I am not out partying or getting drunk."

35. In an interview in *The Observer* for 1st June 2008 in the context of (among other matters, the Ayia Napa incident) the Claimant spoke of moving to Leeds United,

> "I left London, which was probably the biggest turning point in my career…. I had time to reflect and think, 'If I don't knuckle down now, when will I achieve?' And I got a girlfriend…and now I've got a family, and you mature.'"

36. *Mail Online* published an article on 6th February 2010 under the head line "Boozer, love cheat and drug-test dodger. Meet the NEW England captain Rio Ferdinand." The story began,

> "England's new football captain Rio Ferdinand hardly represents a return to the Corinthian ideals; an eight month ban for missing a drugs test in 2003 will forever blight his record. Perhaps the most persuasive argument to the Manchester United defender's promotion is that he has belatedly matured, to become the least worst of potential Terry replacements."

The article concluded

> "His home life is settled, it seems. Last year he married his long-time girlfriend and mother of his two children, Rebecca Ellison, in a ceremony which was not sold to a celebrity magazine. Miss Ellison had shown considerable forbearance in previous years as the footballer was linked with a number of models, including the then ubiquitous Abi Titmuss. Now aged 31 and articulate in interview, Ferdinand seems to have put his wilder days behind him. Time will tell."

37. In an article in *The Times* for 6th February 2010, it was said:

> "The missed drugs test was the nadir but there were other indiscretions, too, among them four driving disqualifications and that infamous Ayia Napa sex tape in 2000. At some point, though, the penny dropped, coinciding - it seemed – with the birth of the first of his two young boys, Lorenz, almost 3 ½ years ago. 'I think I have changed in many ways in the last few years', Ferdinand said in an interview with *The Times* last year. 'Having kids, you realise your responsibilities. I think you get to a point in your life when you know yourself.'"

The Framework in which this claim has to be decided

38. Like in other privacy claims brought against the media, the Court has to grapple with the tension between two different rights set out in the European Convention on Human Rights – that in Article 8 to respect for private life and that in Article 10 to freedom of expression.

    Article 8 of the ECHR provides:

    > "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
    >
    > (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and necessary in a democratic society or the economic well-being of the country. For the prevention of disorder and crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

    Article 10 of the ECHR says,

    > "(1) Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
    >
    > (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the impartiality of the judiciary."

39. Although at first sight, Article 8 appears to be directed at interferences by the State in a person's private life, it is now beyond argument that it also encompasses a positive obligation to put in place a system to protect an individual's private life from interference by non-state entities such as the media: see *Von Hannover v Germany* (2005) 40 EHRR 1 and *Campbell v MGN Ltd* [2004] 2 AC 457.

40. Article 8 accords protection (at least on a qualified basis) to "private life", "home" and "correspondence". Of these, "private life" is perhaps the most nebulous. According to the House of Lords in *Campbell* the question whether a Claimant's

private life is in issue is to be decided by asking whether the person concerned had a "reasonable expectation of privacy" in that matter.

41. Article 8(2) and Article 10(2) make clear that the respective rights in Article 8(1) and 10(1) are not absolute. Neither is broken if the interference is prescribed by law, for a legitimate aim and is necessary in a democratic society. Where both rights are in play, the Court has to conduct a balancing exercise to decide which should prevail. As Lord Steyn said in *Re S (A Child)* [2005] 1 AC 593 at [17],

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

42. Thus the parties in this case were agreed that the Court's approach should be that expressed by Buxton LJ in *McKennitt v Ash* [2008] QB 73 CA at [11] namely,

> "where the complaint is the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If 'no' that is the end of the case. If 'yes', the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter inquiry is commonly referred to as the balancing exercise…"

Was the information in the article in principle protected by Article 8?

43. I am here addressing the first of Buxton LJ's questions in *McKennitt*. Sometimes, that is expressed alternatively as whether Article 8 is "engaged", but there is a danger in becoming distracted by terminology.

44. The Claimant submits that the information plainly was in principle protected by Article 8. The text messages from the Claimant were a form of "correspondence" which is expressly covered by Article 8(1). Furthermore, private relationships, especially those said to involve sexual affairs, are quintessential examples of matters in which individuals have a reasonable expectation of privacy - see for instance *Mosley v News Group Newspapers* [2008] EMLR 20 at [98] – [104]. This would cover the Claimant's entire relationship with Ms Storey. In addition, the article was illustrated by a private photograph of the Claimant and Ms Storey which was taken in a hotel room in 1997. The Claimant had a reasonable expectation that that, too, would remain private. In addition the publication of the article impinged on the private lives of Ms Ellison and his family. That has a direct effect, since the Court is obliged to protect their Convention rights. It also has an indirect effect because the Claimant was distressed as a result of the impact which the article had on them.

