



Neutral Citation Number: [2012] EWHC 355 (QB)

Case No: HQ12X00560

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

**Jonathan Spelman (by his Litigation Friends Mark
Spelman and Caroline Spelman)**

Claimant

- and -

Express Newspapers

Defendant

Jacob Dean (instructed by **Manches**) for the **Claimant**
Christina Michalos (instructed by **Express Newspapers**) for the **Defendant**

Hearing dates: 16 February 2011

Approved Judgment

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

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. The Claimant is a boy who turned 17 in late 2011. He has played Rugby for England in the U16 and other squads and for the Harlequins Rugby Football Club, in each case on a number of occasions. His youth, and his success in public sport, are two of the most important facts at the heart of this case. He has not played rugby since he suffered an injury during a game he played in September 2011. It is events following that injury that give rise to this claim for an injunction to restrain disclosure of what is said to be private information.
2. As is normal in applications for injunctions against the media, at the present stage the Defendant (“the newspaper”) has not said what information it intends to disclose. There is no draft article before the court, or, so I am told, in existence.
3. Mr Savage is the Deputy News Editor of the Daily Star Sunday, a weekly national newspaper published by the Defendant. On Wednesday 8 February 2012 he received information about the Claimant which he investigated with a view to the possible publication of an article in the newspaper. On Thursday and Friday, 9 and 10 February he sought confirmation of the information from a number of sources who he thought might be able to assist. These included representatives of the Harlequins RFC, of his mother (who is a Member of Parliament and Secretary of State for the Environment, Food and Rural Affairs), from the Rugby Football Union, and from the boarding school where he is a pupil in the sixth form. He obtained no confirmation from these sources.
4. But on Friday 10 February he did receive a call from a solicitor for the Claimant, whose call he returned in the afternoon. In that call Mr Savage learnt that the information which he had received from his source was inaccurate. The solicitor spoke of applying for an injunction. So Mr Savage sought further information from a source who he has not disclosed. This time he received further information which the Claimant claims is private and confidential (“the First Source’s Information”) and which the Claimant has not disputed. This information is conveyed in a single short sentence.
5. At 17:12 that day the solicitors sent to the Legal Department of the Defendant a letter headed “Private and Confidential Not for Publication”. It set out certain matters, including matters relating to the Claimant’s health, all of which they said are private (“the Solicitor’s Information”), and they required an undertaking from the Defendant not to publish these matters. Failing an undertaking by 18.00, the solicitors wrote that they would apply for an injunction. I infer that the solicitor did not know at 17.12 that Mr Savage had by then learnt the First Source’s Information. The letter refers only to the inaccurate information which Mr Savage had previously asked about.
6. At 18.11, upon receipt of that letter Ms Patterson, the Head of the Legal Department for the Defendant, spoke to the Claimant’s solicitors, and declined to give the undertaking. There is a difference between the parties to that call as to what was said. According to Ms Bond Ms Patterson said that as things stood the Article would be going to press as planned. In an e-mail sent on Saturday 11 February Ms Patterson

denied that she had said that. She states that what she said was that the newspaper was not prepared to give an undertaking as demanded in the letter of 10 February, that she did not mention publication at all. She states that there was no article at that stage, and that all that the newspaper was doing was seeking comments. She said there was no threat.

7. Mr Savage carried out further research from a public source (“the Second Source’s Information”). The authenticity of this information is not in dispute, but there is an issue as to the accuracy of some of it.
8. On the afternoon of Saturday 11 February 2012 the Claimant, represented by Mr Dean, made an application to Lindblom J, the judge hearing out of hours applications. The application was made on short notice to the Defendant, who were represented by Ms Michalos. The Judge heard the application in private and delivered his judgment in two forms. He delivered a judgment at about 19.30, orally, which was written down by the parties and has been approved by Lindblom J. That form of the judgment remains private, and has been included in the papers before me. The Judge then prepared a redacted form of that judgment which he handed down in public on 15 February [2012] EWHC 239 (QB).
9. The proceedings were conducted in accordance with the Practice Guidance on Interim Non-Disclosure Orders issued by the Master of the Rolls in August 2011. For the reasons set out in his judgments Lindblom J granted an injunction in terms which followed closely the Model Order attached that Guidance, to last until 16 February, the date of the hearing before me. There were derogations from open justice to protect the information which he held to be private and confidential, and he prohibited disclosure of information referred to in the Confidential Schedule, which is defined as “the Information”. The witness statements, and statements of case are referred to as the “Hearing Papers”, and is protected from disclosure by one of the standard provisions in the Model Order. The Judge declined to grant the Claimant anonymity.
10. The open part of the Confidential Information states that the Information referred to in the Order is “Any information or purported information concerning: [two matters which are redacted from the public version of the Order]. (emphasis added) The words “any information” are included, because it would be difficult to frame an injunction that prohibited something less. But it sets a high threshold for an applicant.
11. The redacted definition is expressed in wide terms. The Information as so defined would be apt to include the First Source’s Information (although the draftsman may not have had that in mind), the Solicitor’s Information, and the information in the Hearing Papers (although that is specifically protected by paras 4-6 of the Order, which are substantially in the form of paras 10-12 of the Model Order). The Information so defined would also be apt to include the Second Source’s Information, subject to consideration of the Public Domain paragraph, which is para 9 of the Order, and is in terms similar to para 15 of the Model Order.
12. The only witness statement before Lindblom J on 11 February was that of the Claimant’s solicitor, Ms Bond dated 10 February. She does not refer to the Second Source’s Information in either of her witness statements, and I infer she had not been

made aware of that by the Claimant. The Second Source's Information was summarised in Ms Michalos's Skeleton argument and it was put before Lindblom J in full during the hearing. But Lindblom J did not have any evidence from the Claimant about that.

13. Lindblom J had been informed of the deadline by which a decision was required. Sunday newspapers go to press early on Saturday evening. So if no decision was reached by the deadline, the newspaper would in practice be prevented from publishing by default. That is not an acceptable outcome, so Lindblom J had to work to the deadline. Both counsel are very experienced and knowledgeable in this field of the law, and both had been able to prepare very detailed submissions, notwithstanding the very short time available for preparation.
14. On Sunday 12 February 2012 the newspaper published a story under the title "We are gagged by Cabinet MP: Minister wins injunction". In the text it explained that Mrs Spelman was named in the proceedings as the litigation friend, not a claimant in her own right. The article is illustrated by a photograph of the Claimant, and states that he is at a boarding school and has two siblings. The rest of the article is about Mr and Mrs Spelman and about non-disclosure injunctions generally.
15. On 14 February the Claimant's solicitors wrote to the Defendant complaining that the use of the photograph was an infringement of the Claimant's copyright, and inappropriate because he was aged 16 at the time. The photograph is derived from the Second Source's Information. There has been no suggestion that the Defendant was in breach of the injunction.

