Neutral Citation Number: [2012] EWHC 2466 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 September 2012

Before :

MR JUSTICE LINDBLOM

Between :

STEVE McCLAREN	**Claimant**
- and –	
NEWS GROUP NEWSPAPERS LIMITED	**Defendant**

Hugh Tomlinson QC (instructed by Schillings) for the **Claimant**
Richard Spearman QC (instructed by Simons Muirhead & Burton) for the **Defendant**

Hearing date: 18 August 2012

Judgment Approved by the court

MR JUSTICE LINDBLOM:

1. On the evening of Saturday, 18 August 2012 I heard an urgent application made on behalf of the claimant for an interim non-disclosure order to restrain the publication by the defendant of private information relating to what was described as a "sexual encounter" between the claimant and a third party, to whom I shall refer as SA. The application was made on notice to the defendant, which intended to publish an exclusive about the claimant and SA the following morning in the Sunday edition of one of its newspapers, "The Sun". The hearing was conducted on the telephone. The parties had agreed that it should take place in private (under CPR rule 39.2(3)(a), (c) and (g)). In the circumstances I saw no alternative to that course. This, however, is a public judgment (in accordance with paragraph 45 of the Master of the Rolls' "Practice Guidance: Interim Non-Disclosure Orders", issued in July 2011, and Article 6 of the European Convention on Human Rights and Fundamental Freedoms). Both parties were represented by leading counsel – the claimant by Mr Hugh Tomlinson QC, the defendant by Mr Richard Spearman QC. At the beginning of the hearing the claimant's solicitors undertook to produce a full note of the proceedings (to comply with Practice Direction 25A, paragraph 9.2(2)). This they duly did. Having heard counsel's submissions, I dismissed the application. I now give my reasons for doing so.

2. The basic facts of the case can be shortly stated.

3. The claimant is married. He and his wife have three children, the oldest of whom is 24, the others 20 and 15. He is a professional football manager, now managing FC Twente, a club in the Dutch football league. He used to be the manager of England's international team.

4. The encounter about which the defendant wanted to publish its story happened on Monday, 13 August 2012, when the claimant and SA were alone together in her flat in Manchester. The claimant did not deny his relationship with SA. According to her, they had met in June 2012 in the Lowry Hotel in Manchester. Their relationship had then developed on the telephone and in text messages. She had told the defendant that they had met several times in the course of the following weeks. Although her version of events was not admitted by the claimant, he did not dispute that he had gone with her to her flat on 13 August. A journalist had taken a photograph of them walking along the street on their way there. The defendant had the photograph and was going to print it.

5. On the morning of Saturday, 18 August a journalist from "The Sun" had told FC Twente, who in turn had told the claimant, that the defendant proposed to run its story the next day. The claimant's solicitors promptly sought an undertaking from the defendant that it would not publish. The defendant declined to give that undertaking. The application for injunctive relief was then made.

6. Exactly how the story had come into the hands of the defendant was not clear. The claimant believed that SA had given or sold her account of their affair to the defendant, and Mr Spearman confirmed that this was so. Whatever part SA had played in exposing her relationship with the claimant, it was plain that she did not resist the publication of the defendant's article about it. Indeed, Mr Spearman said she wanted the story of her relationship with the claimant to come out.

7. About six years ago the claimant had another extra-marital relationship. This was revealed when an article about it was published in "The Sun". At the time the claimant was in the running for the England manager's job. On that occasion, it seems, he did not attempt to prevent publication by seeking an injunction. Mr Spearman told me the claimant had deliberately put that affair into the public domain, selling his statement through the publicity agent, Max Clifford, for £12,500. On 29 April 2006 "The Sun" had carried an exclusive story about his affair with a secretary, which he said had taken place during a brief separation from his wife. The article had ended with him saying that

this had been a lapse, and that he wanted to draw a line under it and concentrate on his family and his job as manager of Middlesbrough Football Club. He had said it ought not to affect his credentials for the post of England's manager. Mr Spearman also told me that since then the claimant had twice spoken publicly about his family. In an interview with "The Guardian" in May 2010 he had said they had allowed him to take his present job in Holland. And in November 2011 "The Independent" had reported him saying that his children were resilient to his working abroad.