45. The Defendant submits that the position is not so straightforward. There was nothing in the Claimant's evidence to suggest that his relationship with Ms Storey in the period 1996 – 2000 was a secret. Ms Storey's evidence was that she and the Claimant would go out in public all the time and their relationship was completely open. In

cross examination, the Claimant had agreed that he and Ms Storey went out, though not, he said, as a couple. Between 2002 and 2005 the Claimant and Ms Storey met in hotels. The Claimant did not try to keep this a secret. On the other hand, he did not tell her that their relationship had to be hidden. He said in re-examination that he expected her to keep the communications confidential. The text messages (so far as they had been retained) were available in their entirety at the trial, but what the Claimant has to show is that what was published contravened his reasonable expectation of privacy. Quotations from the texts in the articles were extremely limited. The 1997 photograph was openly taken by one of the other two people present in the room. The Claimant and Ms Storey are fully clothed. He is talking on a mobile phone. He is paying no attention to her. It is unexceptionable and conveys no private information beyond that which was said in the article, namely that they were at this stage friends.

46. The Defendant also observes that in *Murray v Express Newspapers Ltd* [2009] Ch 481 at [36] the Court of Appeal commented,

> "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."

47. The Defendant submits that it is relevant in this context that the Claimant is a public figure in a broad sense and, as such, he must accept and expect that his actions will be more closely scrutinised by the media - see *A v B plc (Flitcroft v MGN Ltd)* [2003] QB 195 at [11 (xii)]. Further, the Defendant argued, the Claimant was saying that he was entitled to protect the privacy of an adulterous affair. The Defendant did not ask the Court to make a moral judgment but submitted that what was at stake was significantly less important than in *Campbell* (recovery treatment for a drug addict) or *Re S (a child)* (the impact on a young child of court reporting of her mother's trial for murder). Additionally, the Claimant had published information about the Ayia Napa incident in his biography. In the January 2006 interview with the *News of the World* he had admitted to "cheating" with other women while he was in a relationship with Ms Ellison. There had been the other articles to which I referred about those affairs. The Claimant had not denied them, nor had he taken any action in relation to them. As a result, explicit details of the Claimant's sex life were already in the public domain and the Claimant could no longer have a reasonable expectation of privacy in this type of information.

48. In addition, the Claimant had behaved recklessly in his text messages to Ms Storey [redacted].

49. I was invited to be sceptical of the distress which this article had caused the Claimant, given that he had taken no action over other disclosures. In *KGM v News Group Newspapers Ltd* [2010] EWHC 3145 (QB) Eady J. said that it was often important to make an assessment of the Claimant's own attitude towards the maintaining of privacy. The judge considered that the Claimant in that case was a robust character

and that was a factor to be taken into account. His judgment was upheld by the Court of Appeal under the name *Hutcheson v News Group Newspapers Ltd* (see above).

50. As for the impact on the Claimant's family, Mr Millar observed that there had been no witness statement or other evidence from Ms Ellison. As Tugendhat J. said in *Terry (previously 'LNS') v Persons Unknown* [2010] EMLR 16 at [66],

> "The court is being asked by LNS to have regard to the Article 8 rights of the other person and the interested persons. Respect for the dignity and autonomy of the individuals concerned requires that, if practicable, they should speak for themselves…If it is not practicable or just that the other person or anyone else should not give evidence personally, the court should know why."

This passage was approved by the Court of Appeal in *Hutcheson* (above) at [26]. The Claimant's witness statement said that his children were too young to fully understand the article.

Conclusions on whether the information was in principle protected by Article 8

51. In my judgment the information in the article was in principle protected by Article 8. I emphasise that I am here addressing only the first of Buxton LJ's questions. It is but an intermediate step on the way to deciding whether or not publication of the information did constitute a wrong.

52. The Claimant agreed that he and Ms Storey went out prior to 2000 and may have been seen in clubs at the same time. However, they were not seen as a couple. This differs from Ms Storey's witness statement that the two of them were completely open, but here I give more weight to the Claimant's evidence which was tested in cross examination whereas Ms Storey's was not. The Claimant was also entitled to rely on Ms Storey's own words as they appeared on the cover of the newspaper and in large type with the story itself, [redacted]. The article was also billed as an "exclusive". Neither description suggests that this was information which had previously been widely disseminated.

53. In any case, even on Ms Storey's evidence, knowledge of their relationship was confined to their circle of family and friends and that is not conclusive of the issue of whether the information is still in principle protected from publication in the mass media – see, for instance, *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 at [61]. Furthermore, this was not an example of publication of the bare fact of a relationship between the claimant and another and in this respect the position is to be contrasted with *Hutcheson*.

