Case No: HQ09X04089

Neutral Citation Number: [2012] EWHC 1601 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2012

Before:

THE HONOURABLE MRS JUSTICE SLADE DBE

- -

Between:

WXY		**Claimant**
- and -		
(1)	**Henry Gewanter**	**Defendants**
(2)	**Positive Profile Ltd**	
(3)	**Mark Burby**	

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

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Mr Aidan Eardley (instructed by **Archerfield Partners LLP**) for the **Claimant**
Patrick Green QC and Kathleen Donnelly (instructed under the **direct professional access scheme**) for the **Third Defendant**

Hearing dates: 20th April, 9th-11th May 2012

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Judgment

As Approved by the Court

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Mrs Justice Slade:

1. Judgment for the Claimant was given on 6th March 2012 in her claim against the Third Defendant, Mr Burby, for injunctive relief restraining him from disclosing or publishing her private or confidential information and from harassing her and for damages for breach of confidence, misuse of private information and harassment. An application by Mr Burby to set aside the judgment has been dismissed.

2. Following hearings on 20th April and 9th-11th May 2012 Mr Aidan Eardley for the Claimant and Mr Patrick Green QC for Mr Burby have helpfully identified the areas of the Draft Final Order which remain in dispute. These will be considered in two categories. First: whether material relating to items (2)(f), (k),(l) and (m), (3), (4) and (5) on the Confidential Schedule have entered the public domain so that further publication or disclosure of the information or allegations should not be restrained by injunction and whether such relief should be granted balancing the Claimant's Article 8 and Mr Burby's Article 10 rights. References in this judgment to paragraph numbers are to the Confidential Schedule unless otherwise indicated. Second, in the body of the order: what should be the territorial provision in all or part of paragraph 6, whether in paragraph 11 Mr Burby should be required to disclose the contact address of funders of his defence and the terms of liberty to apply provision in paragraph 17.

Confidential Schedule: Public Domain and balancing Articles 8 and 10

3. At trial it was held that none of the material on the Confidential Schedule had entered the public domain. Rightly both counsel based their submissions on the public domain issue in considering the final order in this case on material which came into existence after trial. In effect the parties relied on material which came into existence on or after the latter part of February 2012 when Mr Burby's Supplementary Evidence to the Parliamentary Committee ('the Supplementary Submissions') were put on the Parliamentary website.

Submissions of the parties

4. In the course of the hearing on 20th April 2012 Mr Green QC divided the items on the Confidential Schedule into four categories. In Category 1 were matters 'of quintessential privacy in which there can be no public interest in its disclosure'. In Category 2 were matters 'that would fall within Category 1 as being quintessentially private but so inextricably linked with another allegation that the other allegation has to be considered on its merits and a balance struck between both of them'. In the third category 'are those matters which, in their own nature, are both such as to engage the claimant's Article 8 rights and the third defendant's Article 10 rights, having both aspects of privacy and aspects which engage Article 10'. However, included in the fourth category were 'the matters [are] prima facie not only matters of freedom of speech but also of obvious public interest'. Mr Green QC submitted that the categorisation was material to striking a balance between ECHR Article 8 and Article 10 in deciding whether to grant injunctive relief.

5. Mr Green QC did not resist the grant of final injunctive relief in relation to Category 1 material in the Confidential Schedule. These were all items in (1), (2)(a), (b), (c), (d), (e), (g), (h), (i) and (j). He rightly agreed that the evidence did not support a contention that material relating to item (6) on the Confidential Schedule had entered

the public domain. There was no basis upon which a final order in relation to that matter could be resisted.

6. Mr Green contended that material which relates to the contested items on the Confidential Schedule has entered the public domain so that it is no longer private information and that final injunctive relief restraining its publication would be fruitless. In support of this contention Mr Green relied on material provided by Mr Burby and also that provided by Mr Bateman, one of the Claimant's solicitors. He contended that items (2)(k), (l) and (m) were matters of public interest although he agreed that public interest was dealt with in the judgment of 6th March 2012. Further, balancing the Claimant's Article 8 rights with Mr Burby's Article 10 rights to freedom of expression, Mr Green QC contended that injunctive relief should not be granted.

7. In a Note dated 5th March 2012, Mr Burby referred to the publication of his Supplementary Evidence and the 'worldwide media coverage' these had attracted particularly online but also in a print edition of a national newspaper. He relied on a letter from the Claimant's solicitors which asserted that if publication of Mr Burby's Supplementary Evidence continued then 'the injunction would be fully breached'. In support of his contention that matters which are in the Confidential Schedule to the interim injunctions and which are proposed to be included in the final order are in the public domain he produced screenshots of entries on three websites and stated that he would provide screenshots of further websites in advance of the hearing on 20th April 2012. No further copies of published material whether on websites or in newspapers was produced by Mr Burby. Mr Bateman, one of the Claimant's solicitors made a statement (his eleventh) on 18th April 2012 in which he set out

> "our understanding of what has appeared in the press and what can be accessed online via relevant search engine searches."

Mr Bateman exhibited the material which he had found.

8. Mr Green QC relied on nine postings by six individuals on a website, ('W1') made on 1st March 2012. They speculated on the identity of an individual related to items (2)(k), (l) and (m) on the Confidential Schedule. There was no evidence before the Court of the number of times the page was viewed either during the course of the exchanges on 1st March 2012 or since.