THE HEARING ON 16 FEBRUARY

16. The evidence in the case before me is different from the evidence that was available before Lindblom J. And I have not had to work to a deadline.
17. There are, in addition to the first witness statement of Ms Bond, the first witness statement of the Claimant dated 13 February (this exhibits and contains his comments upon the Second Source's Information); the witness statement of the Claimant's father dated 14 February (this relates to the Claimant's circumstances, including his health and well being); the second witness statement of Ms Bond dated 15 February (this exhibits letters from the Claimant's school and the RFU which each support the application for an injunction); the second witness statement of the Claimant dated 15 February (this relates to his circumstances, health and well being); the witness statement of Mr Morgan, the Editor of the Daily Star Sunday, dated 16 February, and the witness statement of Mr Savage dated 15 February.
18. A summary of the evidence for the Claimant, and other matters which cannot be referred to in this judgment, is set out in a Closed Judgment.
19. The Closed Judgment is in two parts. The purpose of doing this is to enable this judgment to be published. This judgment addresses matters of law which have not previously been considered by the court. It is a requirement of open justice and public

accountability of the courts that the application of the law to new factual circumstances should be made available to the public.

20. The Closed Judgment Part 1 contains information which may be published if there is no appeal from this judgment. If there is an appeal, then that information cannot be published until the appeal is determined, and any future publication of it will be the subject of an order of the Court of Appeal.
21. The Closed Judgment Part 2 contains a summary of the Solicitors' Information and the Hearing Papers, and so cannot be published at all unless either the Claimant gives consent in writing, or the Court gives permission.
22. Mr Morgan, in his witness statement dated 16 February, states that the newspaper is seeking to overturn this injunction in the public interest. He states that

“2. ... we have a genuine and strong belief that publication is in the public interest. This is not only my personal belief as Editor but the view of the investigating journalist and editorial team. There is a clear public interest in this story being reported, highlighting as it does, the pressures on elite athletes from the very beginning of their sporting careers. The facts of [the Claimant]'s story act as a warning ...

4. ... Jonathan is a young international sportsman at the beginning of a promising career in rugby. His story is one that speaks to any sports man or woman that hopes to build and maintain a career at the top of their game. Although he is only 17, he is already a role model to other youngsters who aspire to follow in his footsteps and play for their country...

10. This is a much bigger public interest issue than the fact the Claimant is the son of a Conservative politician. Sport operates on a hierarchical structure and those playing rugby at school today are the elite and professional rugby players of tomorrow. Exposing ... pressures on those who are young at elite level informs and educates those below at grass roots level and helps to promote a culture in the public and in sport ...”.

23. In support of his case on the public interest Mr Morgan exhibits a number of documents issued by a sporting body and cuttings from other newspapers.
24. Mr Morgan also explains the effect of the injunction, as follows:

“14. The injunction was granted on Saturday preventing publication in the Daily Star Sunday on 12 February 2012. As I elaborate further below, Sunday titles are in a particularly invidious position if an injunction granted at the weekend is overturned at a further hearing later in the week. This is because the prohibition is removed during the working week and it is all daily titles that have the

opportunity to report. The Sunday paper loses its exclusive. I make this point because I cannot stress enough that the Daily Star Sunday and Express Newspapers are contesting this injunction on an important point of principle and in support of the right of freedom of expression and not for any commercial reason. In fact, there is every commercial incentive not to spend money on legal fees where even success brings no direct benefit to the paper.”

- “15. The resulting injunction has already cost a considerable sum in wasted hours and delayed production. The granting of the injunction on Saturday 11 February, after a long hearing in front of HHJ Lindblom which concluded at about 7.30 pm, meant that the Daily Star Sunday were unable to be the first paper to run this exclusive. The late-running hearing meant that pages were sent later to the printers than intended, with the knock-on effect of delayed delivery trucks and late papers in the shops.
16. Exclusive stories are the very lifeblood of the Sunday press. The commercial imperative of the exclusive should not be underestimated at a time Britain’s newspapers are fighting for their very survival. One only has to listen to the evidence that has been given to the Leveson Inquiry as regarding falling circulation and commercial pressures on the print media.
17. Should the injunction be discharged on Thursday 16 February, every daily newspaper will be free to run the story. They will have the facts freely to hand, courtesy of being put on notice by the injunction. This will inevitably always happen in the case of a Sunday paper, unless a Court can be persuaded to hold a return date on a Saturday afternoon – which is, I assume, unrealistic. Even lifting an injunction on a Friday, means that the Saturday papers can report on a story, a large part of the value of which typically will be the exclusive aspect. I must emphasize that this is certainly not the overriding aspect in this case. The overriding aspect is, as I have said, the public interest in publishing a story that I, and my staff, feel strongly the public have an interest and right to know. However, I feel it is important to explain to the court that there is actually very little commercial incentive to defend this injunction for these reasons.
18. The easiest and cheapest solution for the paper in this case is to accept the interim injunction and walk away irrespective of our views. We are here because we believe this sets an important and wrong precedent and the injunction should be overturned. This case involves serious issues that matter to

the public and not trivia. I personally believe to injunct information of this character is a serious fetter on the press's right of freedom of expression and its function as a watchdog.

19. The net result of this is that our exclusive is now no longer our exclusive, however, we are determined to pursue the matter as we think it vitally important the story be told.”

25. As to the allegation that the newspaper is engaged in an attack on Mrs Spelman he states:

“5. I understand that Mark Spelman claims in his witness statement that he believes the intention of the Daily Star Sunday is to attack his wife, a Cabinet minister, using their son as weapon and that our purpose is “nakedly political”. This is absolutely untrue. Of course, I accept that the identity of Jonathan's mother adds a further dimension of public interest to this story but it is only an incidental dimension.”

26. Mr Morgan gives only this indication of what he says would be the approach of the newspaper if the injunction is discharged:

“20. The Court should not be misled into thinking that publication will or is likely to lead to a press pack descending upon the Claimant or disruption of his studies by numerous journalists door-stepping him at school. This is to wrongly present the press in cartoonish terms and is not grounded in reality. There may be some press interest in the story following any publication,

21. Jonathan Spelman's story will not cause sustained or unreasonable press interest in him personally. This is essentially a news story about the particular facts of his case rather than something likely to generate ongoing media interest in him as an individual. It is unrealistic to think that Jonathan Spelman needs to fear the worst excesses of harassment alleged by some celebrities at the Leveson Inquiry if the facts were made public. While the debate ... is likely to rage for years to come, Jonathan Spelman's case is just the latest chapter in this story. He is of no interest to the press beyond the limits of this particular story and there is no reason for him to fear sustained intrusion into his school and personal life.