54. The 1997 photograph is closer to the borderline. It was taken openly on Ms Storey's account and the Claimant (who could not remember the occasion) was unable to contradict her. It shows nothing remarkable, but it does show the two of them together in a hotel bedroom. I am prepared to accept that this, too, was information which in principle was capable of protection and whose publication would, subject to the balancing test, infringe the Claimant's rights under Article 8. *Wood v Commissioner of Police for the Metropolis* [201] 1 WLR 123 confirms that an intrusion must reach a certain level of seriousness before it is even in principle capable of being protected by Article 8. The Court of Appeal concluded that the mere *taking* of photographs of

demonstrators in the street did not reach that level of seriousness, but it was different when it came to the *retention* of the photographs. Laws LJ (with whom, on this issue, the other members of the Court agreed) made clear at [31] that he was not considering the *publication* of photographs. In my judgment neither the facts nor the principle of *Wood* assists Mr Millar.

55. I accept as well that the texts are examples of "correspondence" and so, again, in principle, subject to protection.

56. Sexual behaviour in private is part of the core aspects of individual autonomy which Article 8 is intended to protect. That does not mean that information about an individual's sexual activities will invariably be in principle protected, but I was not persuaded by Mr Millar's arguments that the Claimant was unable to satisfy Buxton LJ's first question in this case. His public position as a footballer and (at the time) captain of the England football team will need to be considered more closely in the context of the balancing exercise (Buxton LJ's second question), but it has no effect on the first question as to whether in principle the information which was published about him was entitled to protection. Nor do I think that the earlier publicity which he had attracted affects this first question. He said in evidence that he had considered very carefully how much of his private life he wanted to discuss in the media. There is no basis for arguing that, by his own public statements on his private life he had forsaken a reasonable expectation of privacy in connection with his relationship with Ms Storey. In *KGM v News Group Newspapers Ltd* at [38] Eady J. said that "The so-called 'zonal' argument has become discredited since at least the decision of the Court of Appeal four years ago in *McKennitt v Ash*."

57. Mr Millar argued that there has been a material change since *McKennitt.* Section 12(4) of the Human Rights Act requires the Court to have regard to the terms of "any relevant privacy code" when considering whether to grant relief which may affect a person's right to freedom of expression. One of those Codes is The Press Complaints Commission's Editors' Code. Although the Code has been in existence for some time, the section on privacy was amended in October 2009 by adding the words which I have italicised in the quotation below.

> " 3. *Privacy
>
> (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
>
> (ii) Editors will be expected to justify intrusions into any individual's private life without consent. *Account will be taken of the complainant's own public disclosures of information.*
>
> (iii) It is unacceptable to photograph individuals in private places without their consent."

58. I am not persuaded that this change makes any difference in the present context. As I have already said, the Claimant had not, before the article, disclosed anything about his relationship with Ms Storey. It is not necessary to consider whether in an extreme case there would be some merit in the argument that widespread and extensive discussion by a person of similar aspects of their private life would disentitle them to

have a reasonable expectation of privacy. The present case is nowhere near that extreme. In this context, the Claimant was also entitled to say that the articles alleging affairs with other women were not published with his consent and the fact that he had not litigated them could not be taken as his tacit acceptance of another article, let alone another article about a different woman.

59. In my judgment the Claimant's recklessness in his behaviour was not such as to mean that he had no reasonable expectation of privacy. In *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at [226] Eady J. considered this question, but in the context of an assessment of damages. He said in terms that such recklessness did not excuse the intrusion into the Claimant's privacy. The issue of damages, of course, is only relevant once liability is established and the question I am presently considering is relevant to the existence of liability. Similarly, the level of distress which the Claimant himself suffered would be material as and when damages need to be assessed. In the nature of things, the subject matter of the article is private information which is likely to have caused even a phlegmatic character some embarrassment and, as such, this supports the existence of a reasonable expectation of privacy.

60. This is sufficient for me to find in the Claimant's favour on this first question. I should add, though, that I thought the Defendant was on stronger ground in saying that I could place little weight on the impact of the article on Ms Ellison's private life or expectation of privacy. There is no witness statement from her and that is material. The Claimant himself accepted that his children were too young to fully understand. They were aged three and one at the time of publication.

The Balancing Exercise

The legal principles

61. I have already referred to the speech of Lord Steyn in *Re S (a child)* who said that the balancing competing rights between Article 8 and Article 10 called for an intense focus on the comparative importance of the two rights in the specific context of the particular case. Section 12(4) of the Human Rights Act 1998 says that the court must have particular regard to the importance of the Convention right of freedom of expression, but case law (including *Re S (A Child)* has made clear that neither Article has automatic precedence over the other.

62. Freedom of expression applies to banal and trivial expression as well as matters of public interest, but where that right has to be balanced against the rights of others to protect their privacy, the extent to which the content is of public interest or contributes to a debate of general interest assumes a much greater importance. Indeed, the contribution which the publication makes to a debate of general interest is the decisive factor in deciding where the balance falls between Article 8 and Article 10 - see *Von Hannover* at [76]. In this context it has frequently been said that there is a difference between what is in the public interest and what is of interest to the public. As the European Court of Human Rights has said in *Mosley v UK* App No. 48009/08 Judgment 10th May 2011 at [114],

> "The Court also reiterates that there is a distinction to be drawn between reporting facts - even if controversial - capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an

> individual's private life…In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life….Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation….While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the Court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it."