9. Mr Green QC next referred to a screen shot of a foreign website entry of 2nd March 2012 ('W2') which referred to an article in a national newspaper ('N1') which in turn referred to Supplementary Evidence given by Mr Burby to a Parliamentary Committee about the injunction against him obtained by an unnamed person. She was described by reference to her wealth and as having close connections to a foreign Head of State. He contended that this material related to items (2)(k), (l) and (m), (3), (4) and (5) on the Confidential Schedule. The next screenshot Mr Burby referred to was an entry of 7th March 2012 on a website ('W3') referring to the judgment handed down in these proceedings on 6th March 2012. The entry attached names to the Claimant and persons anonymised in those proceedings. Mr Green QC observed that as with the other website references, the number of hits on the site was not before the Court which is why he thought that more weight should be placed on the articles in the broadsheet newspaper and the websites of such newspapers.

10. The broadsheet material relied upon by Mr Green QC related to items (2)(k), (l) and (m) and also to solicitors' actions in relation to the postings on their website made by the Parliamentary Committee. The print articles appeared at the end of February and the beginning of March 2012. The name of a Head of State appeared in an online article of one newspaper, N2. The website entries of N1 related to items (2)(k), (l) and (m) and in one example to (5).

11. Mr Green QC agreed that the print documents referred to the Claimant generically without identifying her. The same generic terminology was used in each of the articles or web entries relied upon. The online version of one of the two newspapers whose article was relied upon appeared on its website at the end of February and was taken down by mid April 2012. Mr Green QC drew attention to one online article by N2 at the end of February which linked the Claimant who was generically described in all publications with a named Head of State. This article related to (2)(k), (l) and (m) material and (3).

12. Print editions and an item on N1's website at the end of February and the beginning of March 2012 referred to the Claimant's solicitors' alleged threats in relation to the Parliamentary Committee's website on which the Supplementary Evidence had been published. It also referred to threatened legal action against the newspaper. There was no information before the Court on how many people accessed these newspapers' websites or the relevant articles, however there were 14 comments on one online article published by N1 when looked at on 6th March 2012. When looked at again on 18th April some comments had been removed. Mr Green QC contended that this material was relevant to items (2)(k), (l) and (m).

13. Mr Green QC drew attention to the fact that an online article in mid April contained a hyperlink to the Supplementary Evidence given by Mr Burby. Accordingly it was contended that the evidence he gave to the Committee was in the public domain. There were other articles which had that hyperlink.

14. Further, Mr Green QC relied upon material obtained by Mr Bateman using a word search against WXY, 'who is WXY' and Mr Burby. By using one search engine one website was linked, on which the alleged names of some of the people anonymised in these proceedings were given. Mr Green QC contended that this material related to paragraphs (2)(k), (l) and (m) and (5) and (6) on the Confidential Schedule. A search using another search engine did not bring up the same results.

15. Mr Green QC contended that if the generic terminology used to describe the Claimant was put together with references to Mr Burby and the named Head of State, the Claimant could be identified. She had therefore been identified as the Claimant in these proceedings and publicly linked to items on the Confidential Schedule.

16. Because of lack of court time to respond orally to Mr Green QC submissions on the issue, Mr Eardley made written submissions on 24th April 2012 on whether matters related to items on the Confidential Schedule had entered the public domain.

17. Mr Eardley submitted that even if some material relating to items in the Confidential Schedule had received some publicity it was not so generally accessible that it could not be regarded as confidential. Relying on **Venables v News Group Newspapers Ltd** (Butler-Sloss J 4th April 2001 paragraphs 27-32) Mr Eardley submitted that the

requirement of general accessibility is only satisfied if the information is known by a substantial number of people. The requirement will not be satisfied where there is merely public speculation as to the nature of the confidential information rather than public factual statements of its contents as was explained in **BBC v Harper Collins** [2011] EMLR 6 at paragraph 56. Mr Eardley contended that the nature and reliability of the publication purporting to disclose the confidential information ought to be a relevant factor. The decision whether information has entered the public domain to the extent that it is no longer private or protectable depends on the particular facts and circumstances of the case.

18. Mr Eardley submitted that in certain respects a distinction is drawn by the courts between the protection of private and confidential information which has entered the public domain. In **OBG v Allan Ltd** [2008] 1 AC 1 at paragraph 255 Lord Nicholls held:

> "Privacy can be invaded by further publication of information or photographs already disclosed to the public."

19. Thus, it was submitted, it may be necessary to restrain publication notwithstanding substantial prior publication where the further publication would reach a different or wider audience causing further harm. Further Mr Eardley contended it may be necessary to restrain publication to the same audience, notwithstanding an earlier publication which is likely to have faded from memories. For example in **Douglas v Hello!** (No.5) [2003] EMLR 31 a final injunction was granted although that private information (contained in photographs) had been published to millions of readers of Hello! and the Sun. Mr Eardley contended that it may be necessary to restrain publication of private information even if it can no longer be regarded as 'secret'. Repeated publication of personal information can be intrusive and distressing and thus in breach of Article 8 even after the facts themselves have been widely publicised.

20. Mr Eardley submitted that in a privacy case the question is whether the point has been reached at which (whether in terms of preventing disclosure of 'secrets' or of preventing further intrusion) an injunction would serve no useful purpose taking into account that the purpose of a privacy injunction is to prevent intrusion as well as disclosure.

21. Mr Eardley contended that the public domain argument is not relevant to the consideration of injunctive relief to restrain harassment. Harassment injunctions may prohibit a defendant from doing that which may be done lawfully by anybody else. Information which is publicly available may be particularly dangerous in the hands of a defendant who threatens to pursue a course of conduct amounting to harassment.