8. The relevant legal principles governing applications such as this are well-established. Counsel reminded me of the two-stage test referred to in *McKennitt v Ash* [2008] QB 73. The first stage is to consider whether an applicant's rights under Article 8 of the Human Rights Convention are engaged, in that he had a reasonable expectation of privacy. The second stage involves a balancing exercise between the right to respect for private and family life under Article 8 and the right to freedom of expression under Article 10. As was emphasized in *Re S (A Child)* [2005] 1 AC 593, neither article takes precedence over the other. Where the values under them are in conflict, the court has to focus intensely on the comparative importance of the specific rights being claimed in the individual case. It must take account of the claimed justification for interfering with or restricting each right. And to each of the two rights the test of proportionality must be applied. Section 12(3) of the Human Rights Act 1998 provides that no relief is to be granted to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. There is no single, immutable standard by which to judge every application for an interim restraint order. In some circumstances, however, a temporary remedy may be necessary to enable the court to consider an application for interim relief pending trial (see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253). Relief can be granted to protect a short-lived relationship as well one that has gone on for some time.

9. Mr Tomlinson submitted that, because the claimant and SA had not at any stage conducted their relationship in public, his Article 8 rights were clearly engaged. And those rights were now at risk of being violated not merely by his relationship with SA being made known to a small number of people but by its being revealed in a sensationalist way to millions. There would be an impact on him, on his wife and on his children. It would cause serious harm to his family life and to his own well-being**.** Even if the story had nothing indecent in it, the fact of the relationship itself was private information, which the court should take care to protect – the more so if the relationship had lasted as long as the defendant was saying it had. The photograph the defendant wanted to publish was itself private.

10. As to the second stage, when the balance with the defendant's rights under Article 10 had to be struck, Mr Tomlinson submitted that this was not a case in which any public interest could be discerned. It had been suggested that the defendant's article would lay bare the claimant's hypocrisy. But this was not so. The claimant had made no public statement to the effect that he was someone who would not commit adultery. The question of his being a hypocrite did not arise. In the article published in "The Sun" in 2006 the claimant had not been quoted saying he was going to remain faithful to his wife. He had said that he was happily married and that his marriage would survive. Nor should one assume that this had necessarily been a voluntary disclosure. The claimant might have been heading off publication by somebody else. The comments he had later made in the press were not about sexual relationships. Mr Tomlinson said this case was not parallel in its facts to *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB). The claimant was not a public figure. As a one-time manager of England's football team, he was in no sense a role model. He had no such status. There was, therefore, no public interest at all in the defendant's story. This was purely a case of "kiss and tell". The claimant was therefore entitled at least to an interim order with a return date of Thursday, 23 August 2012, when the factual and legal issues in contest could be properly explored. Such relief would cause no real prejudice to the defendant.

11. Mr Tomlinson said the form of the proposed order complied with the guidance given by Lord Neuberger MR in *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645. This would not be a superinjunction; the defendant would be able to say that an injunction had been granted but not to identify the claimant. The usual undertakings as to the issuing of a claim and the provision of evidence in a witness statement would be given.

12. Mr Spearman began his submissions by placing them in the context of the claimant's past. He referred to the episode in April 2006, when "The Sun" had published the claimant's account of his previous affair. He submitted that what the claimant had disclosed then he had disclosed knowing the effect it would have on his family. It had been the claimant's choice then to sell his story. And it had been his choice to talk publicly about his family in May 2010 and again in November 2011. The story the defendant now wanted to publish had been presented to it by SA. It had not been obtained by intrusion. It would not be salacious. One party to the relationship wanted to keep it a secret, the other did not. SA, it should be remembered, had rights of her own. She wanted to see the story published. Mr Tomlinson countered this submission by saying that in almost every case of this kind one party to the relationship wanted to tell the story and the other did not. SA's desire to see the story told – if this was what she wanted – did not trump the claimant's rights under Article 8, as was clear from the decision in *Ntuli v Donald* [2011] 1 WLR 294.