22. The PCC has a very effective pre-warning system, to which we as a newspaper still adhere, whereby those subject to unwelcome press attention can put out a warning to all media at the outset to the effect that they do not wish to be photographed or make any comment. This has the effect of a warning shot

and most responsible members of the press will respect the warning. In practical terms, this means that national newspapers are unlikely to disobey a PCC warning. This should allay the fears of Jonathan's parents, who are used to dealing with the press in any event.

23. Finally, it is worth noting that Jonathan Spelman has accompanied his mother on various political outings and campaigns and will not be as unused to the press as others may be."

27. Mr Savage, in his witness statement dated 15 February, states that the tip off that he received on 8 February came from a member of the public unconnected to the RFU, the Claimant's school or Harlequins RFC, and that it was not a breach of confidence or sourced from the Claimant's "inside circle". He states that some relevant facts about the Claimant, which he refers to as "the story" were circulating in rugby circles and were not being treated as confidential.

THE GENERAL LAW OF PRIVACY AND FREEDOM OF EXPRESSION

28. The starting point is the Human Rights Act 1998. By s.6 the court (as a public authority) is required to act compatibly with Convention Rights. By s.1(1) the court is also required to take into account judgments of the European Court of Human Rights ("the Strasbourg court"). That is what Parliament, not the judges, has decided. The Convention rights in question in this case are the rights to freedom of expression of the newspaper, and the right of the general public to receive information, which are protected by Article 10 and by the common law, and the right to respect for private life which is protected by Art 8. So far as material to the present case these provide:

Article 8 right to respect for private and family life

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

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others.

Article 10 freedom of expression

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

(2) The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection

of the reputation or rights of others, for preventing the disclosure of information received in confidence ...

29. The exceptions in Article 10 relating to the protection of the reputation or rights of others and the disclosure of information received in confidence can apply only where conditions are satisfied. The restrictions must pursue a legitimate aim or aims, and be necessary in a democratic society for the protection of the legitimate aim or aims: the protection of the reputation or rights of others, or for preventing the disclosure of information received in confidence. They must also be proportionate to the end pursued, securing what is necessary for the protection of these aims and no more.
30. In accordance with the guidance given by the House of Lords in *Re S (A Child) (Identifications: Restrictions on Publication)* [2005] 1 AC 593, Lord Steyn at [17], the correct approach to the balancing exercise where both Article 8 and Article 10 rights are involved is that: (i) neither Article as such has precedence over the other (ii) 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; (iii) the justifications for interfering with or restricting each right must be taken into account; (iv) finally, the proportionality test – or "ultimate balancing test" – must be applied to each.
31. When deciding whether information is in principle protected by Article 8 and, if so, whether Article 8 must yield to some countervailing right or rights, the Court considers the matter in two stages:
 - i) The first question is whether there is a reasonable expectation of privacy. This is the threshold question, and it is an objective test. See *Murray v Express Newspapers plc* [2009] Ch 481, where Sir Anthony Clarke MR said at [35]-[36]:

"35. ... The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell v MGN Ltd*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity."...

36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

- ii) If and only if that question is answered in the affirmative, the Court proceeds to the second part of the two-stage approach which is laid down by the authorities. See *Murray v Express Newspapers plc* [2009] Ch 481, [27], namely

“whether in all the circumstances the interest of the owner of the information must yield to the right of freedom of expression conferred on the publisher by article 10?”

32. It is also clear from the authorities that the correct application of this approach requires the Court to give separate consideration to different items or classes of information. See, for example, *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, Sir Anthony Clarke MR at [37].
33. In addition, because the relief sought will affect the Convention right to freedom of expression of the Defendant and of any third parties who are served with the injunction, s12 HRA applies. This includes the following:

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

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

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

(a) the extent to which-

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

34. As to s12(3) HRA, the correct approach appears from decision of the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, [22]-[23]. As at the time of a hearing such as the present hearing, the threshold requirement that the applicant for an injunction must satisfy is generally that it is "more likely than not" that s/he will be able to establish at trial that publication should not be allowed:

"As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should

be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights."

35. Turning next to s12(4) HRA, so far as concerns journalistic material, the Court is required to have regard to the PCC Code of Practice is such a code (it is accepted by the Defendant that I should have regard to it). Relevant provisions of it include the following:

“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.

6* Children

- i) Young people should be free to complete their time at school without unnecessary intrusion.
- vi) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

* The public interest

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

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

- i) Detecting or exposing crime or serious impropriety.
 - ii) Protecting public health and safety.
 - iii) Preventing the public from being misled by an action or statement of an individual or organisation.
2. There is a public interest in freedom of expression itself....”

36. Mr Morgan said this about the PCC Code in his witness statement:

“12. The Daily Star Sunday, and Express Newspapers, is not now a member of the Press Complaints Commission. However, the Daily Star Sunday strictly adheres to the Editor's Code of Practice and we take our responsibilities to our readers and subjects of our stories very seriously. All journalists comply with the Code and our legal advisors advise us as to compliance.

13. Our commitment to abide by the Code is clear in this case, where we have followed the Code in all matters from the very start. Our actions have included giving full, prior notification of the story. This is not a case where we elected to run a story

without prior notification; we acted properly and responsibly as explained in Tom Savage's witness statement."

37. On an application for an interim injunction the effect of s.12(3) is that it is for the applicant to satisfy the court that he is likely to succeed at trial.
38. One well known case on the media and confidential information is *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892. At p 989 Sir John Donaldson MR (as he then was) expressed views similar to those which have been adopted by the Strasbourg court on the importance of contributing to public debate, not just for the exposure of wrongdoing, but also for campaigning for reform. He said:

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

39. But Mr Dean relies on the immediately following words of Sir John Donaldson MR said:

"However, they are peculiarly vulnerable to the error of confusing the public interest with their own interest. Usually these interests march hand in hand, but not always. In the instant case, pending a trial, it is impossible to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or to the Jockey Club. Any wider publication could only serve the interests of the Daily Mail".

40. The information about that case which is relevant to the present case can be derived from the following extracts from the headnote:

"Unidentified persons tapped telephone conversation made to and from the plaintiffs' home. The eavesdropper offered for sale to a national newspaper tapes of the telephone conversations which it was alleged revealed breaches of the rules of racing by the first plaintiff, a well-known jockey. The plaintiffs became aware of the existence of the tapes when two journalists employed by the newspaper approached the first plaintiff to confirm the authenticity of the tapes. Thereupon the plaintiffs issued a writ against the newspaper, its editor and the two journalists claiming, inter alia, damages for breach of confidence.... On appeal by the defendants: Held,... (2) That, since the questions of what use might be made of tape recordings which had been obtained by illegal telephone tapping and whether there was an action against the defendants for breach of confidentiality and, if so, whether the defendants

would have a defence of disclosure in the public interest would be in issue at trial, publication of the contents of the tapes pending trial would prejudice the plaintiffs' claim; that to preserve the rights of the parties the injunction restraining publication should be continued until trial but that its terms should be varied so that it would be open to the defendants to apply to the appropriate minister for permission to disclose all the information obtained to the police or the Jockey Club..."