22. In his skeleton argument of 19th April 2012, Mr Eardley developed an argument based on the exception to the public domain proviso in the Master of the Rolls' model order for interim non-disclosure:

> "For the avoidance of doubt, nothing in this Order shall prevent the defendants from publishing, communicating or disclosing such of the information, or any part thereof, as was already in, or that thereafter comes into, the public domain in England and Wales [as a result of publication in the national media] (other

than as a result of breach of this Order [of a breach of confidence or privacy]."

23. Having set out the principles governing Parliamentary privilege and evidence accepted by Select Committees, Mr Eardley submitted that:

> "42. These principles have the following consequences:
>
> (1) The court cannot (and is not invited to) make any adverse finding about the veracity, propriety or motives behind D3's publication of his first and second submissions to the Joint Committee (which the Committee accepted as evidence). Such issues are a matter for Parliament.
>
> (2) The court may, if it considers it appropriate, take into account and make adverse findings about:
>
> …
>
> (b) Any publication of D3's first and second written submissions, or reports thereof or commentary thereon, made by (or on behalf of) D3, outside Parliament;
>
> (c) Any communication by (or on behalf of) D3 to the media, D1 or D2 or other third parties alerting them to the publication by the Joint Committee of his submissions and/or encouraging the reporting or commenting on those submissions."

24. Mr Eardley pointed out that despite Mr Burby stating that 'a complete bundle of all publications/speculation would be made available at the hearing' to show that the identity of WXY has been revealed and her name clearly tied to some of the facts and allegations considered by her to be confidential, no material other than ten pages of screen shots of three websites was provided. To 'prevent an ambush' the Claimant's solicitor had carried out his own search for such material.

25. Mr Eardley submitted that the Supplementary Evidence given by Mr Burby to the Parliamentary Committee was at the root of almost all the material which Mr Green QC relied on. It was publicised on the Committee's website towards the end of February 2012. The submissions were part of a very lengthy PDF document. The document does not name the Claimant. Mr Burby states in his evidence:

> "As these proceedings are anonymous it would clearly be inappropriate in the context of this submission to reveal her identity."

WXY is described by reference to the nature of her connection to an unnamed head of state from a named continent. Mr Eardley contended that readers of the document would learn a schematic summary of the information which is the subject of these proceedings but would not be able to relate it to the Claimant unless they were reliably informed of her identity from another source. An online edition of a

newspaper ('N1') published at the end of February 2012 provided a link to the supplementary evidence.

26. Mr Eardley made submissions on whether each of the categories of material before the court could be said to have placed items in the Confidential Schedule into the public domain.

27. The Supplementary Evidence to the Parliamentary Committee set out an anonymised version of the Confidential Schedule to the interim injunction. A paragraph of the document lists a number of matters. At least one of these falls within Confidential Schedule paragraph (2). In another paragraph there is a reference without detail to a matter which falls within paragraph (3) of the Schedule. The rest of the document makes observations on these matters but does not go into them in detail.

28. As for the ten pages of the website screenshots produced by Mr Burby, the first are of website postings ('W1') on one day at the beginning of March 2012. Google searches carried out by Mr Bateman on 17th April 2012 against the Claimant's name did not give a link to W1 until the eighth page of results. The entry on that page gave a link to W1 but not to the page relied upon by Mr Burby. A single post on the W1 screenshot gives an assertion of the identity of the Claimant, the Head of State and X. It also makes a statement about the source of her wealth. Mr Eardley submitted that the screenshots of W1 showed a short-lived discussion between five people on one day. Such a discussion on an obscure website is unlikely to have attracted significant attention and is still less likely to do so now.

29. The second website ('W2') for which Mr Burby provided screenshots appears to be foreign. Mr Bateman stated that on 17th April 2012 when he carried out his searches there was no link on the first ten pages to it when searching against WXY, 'who is WXY', her name or that of Mark Burby. He could not find the article Mr Burby referred to which was dated 2nd March 2012. The article appeared to have been removed by 17th April 2012, the time of Mr Bateman's search for published material about WXY and Mr Burby.

30. The third website, W3, appeared to have contained a reposting of entries on another website not disclosed by Mr Burby but found by Mr Bateman. On 17th April 2012 Mr Bateman could find no link to it on the first 10 pages of searches for Mark Burby, WXY, her name or 'who is WXY'.

31. Mr Eardley stated that only one newspaper in this jurisdiction, NI, published articles in its print edition which concerned Mr Burby. Five articles were published over six days between the end of February and the beginning of March 2012. He submitted that they refer to the Claimant by her usual generic description and do not contain any further identifying or relevant detail.

32. The equivalent articles to the print editions in the newspaper were published online at the end of February to the beginning of March 2012. There was no evidence of the number of hits they received at the time of first publication or more recently. A blog at the end of February 2012 on another newspaper's website had a link quoting from the first newspaper's article.

33. Another newspaper ('N2') published an online article at the end of February 2012 which reported that a blogger had hinted at and gave the alleged identity of the Head of State. The newspaper wrote that it had no way of verifying the allegation. Subject to identifying the source, the article contained information which would fall within paragraphs (2)(k), (l) and (m) of the Schedule. The online article had been removed by 18th April 2012.

34. Comments on N1's websites were made on an article it had carried on the actions of the Claimant's solicitors with regard to publication of the Supplementary Evidence. The maximum number of comments appeared to have been 32. A printout of the pages on 6th March 2012 hinted at the alleged identity of the Head of State. All but two of the comments had been removed by 18th April 2012.

35. An online article updated N1's online coverage of Mr Burby's supplementary evidence to the Parliamentary Committee by reporting the evidence in rebuttal submitted by the Claimant's solicitors.

36. Using a search engine, Mr Bateman stated that neither WXY nor 'who is WXY' produced any suggested terms which could disclose the Claimant as claimant in these proceedings or link her to any of the protected information.