13. In a situation such as this, Mr Spearman argued, a permanent injunction was most unlikely to be granted. In *JIH* – where a footballer had been granted an interim injunction – and in six related cases interim non-disclosure orders were recently discharged by consent in an order of Tugendhat J (see [2012] EWHC 2179 (QB)). Permanent injunctions were not obtained. Anonymity was continued. Mr Spearman said he knew of no case in which a permanent injunction had been granted where the revelation had been the fact of an affair. Mr Tomlinson rejected this. The culmination of *JIH* and the group of related cases was, he said, irrelevant; these were nothing more than case management decisions. A permanent injunction had been granted, for example, in the very recent decision in *SKA v CRH* [2012] EWHC 2236 (QB). The decisions in *ETK v News Group Newspapers* [2011] 1 WLR 1827 and *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 illustrated the court's willingness to grant relief to protect a relationship. Transient relationships were no exception.

14. In *Spelman v Express Newspapers* [2012] EWHC 355 (QB) Tugendhat J considered the concept of a public figure in the law of privacy (in paragraphs 44 to 52 of his judgment). He referred to the decisions of the Strasbourg court in February 2012 in *Axel Springer AG v Germany* [2012] ECHR 227 and *Von Hannover v Germany (No. 2)* [2012] ECHR 228, citing Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy, which, in paragraph 7, refers to sport:

> "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."

15. In *Spelman* the claimant was a 17 year-old child who had played rugby at international level. Tugendhat J observed (in paragraph 69 of his judgment) that it is "a condition of participating in high level sport that the participant gives up control over many aspects of private life", adding (in paragraph 70) that "[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." Tugendhat J went on (in paragraph 72 of his judgment) to characterize the claimant as "a person who is to be regarded as exercising a public function".

16. By this definition, submitted Mr Spearman, the claimant clearly is a public figure. He is a former England manager, he is the present manager of FC Twente, and he had previously chosen to issue a

public statement about an extra-marital affair, subjecting his family to the ordeal of its being disclosed and giving the impression that this conduct was, for him, out of character and was not going to be repeated. This was, said Mr Spearman, plainly a case of hypocrisy.

17. Mr Spearman referred to the decision of the Court of Appeal in *A v B Plc (Flitcroft v MGN Ltd)* [2003] QB 195, in which a professional footballer (A), who was married, sought to prevent a newspaper (B) from publishing an account of his casual sexual relationships with two women (C and D), both of whom had sold their story to B. Mr Spearman relied in particular on what was said by Lord Woolf CJ in paragraph 45 of his judgment in that case:

> "Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential. Any injunction granted after a trial would have to be permanent. It is most unlikely such an injunction would ever be granted."

Lord Woolf had spoken in an earlier passage in his judgment (in paragraph 11(xii)) of a public figure who

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

18. In paragraph 43 (vi) of his judgment in *A v B* Lord Woolf had said that footballers "are role models for young people and undesirable behaviour on their part can set an unfortunate example". Although A had not courted publicity, someone in his position was "inevitably a figure in whom a section of the public and the media would be interested". Mr Spearman acknowledged that some of the jurisprudence in *A v B* had been doubted – Mr Tomlinson said discredited – in *McKennitt v Ash*, Buxton LJ having observed in paragraph 62 of his judgment in that case (with which Latham and Longmore LJJ agreed) that the width of the rights accorded to the media in *A v B* cannot be reconciled with the decision of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1. Nonetheless, Mr Spearman invited me to note that in *Ferdinand*, after a full privacy trial, Nicol J cited *A v B* in his analysis of the public interest (in paragraph 87 of his judgment). Nicol J said (ibid.) that "[the] phrase "role model" is somewhat ubiquitous. …". He went on (in paragraph 88) to note that in *A v B* Buxton LJ had said (in paragraph 65 of his judgment) that the category of those from whom "higher standards of conduct could rightly be expected by the public" was "no doubt the preserve of headmasters and clergymen, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists". In paragraph 90 of his judgment, having remarked that "Buxton LJ's list of those from whom higher standards were expected certainly was not meant to be closed", Nicol J said that the captain of England's football team, "for a substantial body of the public, would come comfortably within it" and that there were "many who would indeed see the captain, at least, of the England football team as a role model". Mr Tomlinson submitted that *Ferdinand* merely showed a narrow application of the decision in *A v B* to the particular facts of that case.