41. In most cases claims against newspapers for breach of confidence or rights of privacy very rarely proceed to trial. For reasons given by Mr Morgan, it is in many cases not even economically justifiable for a newspaper to oppose an application for an interim injunction. And in the present case, there is no suggestion that the police ought to be involved.
42. But Ms Michalos submits that Mr Dean read too much into the passage cited. She submits that the issue is not whether the public interest can theoretically be satisfied in other ways by the disclosure in private to an appropriate person: the issue is whether proposed publication is lawful in the light of the public interest in freedom of expression. It cannot be in the public interest to place the decision when and what to publish about matters which are, or might become, the subject of an investigation by some private body, whether a school or a regulatory authority, solely in the hands of that body. Such a restriction would be a serious fetter on freedom of expression and limit the media in their function of watchdog in a democratic society.
43. In that case the Jockey Club would have been concerned if there had been a breach of the rules of racing (p899B), which is not private information in so far as it might lead to suspension by that body of a person from the public activity of participating in sport at a national level. They should be accountable to the public for the same reasons as courts are required to be accountable. For the courts accountability is ensured by a number of legal provisions, amongst the most important of which are those relating to open justice.

PUBLIC FIGURES AND PRIVACY

44. In the law of privacy there has been some recognition in the authorities of the concept of a public figure, defined as those who exercise public or official functions.
45. In *Campbell v MGN Ltd* [2004] AC 457 Baroness Hale said at [158-159]:

"The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures..."
46. *Campbell* was a very different case on its facts from the present. It was assumed that Ms Campbell had committed a criminal offence. And she was not a child. There is no suggestion in the present case that the Claimant has committed any offence. Moreover, the information in that case had already been published, and the judgments

were given on a trial and appeals. It was not an application for an interlocutory injunction. So the court knew exactly what information had been published. The outcome of the case in the House of Lords depended crucially upon the precise form that the article complained of had taken. This is not something that could have been known if an application had been made for a pre-publication restraint. The case shows that a court being asked to grant an interim injunction before the words to be complained of have been written may not be in a good position to assess whether what may be published is likely to be information which, at trial, the court would hold should not be allowed.

47. But the scope of what was accepted in *Campbell* as being covered by a reasonable expectation of privacy is informative. It is set out at para [22] of the judgments and I bear it in mind. Lord Nicholls at para [23] expressed no reservations about the approach adopted by the parties.
48. The majority opinion in *Von Hannover v Germany* (2004) 16 BHRC 545; (2004) EMLR 21 stated (among other things) the following:

"(1) a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'imparting information and ideas on matters of public interest' it does not do so in the latter case" [63];

(2) ... the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest" [76]".

49. This test of contribution to a debate of general interest was adopted by the Court of Appeal in *Ntuli v Donald* [2011] 1 WLR 294 at para [20]. It has recently been re-affirmed by the Strasbourg Court in *von Hannover v Germany (no 2)* [2012] ECHR 228 (7 February 2012) at para 109 and *Axel SpringerAG v Germany* [2012] ECHR 227 (7 February 2012). In that case the Court cited the Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy. It refers specifically to sport:

"6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society -

in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.”

50. The Court expressed its own view as to the importance of public debate about sport as follows:

“90. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes (...), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007 [“an issue of general interest, namely society's attitude towards a sports star”]; ...).”

51. Since no illegality is alleged in the present case, there need be no concern as to the interference with the course of justice, or contempt of court. But even if there were such a risk, that would be a matter to be considered as a matter of public law. It would not advance the Claimant’s case in privacy. So I pay no regard to suggestions made in evidence that if there were no injunction, and there were then some publicity in the press, that might have any relevant impact upon the course to be followed by anyone with responsibilities concerning the Claimant.

52. This view is fortified by the recognition that, even if there were pending criminal proceedings, that might not suffice to prevent any pre-trial disclosure about the case. In *Axel Springer* the Court expressed the following opinion on the discussion of the subject matter of trial before the trial had taken place:

“79. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”....

80. This duty extends to the reporting and commenting on court proceedings which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. It is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large...”

CHILDREN AND PRIVACY

53. Children enjoy no general right to privacy simply by reason of their age. But the law has always recognised that in particular circumstances children may be entitled to protection from publicity where an adult would not be. There is much legislation and case law on the proper approach to be taken by the court in cases involving children. Before the HRA there were a number of different authorities on the approach the court should take where the rights of a child had to be balanced against the right of freedom of expression. But it is no longer necessary to refer to those cases, since the position of children can be allowed for under Art 8: see *In Re S* at para [23].
54. As Lord Clarke said in *Murray*:
- “[45] ... The fact that he is a child is in our view of greater significance than the judge thought. The courts have recognised the importance of the rights of children in many different contexts and so too has the international community: see eg *R v Central Independent Television Plc* [1994] Fam 194 per Hoffmann LJ at 204-5 and the United Nations Convention on the Rights of the Child, to which the United Kingdom is a party. More specifically, clause 6 of the Press Complaints Commission Editors' Code of Practice contains this sentence under the heading Children... If a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the media, so too should the child of a famous parent. In our opinion it is at least arguable that a child of 'ordinary' parents could reasonably expect that the press would not target him and publish photographs of him.”
55. *Murray* is a very different case from the present one on its facts. The child in that case was an infant in a push chair, not a 17 year old with a personality and public profile of his own.
56. Mr Dean referred to the Children and Young Persons Act 1933 s.39 and other statutory provisions relating to criminal proceedings in which the court is empowered to protect children from publicity. I do not find these add anything to what Lord Clarke said in *Murray*. As Lord Steyn said in *In re S*, after referring to that provision:

“21 ... section 39(1) is not engaged in the present case. My reason for referring to it is, however, the reflection that, in regard to children not concerned in a criminal trial, there has been a legislative choice not to extend the right to restrain publicity to them. This is a factor which cannot be ignored....

26. While article 8.1 is engaged, and none of the factors in article 8.2 justifies the interference, it is necessary to assess realistically the nature of the relief sought. This is an application for an injunction beyond the scope of section 39, the remedy provided by Parliament to protect juveniles directly affected by criminal proceedings. No such injunction has in the past been granted under the inherent jurisdiction or under the provisions of the ECHR. There is no decision of the Strasbourg court granting injunctive relief to non-parties, juvenile or adult, in respect of publication of criminal proceedings. Moreover, the Convention on the Rights of the Child, which entered into force on 2 September 1990, protects the privacy of children directly involved in criminal proceedings, but does not protect the privacy of children if they are only indirectly affected by criminal trials: articles 17 and 40.2(vii); see also Geraldine Van Bueren, *The International Law on the Rights of the Child*, 1994, 141 and 182. The verdict of experience appears to be that such a development is a step too far.