37. A fourth website ('W4') showed a first posting on 7th March 2012. The first half of the screenshot reports and comments on the coverage by N1 of Mr Burby's evidence to the Parliamentary Committee. The second half purports to name the Head of State, the Claimant and X. Three links are given to Mr Burby's evidence to the Committee and the N1 reports of it. The fourth and fifth links with a heading relating to paragraph (2)(f) of the Confidential Schedule were to material containing speculation several years old about an aspect of (2)(f). Mr Eardley wrote that two links were to reports of previous public judgments in litigation in which the Claimant was involved. Two other links were to articles which were before the court at trial.

38. A second posting on W4 on 7th March 2012 purports to name the Claimant and other persons anonymised in these proceedings. Links were provided to archived copies of Mr Burby's own website. Entries on his website had been considered at trial. Mr Eardley stated that for a brief period the first posting appears to have been linked by two commentators on W1. Both posts were returned as prominent results in a relevant search engine search. W4 is a foreign website.

39. A well known website mentions the overall subject of (2)(f) but gives no details. There is also reference to matters relating to paragraphs (3) and (4) of the Schedule.

40. Mr Eardley pointed out that articles from a third newspaper, N3, dating from several years ago were before the court at trial. These were the result of Mr Burby's contact with journalists and formed part of the finding of harassment.

41. Mr Eardley submitted that Mr Burby has not demonstrated that an injunction in privacy or breach of confidence would serve no purpose. The Claimant's identity has not become generally accessible. He contended that the closest Mr Burby has come to producing material which identified the Claimant was the online publication by N2 which reported an individual's speculation as to the identity of the Head of State.

Speculation in a single newspaper article is not enough to bring the identity of the Claimant into the public domain.

42. Mr Eardley wrote that the internet postings relied upon by Mr Green QC added nothing of substance. Many were expressed to be speculation. None appears on 'high profile' websites, the postings of the online site of N1 having been removed.

43. Mr Eardley contended that the test of 'general accessibility' applicable to privacy cases it to be contrasted with commercial confidential information cases in which commercial competitors can be expected to be on the lookout for useful information such that its confidential value evaporates following a fairly limited degree of availability. The public in privacy cases receive information passively rather than actively pursuing it. Mr Eardley contended that:

> "The fact that someone looking for information about [Mr Burby] might be led to the W4 postings which purport to identify the Claimant, is therefore nothing to the point. Even someone actively looking for information about the Claimant is unlikely to be directed to those postings. The likelihood of them coming to the attention of someone who takes only a passive interest is minimal."

44. Mr Eardley then made submissions on whether, regardless of whether the 'secrecy' element had gone, an injunction protecting the Claimant's identity would protect her from intrusion which would otherwise occur. He submitted that it is likely that at least N1 would publish her identity, if free to do so, if only to complete the story. Further, readers who learned of her identity would be able to link it with the protected information set out in the Supplementary Evidence to the Parliamentary Committee.

45. Mr Eardley submitted that in all the circumstances it would not be futile to make an injunction in the terms sought.

46. In any event Mr Eardley contended that Mr Burby has established no reason why he should not be restrained on grounds of harassment from publishing information falling within the Schedule. The court had found that his purpose in publishing the Claimant's private information was to apply financial pressure to the Claimant. There is no suggestion that he would be prevented from using it for a legitimate purpose. An injunction on harassment grounds would be fully justified and complies with ECHR Article 10.

47. Mr Eardley submitted that it was clear that injunctive relief should be given. If there were any doubt about the matter, regard should be had to Mr Burby's conduct. First it was said that online interest was fuelled at least in part by Mr Burby's original publications and contact with the media which were found to have been unlawful. Secondly Mr Eardley submitted that it should be inferred that Mr Burby drew N1's attention to his evidence given to the Parliamentary Committee.

Discussion and Conclusion

48. Mr Burby produced a limited amount of material – ten pages of screenshots of postings on three websites, W1, W2 and W3 – to support his contention that an

injunction should not be granted to restrain publication of material relating to the following matters in the Confidential Schedule: (2)(f), (k), (l) and (m), (3), (4) and (5). In his submissions on the draft order it was indicated that Mr Burby would resist an injunction on the basis that material he was to be restrained from disclosing or publishing was already in the public domain. It was asserted in that there had been 'worldwide media coverage' arising from his submission of evidence to the Parliamentary Committee. It was said that a 'bundle of all publications/speculations' in support of this contention would be made available at the hearing – it was not. A court can only act on the evidence before it. The question of whether material relating to the matters in respect of which injunctive relief is resisted will be considered on the material, the ten pages of screenshots Mr Burby produced and on the material uncovered in Mr Bateman's searches. As appears from the written submissions of 30th March 2012 on behalf of Mr Burby, the foundation of the argument that information in respect of which injunctive relief is sought is now in the public domain is that Mr Burby's Supplementary Evidence to the Parliamentary Committee was reported and generated interest.

49. I will consider whether the Claimant has been identified in the print and online material which is before the court and whether their content has a bearing on any of the items on the Confidential Schedule in respect of which injunctive relief is resisted. I will not consider any material relating to the items on the Schedule for which such relief is not resisted.

50. The observations and decisions in this judgment are, as they must be, made on the material before me.

The supplementary evidence to the Parliamentary Committee

51. The Claimant was not named in the Supplementary Evidence to the Parliamentary Committee. She was referred to by the generic term which has subsequently been used in any press reporting. Mr Burby rightly acknowledged that as the proceedings were anonymised it would be inappropriate to reveal her identity.