63. It is not the case that the public interest is confined to the exposure of conduct which is illegal. Tugendhat J. rejected that proposition in *Terry* at [100]. He added,

> "[101] It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have. That is not the issue. The issue is what the judge should prohibit one person from saying publicly about another. …
>
> [104] There is much public debate as to what conduct is or is not socially harmful. Not all conduct that is socially harmful is unlawful …The fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest that it be discouraged. There is no suggestion that the conduct in the present case ought to be unlawful or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged. That is why sponsors may be sensitive to the public image of those sportspersons whom they pay to promote their products. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong. Both the law, and what are, and are not, acceptable standards of behaviour have changed very considerably over the years, particularly in the last half century or so. During that time these changes (or, as many people would say, this progress) has been achieved as a result of public discussion and criticism of those engaged in what were, at the time, lawful activities. The modern concept of public opinion emerged with the production of relatively cheap newspapers in the seventeenth century. Before that there was no medium through which public debate could be conducted. It is as a result of public discussion and debate that public opinion develops."

64. In *Hutcheson* (above) at [29] the Court of Appeal said that it was not necessary to resolve the issue in the context of that case, but it described the views of Tugendhat J. as "powerful". I respectfully agree. Freedom of expression, after all, is one of the human rights guaranteed in the Convention because it is an integral part of the foundation of a democratic state and pluralism has long been recognised by the Strasbourg Court as one of the essential ingredients of a democracy (see for example

Handyside v UK (1979-80) 1 EHRR 737 at [49]). While I accept that the subjective perception of a journalist cannot convert an issue into one of public interest if it is not (see paragraph [27] above), the Court's objective assessment of whether there is a public interest in the publication must acknowledge that in a plural society there will be a range of views as to what matters or is of significance in particular in terms of a person's suitability for a high profile position.

65. One facet of the public interest can be correcting a false image. The PCC Code (to which, as I have said, the Court is obliged to have regard by s.12(4) of the Human Rights Act 1998) marks with a star certain of its provisions. These are ones which are subject to a public interest qualification. Clause 3 on privacy is one of those provisions. The Code then goes on to comment on the public interest. It says that this includes, but is not limited to,

> "(i) detecting or exposing crime or serious impropriety; (ii) protecting public health and safety; (iii) preventing the public from being misled by an action or statement of an individual or organisation."

66. One example of correcting a false image was *Campbell v MGN Ltd* [2004] 2 AC 457 where the model Naomi Campbell had publicly denied taking illegal drugs or being an addict. In her subsequent claim for infringement of her privacy she accepted that these statements had been untrue. She accepted that the newspaper had the right to correct the false image which she had projected.

67. Generally in a claim for publication of private information the Court is not concerned with whether the information is true or false. A Claimant is not, for instance, expected to admit the truth of what has been published as the price of obtaining redress. As Longmore LJ said in *McKennitt v Ash* (above) at [85],

> "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 sidetracked into that irrelevant inquiry."

68. However, in the context of a defence of public interest based on correcting a false image, truth is important, as the Court of Appeal went on to acknowledge in *McKennitt*. This defence can only begin to succeed if the Claimant's image is indeed false and if there is therefore something to be corrected.

69. Naomi Campbell's action nonetheless succeeded because the House of Lords considered that the article unnecessarily included a photograph and details of her attendance at Narcotics Anonymous. This was an added and important intrusion into her private life which went beyond what was justified for the purpose of correcting her misleading image.

70. In *Re S (A child)* Lord Steyn said that the balancing act required an intense focus on the relative importance of both rights. Thus even if a Claimant succeeds in passing Buxton LJ's first test (that in principle the information is protectable), it may be necessary to revisit the Article 8 side of the balance to see quite how important the information is.

71. In this case the Defendant invokes its own Article 10 right to freedom of expression, but it relies as well on the rights of Ms Storey. Plainly she had a right of expression under Article 10 (subject, of course, to the balancing exercise). Mr Millar argued that she had a right under Article 8. He relied on what Munby J. said in *Re Angela Roddy (A Minor)* [2004] EMLR 127 that the right to personal autonomy which Article 8 guarantees includes a right to impart information about one's private life rather than to keep it secret. In the context of a case such as the present, however, such a right is likely to march in step with the Article 10 right. Both are qualified rights. Both have to be balanced against the competing Article 8 right of the Claimant.

The parties' contentions as to the balancing exercise

72. The Defendant contended that the Claimant had projected an image of himself as a reformed character. In the *News of the World* interview and on many subsequent occasions he had given the impression that he had put aside his past wild ways. He had matured. He had settled down with Ms Ellison and his children and he was committed to his family. However, Ms Storey's account showed that this was not so. [redacted].