27. The interference with article 8 rights, however distressing for the child, is not of the same order when compared with cases of juveniles, who are directly involved in criminal trials.”

THE LAW OF DEFAMATION

57. Ms Michalos invites consideration of the law applicable in cases of defamation.
58. A claimant may sue in libel if the defendant threatens to publish words about himself which are defamatory of him. For present purposes the definition of "defamatory" can be taken to be words that tend to lower the claimant in the estimation of right thinking members of society. Applications for injunctions in defamation are rarely successful for a number of reasons.
59. One reason is that until the words are published the court is unlikely to know whether they are capable of being defamatory or not. It is possible to write about almost any topic in a way that is not defamatory, even if the claimant would prefer that nothing was said at all. And at the stage of an application for an injunction, even if the words are known, the judge cannot rule on the actual meaning of any words. The most the judge can do is rule that words are incapable of being defamatory, if that is the case. Whether they are actually defamatory or not is a question for the trial. If they are defamatory, and substantially true, there will be a complete defence. So no injunction will be granted, because no wrong has been done. See *Bonnard v Perryman* [1891] 2

Ch 269, and *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1642; [2005] QB 972.

60. In the present case the newspaper has not said what it would wish to publish, and it is under no obligation to do so. There is no dispute about the only fact in the First Source's Information. So if it were threatening to publish that fact in words which were defamatory, it would plainly have an arguable defence available to it.
61. As to the Second Source's Information, there is no dispute that it is what it purports to be. The Claimant has said that it is not all accurate. But the newspaper does not accept that any of it is inaccurate. There are reasons why it is entitled to take that view at this stage, which Ms Michalos explained to me.
62. In these circumstances, Ms Michalos is clearly correct when she submits that this is a case in which the Claimant could not obtain an injunction on the basis of defamation.
63. Mr Dean does not submit otherwise. He submits that defamation is not the cause of action which the Claimant relies on, and he does not have to rely on it. The fact that a claimant cannot obtain an injunction in defamation is no reason why he should not be granted one in privacy, if he would otherwise be entitled to it.
64. There is some uncertainty as to whether, and if so when, a court should refuse an injunction on the basis of *Bonnard v Perryman* when it is sought by a claimant who advances his case only on the basis of privacy.
65. For reasons set out below, this case does not require that I resolve the important issue of principle raised by Ms Michalos.

THE ATTRIBUTES OF THE CLAIMANT

66. Mr Dean submits that the critical attribute of the Claimant is that he is just 17. Ms Michalos submits that that is less critical than it might be, because he will be 18 in less than a year. And she submits that his critical attribute is that he is a sportsman who has played, and who aspires to play, at national and international level.
67. Children (other than heirs to a throne) rarely appear as public figures in politics. But in sport and the performing arts they appear very frequently. Some athletes win an Olympic Gold Medal or a Tennis Championship while aged 16 or under. Some sports are dominated by competitors under 18. Even in sports where peak performance is reached in a person's 20s or 30s, it is necessary for aspiring performers to start their dedication to the sport as children. Much the same is true in many of the performing arts. Children can be world class performing artists, and performing artists often are children.
68. The material benefits to those few children who succeed at the highest level can be fabulous. But these benefits may come at a high price. It is a matter of common knowledge that the effort to achieve the highest honours in sport can damage a person's health and family life, and lead to an early death, or even to a life of misery when careers end early and in disappointment. But the price in terms of health and happiness may be paid even by the less successful performers (being the

overwhelming majority, of course) without their ever obtaining the material or other significant benefits.

69. It is to these matters that I understand Mr Morgan to be referring when he speaks of the public interest. But it seems to me that Ms Michalos is right to submit these are matters which are relevant at the earlier stage of the inquiry, namely as to the extent of the Claimant's reasonable expectation of privacy. As Ms Michalos submits, those engaged in sport at the national and international level are subject to many requirements which are not imposed on other members of the public. Matters relating to their health have to be disclosed and monitored, and they may have little if any control over the extent to which such information is disseminated. It is a condition of participating in high level sport that the participant gives up control over many aspects of private life. There is no, or at best a low, expectation of privacy if an issue of health relates to the ability of the person to participate in the very public activity of national and international sport.
70. The diminution of the reasonable expectation of privacy in the world of participants in public sports and performing arts cannot be confined only to those who achieve the highest levels. They reach the highest level by ascending from the lower levels. The restriction on what might otherwise be a reasonable expectation of privacy may well apply to those who aim for the highest level, even if they do not achieve it, or can no longer expect to achieve it.
71. What the Claimant describes in his witness statement about the general circumstances of his life is what any informed observer would expect, even though such things are not so often talked about. Before his injury he spent 30 to 40 hours each week in training. This is time he spent in addition to the time devoted to preparing for his school exams. So he had little social life with his contemporaries outside his sport. If he cannot train, he loses both the main interest in his life, and most of his friends at the same time, because they are boys who train as he does.
72. In my judgment Ms Michalos is clearly right on the relevance of the Claimant being a child. The fact that the Claimant is a child is of limited support for a claim for an expectation of privacy, for both the reasons she gives. He is nearly 18. And even if he were still under 16, as he was when he first played for England, his status as an international player means that discussion of his sporting life, and the effect that it may have upon him, is discussion that contributes to a debate of general interest about a person who is to be regarded as exercising a public function.

THE POSITION OF THE CLAIMANT'S MOTHER

73. Mr Mark Spelman refers in his witness statement to the article published on 12 February. He states that:

“It appears to me that the paper is seeking to attack my wife and is using my son... as a weapon to do so ... the purpose of the paper's interest is nakedly political”.
74. Mr Dean relies on the article published on Sunday 12 February 2012 in support of that.

75. Exhibited to the witness statement of Mr Morgan there are a number of articles published in the press (although not by this Defendant) about another young sportsman, together with articles about the same person in a publication issued by a sporting body. The circumstances of that case are not the same as this case. But this evidence illustrates the submission that I find to have a real prospect of success, namely there could properly be a story about the Claimant which a newspaper might well wish to publish, regardless of who the subject's parents might be.
76. Moreover, the story on Sunday 12 February was not primarily about the Claimant. It was about this litigation. Although the Claimant is the person in whose name this action is brought, and his parents are named as litigation friends, this reflects the view taken by the law that children are not competent to conduct litigation alone, and that decisions must be taken by their parents or other appropriate adults. That Mrs Spelman is named in the title to the action is not a mere formality. It could hardly be supposed that he could bring these proceedings otherwise than on the advice of his parents.
77. Applications for injunctions to restrain the disclosure of private information are a matter about which newspaper publishers have strong views. They are entitled to hold and to express views on this topic. An application for an injunction can be reported except in those very rare cases where the court's order prohibits such a report. A report must not intimidate a litigant, or otherwise interfere with the course of justice. But it is not alleged in this case that the article of 12 February is in breach of the law.
78. In so far as it is part of the Claimant's case what the newspaper are proposing to do would be in breach of the PCC Code para 6(i) or (vi), it does not appear to me that that contention is likely to succeed.