52. In his evidence, Mr Burby set out the categories of information or allegations in respect of which the Claimant is seeking injunctive relief.

53. Whilst a participant in these proceedings is likely to appreciate that one category in the Supplementary Evidence has a bearing on items (2)(k), (l) and (m) of the Confidential Schedule, the parts of the hearings dealing with those matters were held in private. Without further information no-one unconnected with these proceedings would have any reason to identify the Claimant from the very general description in the Supplementary Evidence or link her name with those allegations. However, if sufficiently interested, a reader may speculate on her identity based on the description of her by reference to the nature of her connection to an unnamed head of state from a named continent.

54. Whilst the fact that Mr Burby succeeded in proceedings for a large sum of money in foreign proceedings received some publicity and the sum remains unpaid, any link between that debt and the Claimant by name was not the subject of informed statement although her name was the subject of very limited speculation. Two categories of allegation or information in the Supplementary Evidence have a bearing

on items (3) and (4) in the Confidential Schedule. However there was very limited reference in the material before me to alleged dealings between the Claimant and Mr Burby with regard to the debt. However there was reference to the details of those alleged dealings. What is sought to be protected by (3) and (4) of the Confidential Schedule are details of those matters.

55. Another category included in Mr Burby's supplementary evidence related to item (5) on the Schedule. The Claimant was anonymised in the matters referred to. It is most unlikely that members of the public would be aware of the subject matter of (5).

Print and online publications by N1

56. On the material before me, N1 was the first to publish the Supplementary Evidence. It was the only newspaper in this jurisdiction to publish articles in its print edition which have a bearing on whether the disputed items on the Confidential Schedule have entered the public domain. The newspaper published five articles about the Supplementary Evidence and the steps threatened by the Claimant's solicitors in relation to them. Those articles appeared in a period of about a week at the end of February to the beginning of March 2012.

57. N1 did not name the Claimant and referred to her by the generic term which was used by Mr Burby in his Supplementary Evidence and which has been repeated in any press and website coverage. N1 is a reputable newspaper with a large readership. It gave prominence in its reporting to matters which are the subject of (2)(k), (l) and (m).

58. Whilst readers may well have tried to guess the identity of the person who was the subject of Mr Burby's Supplementary Evidence from the terms he used to describe her, in my judgment the N1 print articles rightly did no more that report the Supplementary Evidence and the steps the Claimant's solicitors stated may be taken in relation to the publication of the Evidence. It is not apparent that N1 knew the Claimant's identity. In my judgment even if it did, the material N1 published would not, without more information, lead the reader to identify the Claimant from its publications. Mr Eardley pointed out that Mr Green QC conceded this point in argument.

59. Online articles were published by N1 over the same period of time as the print versions. Their contents are similar to that of the print versions. Although not apparent from the screenshot, Mr Eardley stated that one online article reproduces the Supplementary Evidence in full.

60. N1 articles remain online although there is no evidence of how many hits they have received.

61. One of N1's online articles permitted readers to post comments. Some of the comments speculated about the identity of the Head of State. Three claimed to have found the Claimant's identity through the internet, some using a link to a website W3. These comments had been removed by 18th April 2012 although two other comments remained one of which gave the initial letter of the State of which the person connected with the Claimant is Head. All the comments on the pages searched by Mr

Bateman appear to have been made before 6th March 2012, the date of the judgment in these proceedings.

62. The print and online publications by N1 related to items (2)(k), (l) and (m) on the Confidential Schedule but not to the other items in respect of which injunctive relief is resisted. Without further information no-one unconnected with these proceedings would know from those publications the identity of the Claimant although, as previously observed, they may have speculated based on her generic description.

Online publication by N3

63. At the end of February 2012 a blog on a site hosted by another newspaper, N3 referred to the fact that a submission had been made to a Parliamentary Committee referring to a report in N1 of threatened action by the Claimant's solicitors against the Committee. No further details were given by N3.

Online publication by N2

64. At the end of February 2012, the online edition of a major newspaper carried an article reporting that a blogger hinted at the identity of the Head of State. N2 stated that it had no means of verifying the information. Reference was made to matters which Mr Eardley agreed would be information falling within paragraphs (2)(k), (l) and (m) of the Confidential Schedule.

65. In an online publication in mid April 2012, N2 reported the outcome of the Claimant's proceedings against Mr Burby. The online content went no further than reporting part of the judgment. The article noted that in light of the judgment it was doubtful that Mr Burby's supplementary evidence could be regarded as reliable. Mr Bateman in his searches of the internet on 18th April 2012 could not find the February article.

66. As with all the other online material, there was no evidence of the number of hits on N2's site.

Website postings produced by Mr Burby

67. I accept that on 17th April 2012 searches of the Claimant's name, WXY and 'who is WXY' would not readily lead to the W1 website and that a search for Mr Burby, whilst more readily linked, would not lead to W1 until the eighth page of the search results. From Mr Burby's printout on 29th March 2012 of pages from W1 all the entries appear to have been made on the same day, 1st March 2012. One relates to Confidential Schedule (2)(k), (l) and (m) and another purports to give the name of WXY and the Head of State. There is a reference to the source of the Claimant's wealth.

68. Even if the information about the source of the Claimant's wealth coupled with her generic description may lead to her identification, the number of people who are likely to have seen the W1 website and made that connection is bound to be extremely small.

69. I accept that it is most unlikely that the W1 website would have come to the attention of many people. The discussion between five people on one day is not indicative of widespread attention to the website.