73. Furthermore, these attempted meetings with Ms Storey impinged on his professional life. They had in the past taken place in hotels where the Claimant was staying with his football team. At least some of the meetings planned [redacted] were intended to do likewise. The Claimant acknowledged that this was in breach of his obligations as a team member.

74. The Defendant argued that the Claimant had embarked on a wider campaign since 2006 to project a more responsible and positive image than the reputation which he had had in the past. His charitable and business activities were part of this. Here, too, the Defendant argued, there was a public interest in demonstrating that this was misleading because his relationship with Ms Storey had continued long after the time when he was supposed to have changed.

75. In addition, the Defendant argued, there was a public debate as to whether the Claimant was a suitable person to be appointed as England captain following the dismissal of John Terry. Terry had been dismissed because of his extra-marital affair. Mr Capello and many commentators had observed that the England captain was expected to be a role model for young fans and a high standard was therefore demanded of the person who filled that role – both on and off the pitch.

76. In its defence, the Defendant argued additionally [redacted] the Communications Act 2003, but Mr Millar did not pursue this aspect at trial and I need say no more about it.

77. The Claimant responded that Ms Storey's account did not show that the Claimant had lied when he gave his interview to the *News of the World* in January 2006. He was not then promising to the world to remain in a monogamous relationship with Ms Ellison ever after. The past mistakes which he was intending to put behind him were those which had previously marred his professional career. Pre-eminently this was a reference to missing his drugs test which had led to him being banned from playing football for several months. It also included clubbing and partying which might also affect his play. He and Ms Storey never had met after 2005. Since his marriage to Ms Ellison in 2009 they had not even made any arrangements to meet.

78. Mr Tomlinson submitted that the Claimant's business activities had nothing whatever to do with the case. Nor did his charitable activities. The Claimant was keen to encourage young boys to take part in sport and to discourage them from being involved with guns, knives, drugs or criminality. Nothing in the article had anything to do with that at all.

79. Even taking into account all his public activities, the Claimant was simply not in the same category as politicians who might have to accept a greater public debate about their private lives.

80. The Claimant also submitted that his appointment as England captain provided no legitimate excuse for the publication of this private information. John Terry had been dismissed, not simply because he had had an extra-marital affair but because the affair had been with the girl-friend of a team mate. It was that aspect of the matter which had undermined the trust and authority which was essential for a captain. In addition, the appointment of the Claimant had taken place at the beginning of February 2010. Ms Storey had approached her public relations agent at the end of February. The article had not appeared until the end of April. This delay was incompatible with the article genuinely being a contribution to the debate about the England captaincy. Furthermore, there had been no evidence of any reaction at all to the publication of the article. That showed it did not impact at all on the public's view of the suitability of the Claimant to hold the post of captain.

81. The Claimant submitted that Ms Storey's rights, whether under Article 10 or Article 8 were entitled to very little weight. While the article had given her account of the relationship with the Claimant, it had been published and would be read because of what it said about the Claimant. It was his story rather than hers. There was a parallel in this respect with *McKennitt v Ash* (above) where the findings of Eady J. at first instance were echoed by Buxton LJ in the Court of Appeal who said at [31] of Ms Ash, "She gives vent to many complaints about the first claimant; but the interest of those is that they are complaints about the first claimant, and not at all that the complaints are made by the first defendant." And he added at [51] "As a result the first defendant had no story to tell that was her own as opposed to the first claimant's." Furthermore, as Ms Storey had said in her text of 6th February, now was the time for her to cash in. She had done so, being paid £16,000 for her information by the Defendant.

82. In any case, the Claimant argued, the article intruded on the Claimant's private life further than could possibly be justified. Whatever the merit of the defence in relation to the texts that passed between the Claimant and Ms Storey in 2007-2010, they provided no justification for the disclosures and their relationship between 1996 and 2005. The article went well beyond publication of the bare fact of the relationship during that period. It included, for instance, allegations about the number of times the two of them had had sex. The photograph of the Claimant and Ms Storey from 1997 made no contribution to the public interest and *Von Hannover* and *Campbell v MGN* showed that there was a particular sensitivity over the publication of photographs. This was not a case where a publication had been produced under great time pressure and, where, as a result the Court might be tempted to allow additional latitude to a journalist. This article appeared months after the Claimant's appointment, weeks after Ms Storey had approached Max Clifford and with no explanation for what had happened in the interval.

83. Had the Defendant been confident about the claimed public interest in the article, it would have contacted the Claimant in advance of publication. The House of Commons Culture Media and Sport Select Committee reported that this was normal practice in the newspaper industry (see the quotation from the Committee's report of 9th February 2010 in *Mosley v UK* at [52]). There was no evidence from the Defendant to explain this departure from the norm, but the court could infer that the Defendant knew that if it did give the Claimant notice, it recognised that he would have applied for, and been granted, an injunction to prevent publication.