THE NATURE OF THE ACTIVITY IN WHICH THE CLAIMANT WAS ENGAGED

79. There is little that can be said in an open judgment, other than that the activity with which this action is concerned was related to the Claimant's sporting achievements and aspirations. Details are set out in the Closed Judgment.

THE PLACE AT WHICH IT WAS HAPPENING

80. The place was private. But the effects could not be confined to one place. And it could not be said that there would be no potential effects on other people. In the world of sport, performers do not perform in isolation.

THE NATURE AND PURPOSE OF THE INTRUSION

81. It is an important feature of this case, as it is of most pre-publication injunctions, that the nature of the intrusion sought to be prevented cannot be known.
82. There are different components to the right to privacy. One is the preservation of secrecy, and another is intrusion, sometimes in the form of harassment. In some cases the only issue at stake is secrecy, in others it is intrusion. The witness statements for the Claimant put much emphasis on intrusion.

83. It is understandable that an applicant in the Claimant's position should be concerned at the risk of intrusive and distressing press coverage. There have been a number of recent examples of that. But it is one thing for the court to find that articles that have been published in the press constitute unlawful intrusion, harassment or libel. It is another for the court to be asked by an applicant to find that that is what is what is likely to happen if no injunction is granted. Sometimes past publications in the press or on the internet support a finding that that is what is likely to happen if no injunction is granted. But in the present case there is no evidence that that is what is more likely than not to happen. It is something which may happen.

THE ABSENCE OF CONSENT AND WHETHER IT WAS KNOWN OR COULD BE INFERRED

84. This is a difficult issue in the present case. Clearly the Claimant is not now consenting to any publication. But the Second Source's Information entitles the newspaper to challenge the extent to which relevant information about the Claimant has been disclosed by him in the past, and how much disclosure he has consented to.
85. I think it more likely than not that the Claimant has made relevant information available to a significant section of the public in the past. And I am unable to find that it is probable that the Claimant will establish at trial that the information that he has made available in the past to at least a significant section of the public is information that is inaccurate.
86. As Ms Michalos submits, this is directly relevant to s.12(4)(a)(i) of the HRA ("the extent to which the material has, or is about to become, available to the public").

THE EFFECT ON THE CLAIMANT

87. The witness statements served for the Claimant make clear that any publicity, or further publicity, would be most unwelcome and is greatly feared by the Claimant, his parents and others responsible for his welfare.
88. What the effect would be must depend on the nature of any publication. But I accept that even sympathetic coverage would be unwelcome and hurtful, and would probably have a serious adverse effect upon the Claimant, at least temporarily.
89. Ms Michalos submits that the level of interference with the Claimant's private life is relatively low having regard to the extent to which rugby at the level to which he is accustomed to play is a public activity. The fact that he is not playing is already known. Further information relating to the circumstances of that would not be comparable to publication of information about the health of a person whose health is otherwise not a matter about which the public would ever be concerned.

THE CIRCUMSTANCES IN WHICH AND THE PURPOSES FOR WHICH THE INFORMATION CAME INTO THE HANDS OF THE PUBLISHER.

90. Ms Bond in her first witness statement said that the information sought to be protected "is likely to have been obtained by way of a breach of confidence". Mr Savage states that that is not the case.

91. Even without the Second Source's Information I would find myself unable to come to a finding that the information is likely to have been obtained by way of a breach of confidence. If the information could only have come from persons, such as employees of the school, who owe duties to the Claimant, then I would make that finding. But the "many of [the Claimant]'s contemporaries [who] know ..." (in the words of Ms Bond) have not been further described. It is not shown that they do owe him any duties. If a person does not owe to the Claimant contractual or other professional or social duties of confidentiality, a different duty of confidentiality can still arise from the nature of the information in question itself. And everyone is bound by the law of privacy.
92. But whether there has been a breach of a duty of confidentiality, or privacy, arising from the nature of the information in question (as opposed to a contractual, professional or other relationship of trust) depends upon whether there is a reasonable expectation of privacy, or a public interest in disclosure. That is the very question that I have to address in this judgment.

THE DIFFERENT CATEGORIES OF INFORMATION

93. There are the following classes of information relevant to the application before me: (1) the First Source's Information; (2) the Solicitor's Information (3) the Hearing Papers and (4) the Second Source's Information. In addition there is (5) information which the newspaper may acquire, or have acquired, other than that referred to in the papers before the court.
94. The submissions of Ms Michalos appeared to me to be based in part upon the information in the Hearing Papers. She submitted that it is in the public interest that much of this information be published. Although no submissions were addressed to me in relation to the different categories of information, it appears to me that there are difficulties about that approach. In my judgment even if Ms Michalos is right in her submissions as to reasonable expectation of privacy and the public interest, the newspaper would still require consent of the Claimant or the permission of the court to use this information.
95. In making the order that I made to sit in private I referred to the following passage in *Cream Holdings* at para [26]:

"I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt Echo's publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group

may ultimately be found to have against the Echo or Ms Banerjee in respect of matters the Echo may decide to publish.”

96. The witness statements to support the Claimant’s application for an injunction are subject to the protective orders relating to the Hearing Papers. In so far as it is contained in the Hearing Papers, the information is protected as such, and should remain protected from disclosure for the reasons given in *Cream Holdings*.
97. A claimant is entitled to have such protection for Hearing Papers because otherwise he could not bring an action at all without disclosing his private or confidential information, and so defeating the purpose of the proceedings. The effect would be that private or confidential information would have no legal protection at all.
98. Ms Michalos was, of course, able to rely on the Hearing Papers to argue that the Claimant had no reasonable expectation of privacy in the information that the newspaper does wish to publish, or otherwise to undermine the Claimant’s case in relation to that. If she is successful (as she has been before me), the newspaper would then not be restrained from publishing the First Source’s Information, and any other information which it is prepared to defend as not being private and confidential, or as being in the public interest.
99. For example, there is no restriction in any order on the use to which the newspaper can put the Second Source’s Information, because it obtained that from a public source. I note that it has not been argued before me for the Claimant that that information is confidential or private.