70. The screenshot of W2 shows an entry on 2nd March 2012. Mr Burby printed it out on 29th March 2012. Mr Bateman could not find it on his search on 18th April 2012. The article included allegations relating to (2)(k), (l) and (m) and expressed an opinion of the identity of WXY. That opinion was based on a search against the name of the Claimant not of the letters WXY.

71. Mr Burby gave evidence of how he came upon W3. Mr Bateman's searches for Mark Burby, the name of the Claimant and WXY or 'who is WXY' did provide a link to the website.

72. The alleged names of the Claimant, X and M were given on website W3 at the beginning of March 2012. There is a link to W4 and to the judgment of 6th March 2012 in these proceedings. Also a link was provided to archived articles from Mr Burby's inactive website described in the judgment of 6th March 2012 as website A. W3 refers to their content by headline title which relates to Confidential Schedule (2)(k).

73. Two postings on W4 were before the court. The first from the beginning of March 2012 referred and provided a link to the Supplementary Evidence. It also referred to N1's print article about that Evidence. Headline reference was made to matters in the Confidential Schedule paragraphs (2)(k). The blog purports to name WXY, the Head of State and another person anonymised in these proceedings.

74. The second posting on the same day reports on and provides a link to the judgment of 6th March 2012. The blog again purports to name WXY and two anonymised persons referred to in the judgment. The posting provides a link to archived material from website A. The W4 second posting does not refer to the topics covered in the linked material although in his submissions Mr Eardley stated that one of the linked website A's entries contained an implied threat to publish information covered by paragraph (2)(k) of the Confidential Schedule.

75. The first W4 posting was linked, it was said, for a brief period, to two commentators on the N1 website. Further, both posts were shown on a search for Mr Burby's name although not on that for WXY, 'who is WXY' or her name. Whilst it may be that W4 is more likely to be accessed by people interested in Mr Burby, those seeking the identity of WXY would not, on the evidence of Mr Bateman, be led to the W4 postings.

76. In my judgment on the evidence it is most unlikely that the postings on W4 would have come to the attention of many people.

77. Mr Bateman referred to an entry on a well known website which mentions the source of the Claimant's wealth but gives no details.

Which of the disputed items on the Confidential Schedule are or were likely to have come to the attention of members of the public?

78. None of the published material gave the details disclosure of which paragraph (2)(f) restrains.

79. The material before me does not include a reference to allegations the subject of paragraphs (5)(i) and (ii) save in the Supplementary Evidence. They were referred to in that Evidence as an introduction to matters in paragraph (6) of the Confidential Schedule in respect of which an injunction is no longer resisted. Material relating to these items is most unlikely to have come to the attention of the public.

80. The Supplementary Evidence sets out the claims made which are the subject of paragraphs (3) and (4) on the Confidential Schedule. They give no details of these matters nor are these matters referred to in the other material placed before me. The claim of confidentiality in respect of these items was considered in the judgment of 6th March 2012. The fact that the Claimant had discussed the judgment debt with Mr Burby is referred to. A public judgment may be read by members of the public and at least one of the screenshots showed a link to the judgment. But for the finding of fact that the identity of the Claimant is not in the public domain, I would have held that the fact that such discussions took place between the Claimant and Mr Burby would have been in the public domain. On the evidence before me no details sought to be protected in item (3), (4) or (5) are shown to have come to the attention of the public.

81. Whilst item (2)(m) was referred to in the Supplementary Evidence, in a print edition of N1 and in W2 it did not receive as much publicity as items (2)(k) and (l). On the material before me it is most unlikely to have come to the attention of the public to such an extent that an injunction restraining its dissemination would no longer serve any useful purpose.

82. Information relating to (2)(k) and (l) was referred to in the Supplementary Evidence. In these cases there is a direct correlation between the allegations or information which is sought to be restrained and the publicity which it has received. The material in the Supplementary Evidence replicates what is sought to be restrained. N1 in both print and online publication and N2 in its online version made a feature of those allegations. Indeed all the material before the court which carried a report relevant to these proceedings refers to the allegations in (2)(k) and (l). Accordingly those allegations will have reached the attention of those members of the public who read that material. Whilst it may be assumed that the material published by N1 and N2 will have been read by a significant number of people the same cannot be said of W1, W2, W3 and W4. There was no evidence before the court as to the numbers of people who access those websites let alone those who did so in the period the material was on the site. Nor is there evidence showing the numbers of those who accessed the relevant pages during that period.

83. In order to establish that some of the material referred to above has come to the attention of members of the public so that an injunction in confidence or privacy would serve no useful purpose it is necessary to show that the reader would make a link between that information and the Claimant.

84. In a print edition, NI reported that Mr Burby claimed that he had been gagged by a person described by the nature of her connection to an unnamed head of state from a named continent and referred to her wealth. This description of the person who obtained an injunction has been used in many of the publications produced before the court. The Claimant has not been authoritatively named.

85. There was no speculation as to the identity of the Claimant in articles in print editions of N1 although there was some speculation in a few comments on one of its online articles in March 2012.

86. No print article by N2 was before the court but an online publication at the end of February 2012 speculated and reported the feelings of an 'influential political blogger' as to the identity of the Head of State. N2 stated that it had no way of verifying the allegation.

87. Several of the online articles included links to Mr Burby's Supplementary Evidence to the Parliamentary Committee. He had not named the Claimant.

88. Of the screenshots of websites placed before the court, it appears that a post at the beginning of March 2012 on W1 named the people alleged to be the Claimant and the Head of State. A writer on W2 at the beginning of March was 'of the opinion' that the Claimant was a named individual. At the beginning of March, W3 gave the alleged names of the Claimant and individuals anonymised in these proceedings as did W4 in early March.