Balancing exercise: discussion

84. In my judgment there was a public interest in this article. At one level it was a "kiss and tell" story. Even less attractively, it was a "kiss and paid for telling" story, but stories may be in the public interest even if the reasons behind the informant providing the information are less than noble. The interview with the *News of the World* was significant. This was not a casual encounter with a reporter who elicited an off the cuff remark. As the Claimant explained, the interview was set up by his publicity agent. He did quite clearly wish to portray himself as a reformed character. He confessed past mistakes. They included his missed drugs test which had directly impacted on his career. But they were not restricted to matters so closely related to the football pitch. Even though he had played no part in the articles about women with whom he had allegedly had affairs while living with Ms Ellison, those stories had contributed to his wild image and it was that image to which he confessed in the article and said he was now putting behind him. He contrasted his past behaviour with where he was in the present – older, more mature, and, critically, in a stable family relationship with Ms Ellison. The article was accompanied by a picture of the two of them together. She was heavily pregnant and he was cradling her 'bump'. The picture reinforced the message of the article: Rio Ferdinand is now a family man and has given up the ways of his past including 'cheating' on Ms Ellison.

85. Mr Tomlinson is right to say that the article could not be construed as a promise through to an indefinite time in the future that the Claimant would remain faithful to Ms Ellison. But nor would it be right to approach the article in the way that a contract lawyer would analyse a pre-contract representation. Through that article he projected an image of himself and, while that image persisted, there was a public interest in demonstrating (if it were to be the case) that the image was false.

86. The *News of the World* article was followed by the Claimant's autobiography and numerous other articles in which the same theme echoed: Rio was now reformed. Some of these articles were published after he had resumed contact with Ms Storey. I do not find it significant that he only married Ms Ellison in 2009. For many people infidelity with a long term partner is little, if any, different from adultery. It was 'cheating' on Ms Ellison to which the Claimant confessed in his *News of the World* interview in 2006 at a time when they not even engaged, but had, by then been living together for some 6 years. That was part of the behaviour that he said in that interview he had put behind him. Nor do I regard it as of any great weight that he and Ms Storey did not actually meet in the period 2007-2010. [redacted]

87. I also agree that a further factor in the public interest case is the Claimant's appointment as captain of England, first, on a temporary basis, in March 2008 and then in replacement of John Terry in February 2010. Mr Tomlinson may be right that

what interests some managers, players and fans is only a captain's performance on the pitch. John Terry's affair certainly had the extra dimension that it had involved the girl friend of a fellow team member and so was likely to make dressing room relations tense to say the least. But on the evidence presented in this case, it is by no means a universal view that the captain's role is confined to what happens on the pitch or what affects the players' performance. The phrase "role model" is somewhat ubiquitous. In *A v B plc* [2003] QB 195 Lord Woolf CJ spoke at [11(xii)] of a public figure who

> "may hold a position where higher standards can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely will that be the position. Whether you have courted publicity or not, you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information."

Lord Woolf went on at [43 (vi)] to say specifically that footballers were role models and undesirable behaviour on their part can set an unfortunate example.

88. In *McKennitt v Ash* (above) Buxton LJ said at [62] that the width of the rights given to the media by *A v B plc* could not be reconciled with *Von Hannover.* He went on to add (at [65]) that Lorenna McKennitt, the Canadian folk singer who was the Claimant in the case before him, did not hold a position where higher standards of conduct could be rightly expected by the public. That, Buxton LJ said, "is no doubt the preserve of headmasters and clergyman, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists." Ms McKennitt had, at most, been an involuntary role model and it was clear that Lord Woolf thought that role models anyway were only at risk of disclosure of disreputable conduct which had not been the position in her case.

89. To return to the present case. The Claimant voluntarily assumed the role of England captain. It was a job that carried with it an expectation of high standards. In the views of many the captain was expected to maintain those standards off, as well as on, the pitch. By way of example, in 2008, Brian Barwick, the Chief Executive of the Football Association said,

> "one of the most important early decisions [Fabio Capello] will have to take will be to decide who is going to be his captain. …There isn't the degree of importance laid at the door of captains of other countries, but Fabio is aware of the importance of this decision…the captaincy, currently held by John Terry, is a very significant part of the English sporting and social fabric…England players are special players. And that carries with it an extra weight of expectancy and responsibility ... If you are an England player you are living out the dreams of thousands and thousands of kids and millions of people. And while you don't want that weight of moral expectation weighing too heavily on anybody's shoulders, it is part of your responsibility. They have to accept that off the field they are role models."

At a press briefing on 26th February 2010 Fabio Capello said why he had taken the captaincy away from John Terry,

> "It was not good because I always asked that the Captain is an example for the young, the children, for the fans. It was not good. This is the reason and I told him this...The England shirt is very important and for me this will be one of the most important points we speak about... part of that is to talk about how important it is to behave well when you are representing England."