CONCLUSION ON EXPECTATION OF PRIVACY

100. I am unable to find that the applicant is more likely than not to establish at any trial that he has a reasonable expectation of privacy in relation to the First Source’s Information. Nor can I find that he is more likely than not to fail in establishing that. The likelihood of his success on this point seems to me to be somewhere between the two. Whether the Claimant has a reasonable expectation of privacy is an issue on which each side has a real prospect of success.
101. As to the Second Source’s Information, it has not been argued that the Claimant has a reasonable expectation of privacy in relation to this information. So I express no view on that.

PUBLIC INTEREST

102. It is not possible to discuss this issue in any detail in this open judgment. My conclusion is that the newspaper has a good prospect of establishing that if it were to publish some information of the kind that is sought to be prohibited, that would be in the public interest. Of course, much would depend upon the style of any article, and how intrusive or offensive it might be.
103. The information upon which I reach this conclusion is set out in the Closed Judgment.

104. I would also consider that there would be some force in an argument that the fact that the applicant is a child supports the view that discussion about him is, rather than is not, in the public interest. It might be said that Sir John Donaldson MR's words in *Francome* need not be confined to newspapers. Newspaper publishers are not the only persons about whom it can be said that they "are peculiarly vulnerable to the error of confusing the public interest with their own interest". All those who have responsibilities for children, in particular schools and sporting authorities, ought to, and generally claim to, give priority to the interests and welfare of children over their own interests. But experience has shown that many schools and other bodies with responsibility for children, while claiming to act in the best interests of children, nevertheless on occasions commit the error of confusing the interests of children (and the public interest) with their own interest. All institutions are vulnerable to the error of seeing the preservation of their own reputations as of particular importance, and to invoke the privacy and other interests of those for whom they are responsible in pursuit of that aim.
105. That is one reason why public debate about how such institutions perform their functions with regard to children is important. The likelihood of public debate of such matters provides an incentive to such institutions to give particular attention to the distinction between their own interests and the interests of the children for whom they are responsible.
106. I must make clear that in the present case no one has put in doubt that the school, or anyone else who may be involved, is doing their best to give appropriate priority to the welfare of the Claimant.
107. But what is appropriate priority, and what is for the welfare of children and young people, is itself a matter fit for public discussion. This can be seen from the history of the last 50 years. Opinions can change. Discipline by corporal punishment was almost universal in schools in England until the 1960s, and it was administered by many parents and school teachers who believed that it was in the best interests of the children. It has since come to be regarded as unacceptable. On the other hand, the demands made on children for the benefit of sport have increased very greatly over that period. Whereas in the past there was relatively little money to be made out of sport by anyone, sport has in recent years generated huge revenues, mostly from broadcasting and other intellectual property rights. So there is a risk that those responsible for organising national and international sporting activities may have interests that conflict with the welfare of the children who participate, or aspire to participate, in these activities.
108. So on the issue of public interest, again I find that each side has a real prospect of success.

DAMAGES AS AN ADEQUATE REMEDY

109. Where the court finds, as I have, that a claimant has a good arguable case, then in deciding whether or not to grant an interim injunction, the court must go on to consider what is sometimes called the balance of convenience, but what the Sir John Donaldson in *Francome* called the balance of justice. For this, it is often important to

consider to what extent damages, rather than an injunction, would provide an adequate remedy. In one sense damages are never an adequate remedy for a tort or for an interference with privacy. But the court law does not adopt as stark an approach as that.

110. In a case where the principle privacy interest at stake is the keeping of a secret, there is often a strong argument for saying that damages will not be an adequate remedy. Once a secret is known, that knowledge cannot be covered up.
111. However, there are privacy claims where the main issue at stake is intrusion, injury to feelings and other distress. In such case the position is less clear in relation to damages. The law commonly gives compensation for distress and injury to feelings, including in a libel action. The fact that a threatened defamatory publication would be highly distressing has never been considered a good reason for granting an injunction.
112. In *Mosley v The United Kingdom* - 48009/08 [2011] ECHR 774; [2012] EMLR 1 the Strasbourg Court has said this at para [120]:

“The Court further observes that, in its examination to date of the measures in place at domestic level to protect Article 8 rights in the context of freedom of expression, it has implicitly accepted that ex post facto damages provide an adequate remedy for violations of Article 8 rights arising from the publication by a newspaper of private information. Thus in *Von Hannover*, cited above, the Court’s analysis focused on whether the judgment of the domestic courts in civil proceedings brought following publication of private material struck a fair balance between the competing interests. In [*Armonas v. Lithuania* - 36919/02 [2008] ECHR 1526; [2009] EMLR 7], a complaint about the disclosure of the applicant’s husband’s HIV-positive status focused on the “derisory sum” of damages available in the subsequent civil proceedings for the serious violation of privacy. While the Court has on occasion required more than civil law damages in order to satisfy the positive obligation arising under Article 8, the nature of the Article 8 violation in the case was of particular importance.”

113. It is to be noted that *Armonas* was a case concerning information about health. In para [47] of the judgment in that case the Strasbourg Court said:

“in a case of an outrageous abuse of press freedom, as in the present application, the Court finds that the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and sufficiently deterring the recurrence of such abuses, failed to provide the applicant with the protection that could have legitimately been expected under Article 8 of the Convention”.

114. If a remedy in damages is to be an effective remedy, then the amount that the court may award must not be subject to too severe a limitation. Recent settlements in the much publicised phone hacking cases have been reported to be in sums far exceeding what in the past might have been thought to be available to be awarded by the courts. The sums awarded in the early cases such as *Campbell* were very low. But it can no longer be assumed that damages at those levels are the limit of the court's powers.
115. It is customary to have regard to the law and practice of other common law jurisdictions. It is less often that English judges have the opportunity of knowing the practice of national courts in other states which are our fellow Members of the Council of Europe, although since they are applying the same Convention law, it might be thought that their judgment would be no less relevant. However, this is possible in the present case. Judge Nicolas Bonnal, was formerly President of the *Chambre de la Presse* of *Tribunal de Grande Instance* in Paris, a position corresponding to that of the Judge in charge of the Jury List. He delivered a paper to a conference of the Franco-British Lawyers Society on the subject of "Privacy in an Open Society" held in London on 22 and 23 September 2011. He explained that in France prior restraint injunctions against the press are very rarely granted. Art 9 of the French Civil Code is in terms almost identical to ECHR Art 8. It provides:

"Everyone has the right to respect for his private life".