89. I proceed on the basis that more people in this jurisdiction will have read the print and online publications of N1 and N2 than the online articles and postings on W1, W2, W3 and W4. There are no figures before the court of how many individuals accessed these websites or the relevant pages.

90. On the evidence before me I find that whilst a significant number of people may have read the print article published by N1 at the end of February which included matters related to items (2)(k), (l) and (m) in the Confidential Schedule there is no evidence that they learned the name of the Claimant from the article. In my judgment it cannot be inferred that without a degree of knowledge, forensic skill and interest a reader of the print edition of N1 would deduce the Claimant's name. Accordingly, on the evidence, it would not be safe to infer that the reader of the print edition of N1 would have learned the identity of the Claimant.

91. Although no evidence was placed before the court as to the number of readers of the websites of N1 and N2, in my judgment in this jurisdiction they are likely to have been greater than those reading W1 to W4. However N1 and N2's websites contained no more than, in the case of N1, purported identification of the Claimant by one person and in the case of N2, the unverified 'feeling' of a blogger.

92. In light of the absence of visitor figures to websites W1 to W4 it is impossible to determine how many people were likely to have viewed the statements of the alleged identity of the Claimant and of two people anonymised in the proceedings brought by her against Mr Burby.

93. Accordingly, whilst material relating to items (2)(k) and (l) received coverage in a national newspaper, on the evidence the Claimant's name was not associated with it in the minds of a sufficient number of people so as to render an injunction restraining publication of such allegations or information futile.

94. I find that none of the disputed material in respect of which injunctive relief is sought has entered the public domain so that it would be futile to make such an order.

95. Even if the identity of the Claimant had become known by those who accessed websites W1 to W4 or other users of the internet there would still be utility in restricting the publication to a much wider audience of her name in connection with the material in paragraphs 2(k), (l) and (m) of the Confidential Schedule. Further, on the evidence, it appears that there was a flurry of interest in the allegations made by Mr Burby at the time of the publication of his Supplementary Evidence to the Parliamentary Committee at the end of February and on the handing down of the judgment in the Claimant's case against him on 6th March 2012. There is utility in restraining the publishing of information which, even if once known is likely to have faded from memory because of the passage of time as is likely in this case.

96. The screenshots of websites which were provided by Mr Burby on 10th April 2012 all dated from early March. Mr Bateman's searches on 18th April 2012 revealed material from that time. There seemed to be less rather than more relevant material by 18th April 2012. Some of the postings previously made on the W1 website in early March 2012 had been removed by 18th April 2012 as indicated on the website.

97. The only allegations or information publication of which is sought to be restrained which could be said to have entered the public domain to any material extent is that relating to items (2)(k), (l) and (m) on the Confidential Schedule. Having considered the evidence before me as to the extent to which it could be said to be known and further the extent to which the identity of the Claimant is public knowledge so as to connect her with these allegations, in my judgment in the words of Lord Goff in **A/G v Guardian Newspapers (No 2)** [1990] 1 AC 109 at page 282 the identity of the Claimant is not so generally accessible that there is nothing for the law to protect. Such information or speculation that there has been as to the identity of the Claimant has been in online publications by N2 and on a limited number of websites. Publication of the Claimant's name in connection with the material sought to be protected could reach a different or wider audience. Even where there has been widespread publication, which is not this case, in one forum, publication in another can be restrained. The observations of Lord Keith in **Spycatcher** at page 260 can be applied to the difference in this case between internet websites and the print media. In the absence of any evidence of their popularity or of the number of hits on the relevant pages, the sites Mr Burby relied upon can, in my view, be described as specialist or not in the mainstream. This case is far from that of **Ryan Giggs (previously known as CTB) v News Group Newspapers Ltd, Imogen Thomas** [2012] EWHC 431 in which the initials CTB were chanted at football matches when Ryan Giggs was playing. Tugendhat J held that the identity of the 'footie star' referred to in the newspapers became well known. An injunction in this case would not be a 'brutum fulmen' (**Mosley v News Group Newspapers Ltd** [2008] EWHC 687).

98. The evidence of internet and print publication shows that such interest as there was in Mr Burby's Evidence given to the Parliamentary Committee appeared at the end of February and the beginning of March. Whilst some material may have remained on the internet, apart from reports of the judgment of 6th March 2012 the evidence does not show relevant new publications after about mid-March 2012. Memories of the story may have faded. An injunction would have utility in preventing the re-entry of the story onto the pages of newspapers or the internet.

99. In the judgment of 6th March 2012 I held that the allegations the subject of the Confidential Schedule paragraph (2)(k), (l) and (m) were not from an apparently reliable source. I balanced Mr Burby's Article 10 rights to 'tell his story' with the Claimant's Article 8 rights. Taking into account all the circumstances I concluded at paragraph 109:

> "…even if his motives for publicising information regarding the Claimant had not been to exert pressure on her for his financial benefit, in all the circumstances his rights to publicise such information are of less weight than the Claimant's Article 8 rights."

No evidence has been produced or argument advanced to cause me to come to a different conclusion when now deciding whether permanent injunctive relief is to be granted.

100. In a claim under the Protection from Harassment Act 1997 a court may grant an injunction for the purpose of restraining the defendant from pursuing any conduct which amounts to harassment. The Claimant's claim under that Act succeeded at trial. I accept Mr Eardley's submission that the fact that material which the defendant has or threatens to publicise may be in the public domain is not a defence to such an injunction. Mr Eardley submitted that:

> "Harassment injunctions regularly prohibit a defendant from doing that which may be done lawfully by anybody else (e.g. entering a particular public street). Information which is publicly available may nevertheless be particularly dangerous in the hands of a defendant who threatens to pursue a course of conduct amounting to harassment. The fact that such conduct may be contrary to the criminal law is nothing to the point: the Act specifically provides for civil remedies."