Mr Tomlinson emphasised that Mr Capello had added that it was only the problem with Wayne Bridge (the team mate with whose girl friend John Terry was said to have had an affair) which caused him to dismiss Terry. But for some commentators at least (e.g. *Mail Online* 28th February 2010), this qualification was to distinguish the affair from other, quite separate, alleged misdemeanours of Terry.

In any event, Mr Capello's remarks about the captain needing to set an example for young fans were in line with his remarks in March 2008 (see above) when the Claimant was temporarily made captain, that the captain was expected to be a symbol on and off the pitch.

Similarly, in February 2010 the Sports Minister, Gerry Sutcliffe was quoted as saying,

> "On the field John Terry is a fantastic player and a good England captain, but to be captain of England you have got to have wider responsibilities for the country, and clearly if these allegations are proven – and at the moment they are only allegations – then it does call into question his role as England captain."

90. Buxton LJ's list of those from whom higher standards were expected certainly was not meant to be closed. The captain of England's football team, for a substantial body of the public, would come comfortably within it. In *Sir Frederick Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) Tugendhat J. said at [103] that the Claimant, an exceptionally forceful business man, came within the concept of a public figure and that distinguished him from sportsmen and celebrities in the world of entertainment. However, as can be seen from the remarks that I have quoted there are many who would indeed see the captain, at least, of the England football team as a role model.

91. Of course, as Buxton LJ mentioned, the Strasbourg jurisprudence has developed since *A v B plc*. Princess Caroline of Monaco established that her rights under Article 8 had been violated in *Von Hannover* because German courts had not given her a remedy for the publication of photographs of her going about ordinary activities. But there was nothing in the private information which had been published in that case which called into question her fitness to perform the ceremonial duties which her status required. The Defendant's argument here is that Ms Storey's account did call into question the Claimant's fitness to be the role model which was expected of an England captain.

92. During the course of the hearing I asked the parties whether it was incumbent on me to decide whether the Claimant *was* fit to be England captain. Thankfully they agreed that it was not. The issue is rather whether the Defendant's article reasonably contributed to the debate as to his suitability for that role.

93. In paragraph [36] above I quoted the *Mail Online* article from 6th February 2010 which had the headline "Boozer, love cheat and drug-test dodger. Meet the NEW England captain Rio Ferdinand." The journalist who wrote that article would expect his (or her) readers at least to regard being a "love cheat" as not a good qualification for being England captain. The article went to say that the most persuasive argument in the Claimant's favour was that he had "belatedly matured" and that, of course, was precisely the image which the Claimant had sought to project from the *News of the World* article onwards. But the Defendant's article showed that, at least as far as women were concerned, the image of change was a false one.

94. I was not convinced that the gap of almost three months between the Claimant's appointment as captain and the publication of the article took the matter much further. Ms Storey had said that she contacted Max Clifford towards the end of February. I could only speculate as to why there was then a further two months before the article appeared. But in any case, the qualifications needed to be England captain seems to have perennial interest and the suitability of the captain of the moment is debated not just at the time of his appointment. One example in evidence in this case was the article from *Mail Online* for 24th March 2011 where seven former England captains discussed their views of the role.

95. Nor did the absence of media comment in the wake of the Defendant's publication have much bearing. Liability needs to be determined as of the date of publication and therefore in advance of any reaction. If there was a subsequent response that might be evidence that the publication did contribute to a public debate, but the absence of any such response is, at best, only weak evidence of the reverse proposition.

96. There is a further aspect of Ms Storey's account where the correction of a false image and the suitability of the Claimant to be England captain overlap, namely the Claimant's admission that on occasions he either did, or tried to, sneak Ms Storey into a hotel where he and the other members of his team were staying. He acknowledged that this was against the rules set by the team's management. [redacted].

97. Mr Tomlinson observed that this was not said to have happened (and indeed the Claimant had not tried to meet Ms Storey) since he had been made England captain.

98. I did not find this answer persuasive. In his evidence the Claimant said that Mr Capello had told him to be professional, not only on the pitch but "around the hotel". In the past the Claimant had not behaved in a professional manner around the hotels into which he had tried to sneak Ms Storey. Whether or not he had done that in the few weeks since he had been made the permanent captain of England, his relatively recent past failings could legitimately be used to call into question his suitability for the role.

99. Nor was I persuaded that the Defendant's article excessively intruded into the Claimant's private life. *Campbell v MGN* was an example of a case where this was so. The essential story – that Ms Campbell had lied when she said she was not a drug addict – was in the public interest, but the newspaper went beyond what was reasonable by publishing additional details of her treatment at Narcotics Anonymous and the covertly taken photograph of her leaving one of the NA meetings. In this case, Mr Tomlinson argued that there was no justification for publication of the details of

the relationship between the Claimant and Ms Storey prior to 2005, nor for the photograph of the two of them in a hotel room in 1997.