116. Judge Bonnal described the practice of the French courts as follows:

"2-1-2 The judge's main role: to prevent the intrusion or to make it cease

[1] In fact, the key factor which must guide the *juge des référés* [interim applications judge] when making a decision is the necessity and the proportionality of the measures ordered. What are these different measures, to which Article 9 suggests but gives a non-exhaustive reference? When the 'claim is made before the impugned publication, the judge may ban it. When it is made after the publication, the judge may order the seizure of all the copies of the newspaper. These two measures are fully in conflict with the freedom of expression. They imply that the damage that is being caused or could be caused by the publication is serious; and could never' be effectively compensated afterwards by merely awarding damages. It very seldom happens that they are ordered by the *juge des référés*. In eight years of exercise of this responsibility in the area of the freedom of the Press, I have never myself ordered a preventive ban or a seizure of a newspaper. And I remember, during those eight years, only one case of a seizure order: when a weekly magazine published, on its cover page, a photograph of the victim of a sordid and violent kidnapping, followed by a barbarous murder, a photograph that was considered to be a violation of the dignity of the victim and a breach of the privacy of his family, and which was published at the time of

the opening of the trial of the accused. I must add that this order was partially invalidated by the Court of appeal, one day later.

[2] A more famous case that comes to mind is the seizure of a book published by President Mitterrand's personal doctor, a few months after the president's death. This order was confirmed by the Court of appeal, and by the Cour de cassation. And this was again confirmed at all three court levels when a full hearing was heard. But, even if the European Court of Strasbourg [*Plon (Societe) v. France* 58148/00 [2004] ECHR 200; 42 EHRR 36)] found that there had been no breach of the freedom of expression (at least in the first order issued by the juge des référés, since it ruled that, after a period of time, the banning of the publication of the book was no longer justified), this case is not really typical: because what was at stake was not only the breach of the private life of the family of the dead president, but also a patent violation of medical confidentiality, and because of the aura left by Mitterrand after his death.

[3] The judge can decide on another measure, which is less a breach of the freedom of the Press and is not referred to in the open list given by Article 9: the judge can order the newspaper to publish, in the next edition, a statement mentioning the fact that the impugned publication was found by the judge to be a breach of the right to private life of the claimant. The judge will decide on the wording of the statement and more specifically, its size and the place where it must be published. This is still a limitation to the freedom of the Press, usually considered by the newspapers as the equivalent of a partial expropriation of their editorial content. And, again, the test, for the judge, is necessity and proportionality. Necessity to make known to the periodical's readers, while their memory of the breach is still vivid, that the impugned publication was made in violation of the rights of the claimant. And proportionality with the breach itself. An analogy can be made with what the Freedom of the Press Act of 1881 calls the right of reply, where every person named in a periodical or newspaper is allowed to get a reply published, in the same place, with the same characters as in initial publication. But this is only an analogy, since, as far as a breach of Article 9 is concerned, there is no express provision linking the place and size of the statement to the place and size of the impugned publication.

[4] On the contrary, the judge must be very cautious, since the publication of a statement on the best part of the front page has a very strong impact on the public and on the media to which it is imposed. And it cannot be undone. And the judge must be very precise about the definition of the aim the claimant is

pursuing when asking for such a measure. Sometimes, things are very clear, especially when the impugned publication may have left the reader under the impression that the person concerned had cooperated in making it: the statement is, in this kind of situation, useful, since it corrects this misrepresentation and contributes to causing the intrusion to cease. More often, the claimant considers the statement as part of the remedy he is seeking. And perhaps still more often, the claimant hopes that the action will have a deterrent effect. Which means we are far from the original role given by Article 9 to the juge des référés. The judge is already allocating damages for the loss or injury sustained.

[5] Before dealing with this extension of the role of the judge, I must give a last detail on the measures ordered to prevent the intrusion or to make it cease. Contrary to the basic rule of civil procedure, which limits the power of the judge to what is in the claim and prohibits any decision *ultra petita*, the juge des référés can decide freely which is the fairest and most relevant measure to order, and even when the claimant asks for a seizure, the judge may instead decide on the publication of a statement in reply, or modify the wording of the publication which the claimant is suing.

2-1-3 The [award] of damages

[1] Article 9 does not provide that the juge des référés may deal with damages for the loss or injury sustained resulting from the breach of the right to private life. But the judge, as I already mentioned, may combine the special provisions of this article with the general ones, which, *inter alia*, permits, when the existence of a duty cannot be seriously in dispute, the awarding of a payment in advance to the entitled party (Cass. Civ 1, 12 December 2000). On a very regular basis therefore, the claimant may ask the judge to order a payment in advance of the damages claimed. And, in this field of law as in many others, when the breach is obvious, so that it cannot be seriously disputed, the judge may order a payment in advance which will be as close as possible to the full amount of damages to be awarded as a means of putting an end to the dispute and preventing the interlocutory application from being followed by a full action before the Court. This happens very often, since the Cour de Cassation does not fix any limits to the amount of payment". (emphasis added)

117. It may be that some of the remedies fashioned by the French courts as substitutes for a prior restraint injunction could be developed in the English courts, for example an interim payment in respect of damages. No such attempt has ever been made, to my

knowledge. But whether they can or not, it appears that French law does not regard an injunction as the only effective remedy for interference with the right to private life.

118. The rules on Statements in Open Court have recently been extended to claims for misuse of private or confidential information (CPR Part 53 Practice Direction para 6.1(4)). Apart from injunctions and damages, there are other orders that a court can make where a defendant has agreed to pay, or be paid, for the disclosure of private or confidential information (although there is no suggestion of that in this case). In support of a claim for damages for breach of a fiduciary duty, or a claim in unjust enrichment, one form of order that has been made, but very rarely, is a restraint on receiving money due to be paid in respect of what is alleged to be a breach of confidence, or a Freezing Order in respect of money actually received. In *A-G v Blake* [2001] 1 AC 268, 277 the order that court had made against the traitor George Blake was:

“That the defendant George Blake be restrained until further order from receiving or from authorising any person to receive on his behalf any payment or other benefit resulting from or in connection with the exploitation of *No Other Choice* in any form or any information therein relating to security and intelligence which is or has been in his possession by virtue of his position as a member of the Secret Intelligence Service.”

CONCLUSION

119. Having regard to all the matters set out above, I have reached the conclusion that it is not necessary or proportionate to make an order restraining the defendant from disclosing any information relating to the Claimant of the kinds specified in the order made on 10 February, which the Claimant asks the court to continue.
120. This is not a licence to the defendant or anyone else to publish whatever they choose, or indeed anything at all. It is simply a decision not to grant an injunction. If the defendant or anyone else does disclose private information about the Claimant, then such disclosure may be the subject of a claim for damages, which may, in an appropriate case, include aggravated damages. The question whether or not what has been published is an interference with the Claimant’s right to privacy will then fall to be decided on the facts as they are then found to be. Any publisher who does choose to publish something about the Claimant will have in mind para 114 above.
121. For the reasons set out above, the Claimant’s application for the continuation of the interim injunction granted on 10 February will be dismissed.