Those submissions are well made. I accept that the fact that material may have entered the public domain does not provide a defence to injunctive relief to prevent harassment by publicising such material. However this conclusion is not necessary to the decision in this case as I have held that on the facts the relevant material has not entered the public domain.

101. In light of my conclusion in paragraph 133 of the judgment of 6th March 2012 that

> "unless restrained, the Third Defendant is likely to resume publication of or threatening to publish private and confidential

information of the Claimant and thereby to continue to harass her.",

my judgment that the relevant material has not entered the public domain in the respects and to the extent that injunctive relief would be fruitless, balancing the Claimant's Article 8 rights and Mr Burby's Article 10 rights and in the exercise of discretion having regard to all these matters, injunctive relief is granted in the terms sought with the agreed addition of words to paragraph (4) of the Confidential Schedule.

The body of the order

102. Counsel have helpfully identified the remaining areas of dispute over the wording of the body of the final order.

Paragraph 6

103. There is a dispute about whether the obligation on Mr Burby to disclose the names of those to whom he has published various documents should be limited to publication in England and Wales. Certain changes in the wording of the draft order were agreed by the Claimant in the course of argument on 11th May. The changed draft reads:

> "6. By no later than 4pm on [14 days] 2012, the Third Defendant shall serve on the Claimant a Witness Statement, verified by a Statement of Truth, setting out:
>
> (a) The name of each person or institution to whom since March 2009 the Third Defendant (whether by himself or through any other person acting on his behalf) has published [in England and Wales]
>
> (i) Any document (including, for the avoidance of doubt, any email, text message, computer file or other electronic document) containing any part of the information or allegations set out in Confidential Schedule I;
>
> (ii) Any document (whether or not falling within (a)(i) above) filed or served in these proceedings or sent or brought into existence for the purposes of these proceedings save for any documents not falling within (a)(i) above which the Third Defendant had in his possession prior to the commencement of the proceedings."

The dispute is therefore whether the obligation to state the names of those to whom Mr Burby has published documents only in England and Wales or whether the obligation is to disclose those names wherever publication took place.

104. Mr Eardley contended that there should be no territorial limitation to the requirement to disclose the names of those to whom the specified documents had been published. None had been imposed in an equivalent paragraph of the interim injunction which provided:

> "The Defendants and each of them are restrained from giving …any material served on them in connection with this order or these proceedings to anyone else [i.e. other than instructed lawyers] without prior permission of the Court."

Further, Mr Eardley contended that the requirement to state to whom publication had been made wherever that took place would further the integrity of the proceedings and protect against the risk that Mr Burby might be in a better position to harm the Claimant because of information he has obtained in the course of or for the purpose of the proceedings. It was pointed out that this was particularly important in light of the view expressed by Mr Burby and Mr Begg that they were not bound by the interim injunction in Jersey.

105. Secondly Mr Eardley contended that the court should do what it can to ensure that the protection to which the Claimant is entitled in this jurisdiction is real and meaningful. Publication in this jurisdiction may be carried out by persons outside the jurisdiction.

106. Mr Green QC contended that the words 'in England and Wales' should be included after 'published'. Mr Green QC submitted that there was no proper basis for requiring Mr Burby to identify any disclosure of such matters outside the jurisdiction although he recognised that some distinction can be drawn between the matters in 6(a)(i) and those within 6(a)(ii). Mr Green QC also sought to advance an argument that Mr Burby should not be required to give the names of those to whom he had published documents outside England and Wales because of an exclusive jurisdiction clause in the Claimant's confidentiality agreement with Mr Burby.

107. In my judgment it would be proportionate and would further the integrity of the orders obtained in these proceedings for Mr Burby to be required to state the name of each person to whom he had disclosed or published any document falling within 6(a)(ii) wherever that publication took place. However a requirement on Mr Burby to state the names of those to which he had published outside England and Wales any document containing any part of the information or allegations in Confidential Schedule 1 would be to require information about acts over which the court has no jurisdiction. Accordingly the requirement to give the names of those to which documents were published will be limited to publication in England and Wales for those documents in 6(a)(i) but is not to be so limited with regard to the publication of documents in 6(a)(ii).

Paragraph 11

108. Mr Eardley submitted that Mr Burby should be required to give not just the name but also the contact address of each individual or institution which has provided or agreed to provide litigation funding to him. This is necessary. CPR 48.2 requires a funder to be joined as a party if there is to be an application for a third party costs order. Mr Burby does not agree to such an order but notes the provisions of CPR 48.2(1).

109. There is no good reason why Mr Burby should not be required to provide the address as well as the name of those who have or who have agreed to provide funding for his litigation. The address as well as the name of a funder is needed if they are to be joined as a party for the purpose of a costs application under CPR 48.2.

Paragraph 17

110. The liberty to apply provision should be limited to an application founded on a finding of fact by the judge in the trial of the claim against Mr Gewanter and his company as proposed by Mr Eardley not on evidence (which may or may not have been accepted by the judge) as proposed by Mr Green QC. Further, a period of 3 months for making such an application as proposed by Mr Green QC is too long. However, since Mr Burby may not be at the trial of the claim against the First and Second Defendants he should be given 28 rather than 21 days from the specified dates, the date of the judgment in the claim by the Claimant against the First and Second Defendants or from the date of determination of an appeal from that judgment, in which to make an application to vary the terms of this order.