100. In my judgment, though, the Defendant was entitled to place the relationship between the Claimant and Ms Storey in context. [redacted] They had known each other for many years. Mr Tomlinson makes the point that they did not actually meet in the period from 2007. Yet it would be unreal to disguise the fact not only that they had known each other long before, [redacted].

101. Publication of photographs can constitute an unacceptable intrusion into privacy even if a verbal report of the same occasion would not. *Von Hannover, Campbell,* and *Murray* are all examples. But even if the occasion is private (as this one was) the "intense focus" of which Lord Steyn spoke in *Re S (A Child)* has still to be brought to bear. The Claimant could not remember the occasion when the picture was taken. Ms Storey says that this and other photographs were taken openly by one of the other people in the room. Given the size of a typical hotel room, that would seem likely. This was not, therefore, covert photography as had been the case in *Von Hannover* and *Campbell*. When Mirror Group Newspapers complained to Strasbourg that the House of Lords' judgment (both in substance and in relation to the order that it pay Ms Campbell's costs) had violated their right to freedom of expression, the Court dismissed the claim. It observed that,

> "Photographs appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution." - *MGN Ltd v UK* Application No. 39401/04 Judgment 18th January 2011 [143].

102. The House of Lords in *Campbell* placed great emphasis on the added degree of intrusion from the publication of the photograph. It was part of the additional details to do with Narcotics Anonymous which was both superfluous to the exposure of Ms Campbell's dishonesty about drugs and potentially harmful to her recovery. Furthermore, the photograph added nothing to the credibility of the story because the reader depended on the newspaper to explain what the picture showed (see Lord Hope at [123]). Here, the picture showed the Claimant and Ms Storey clothed. They are not even engaging with each other. The Claimant is speaking on a mobile phone. It is an unexceptionable picture. It was taken in a private room, but its publication could have caused nothing comparable to the additional harm that was referred to in *Campbell* and none of the embarrassment that pictures of sexual activity may cause (see for instance *Theakston v MGN Ltd* [2002] EMLR 22). In this case, the picture did provide an element of support to the story because it showed the Claimant and Ms Storey together. It was of limited value because of the age of the photograph but to that limited extent it did do more than the picture in *Campbell.* The Claimant said he was surprised and angry at the publication of the photograph as it was clearly a very old photograph and yet the article was making out that the relationship was much more recent. I do not agree that the article misrepresented the position. It stated the date of the photograph. The relationship between the Claimant and Ms Storey had continued until January 2010. Unlike in *Campbell,* I find that publication of the picture did not cause the Claimant justifiable additional distress. Mr Millar argued that the Court should be slow to take on the role of editor and, at a micro-level, judge what was or was not acceptable for inclusion in the story. He is, of course, right that judges are ill equipped to be editors but Mr Tomlinson was equally entitled to respond

that editorial discretion did not give *carte blanche* to intrude on privacy and the House of Lords in *Campbell* had indeed found in the Claimant's favour because the additional details (including the photographs) had been part of the publication. The resolution of this issue lies, in my judgment, in Lord Steyn's intense focus on the competing rights. Here, although the Claimant did have a reasonable expectation that such a photograph would remain private (and so, as I have held, he succeeded on Buxton LJ's first question), its unexceptionable character meant that the right was of relatively low importance. Publication of the photograph did provide some corroboration for the story (although, as I have accepted, of a relatively modest kind). It supported the case that Ms Storey and the Claimant had known each other since 1997 and that, too, was a legitimate ingredient of the Defendant's argument as to why the Claimant had not, in fact reformed. I conclude that publication of this picture does not tip the balance in the Claimant's favour.

103. Mr Tomlinson's emphasis on the absence of prior notice to the Claimant was in my view, with respect, a red herring. He suggested that this was only explicable on the basis that the Defendant feared being subject to an interim injunction if notice had been given and this fear betrayed a lack of confidence in the reliance that they now placed on freedom of expression. I do not find this line of argument helpful. Partly, that is because it is entirely speculative as to why no notice was given to the Claimant. More importantly, I have to decide where the balance lies between these competing rights as an objective matter. The arguments which the Defendant now advances will either succeed or fail. The Defendant's internal assessment of their merits at some earlier stage is neither here nor there.

104. I did agree with Mr Tomlinson that, for the reasons he gave, Ms Storey's rights under Articles 8 and 10 did not assist the Defendant.

105. Overall, in my judgment, the balancing exercise favours the Defendant's right of freedom of expression over the Claimant's right of privacy.

The claim in breach of confidence

106. The action for misuse of private information has grown out of the older equitable claim for breach of confidence. Breach of confidence in its original form does still have a life of its own and may be relevant, for instance, where the Claimant is not in a position to invoke Article 8. However, I did not understand Mr Tomlinson to argue that the Claimant had grounds for succeeding in breach of confidence even if he failed in relation to the newer, human rights based, cause of action. It is not necessary, therefore, for me to say any more about it.

Conclusion

107. For all of these reasons, this action is dismissed.