19. In *Hutcheson (formerly known as KGM) v News Group Newspapers Ltd* [2012] EMLR 2 the Court of Appeal endorsed the observations of Tugendhat J in paragraphs 101 and 104 of his judgment in *Terry (previously referred to as "LNS") v Persons unknown* [2010] EMLR 16, emphasizing the importance of public discussion and the freedom to criticize in a "plural society":

> "101. It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have. That is not the issue. The issue is what the judge should prohibit one person from saying publicly about another. …
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> …
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> 104. … There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong. … It is as a result of public discussion and debate, that public opinion develops. …"

(see paragraph 29 of the judgment of Gross LJ, with whom the Master of the Rolls and Etherton LJ agreed).

20. Mr Spearman relied on those passages in *Terry* in support of his submission that the defendant's freedom to criticize the conduct of the claimant and to stimulate public debate should not be restrained. At the Olympic Games held in London in July and August 2012 the behaviour of the athletes had been exemplary. But in professional football misconduct still goes on. Commenting on the Olympics, the present England manager, Roy Hodgson, had said this:

> "A benchmark has been set. Football and rugby are under a bit more of a spotlight."

Mr Spearman said the defendant wanted to make the legitimate point that high standards of conduct are absent in football. How this was to be done was for the defendant to decide. Once it was accepted that the freedom of the press should prevail, the way in which the defendant reported the matter was not to be determined by the court (see paragraph 48 of Lord Woolf's judgment in *A v B*). Mr Tomlinson's response was that the defendant could not use this rhetoric to justify an intrusion into the claimant's private life by publishing a "kiss and tell" story devoid of any public interest. What the claimant had done here was just the kind of private conduct the law was meant to protect. Freedom to criticize the conduct of others is one thing; treating private information as if it were public quite another.

21. Mr Spearman submitted that in any event an injunction in the terms sought by the claimant ought not to be granted. As Tugendhat J had reaffirmed in *Spelman* (in paragraphs 109 to 118 of his judgment), not every claim in which an invasion of privacy is established will result in an injunction being granted. There will be cases in which damages are an adequate remedy, and, Mr Spearman submitted, this was such a case.

22. The defendant did not accept that in drafting the proposed order the claimant had followed the guidance given by Lord Neuberger MR. An order in those terms, said Mr Spearman, would be draconian, only one degree below a superinjunction. The claimant appeared to be seeking both anonymity and a bar on the defendant publishing anything about the subject of the action. This went well beyond what would be strictly necessary if an interim injunction were to be granted. There was

no prospect of relief in this form being given on a permanent basis. In reply Mr Tomlinson said the claimant was not asking for an order whose effect would be the same as a superinjunction. He was not seeking to prevent the defendant reporting the fact that an order had been granted, only the disclosure of any information identifying himself.

23. The essential facts of the case, as I have shown, were not complicated or controversial.

24. In making my decision I had in mind, in particular, that the claimant is a well-known football manager who, in the course of his career, has had responsibility for England's international team and remains involved in the game as manager of FC Twente; that he is married with three children, the youngest of whom is still a teenager; and that several years ago, when a candidate for the England manager's job, he did not seek an injunction to prevent publication of information about a previous extra-marital relationship, deciding instead to put into the public domain his own account of the affair, which was published in "The Sun". I should add this: Mr Tomlinson said the claimant had little choice but to make that disclosure, and the question of whether or not he sold the story is also, perhaps, contentious.

25. The story the defendant now wanted to publish in "The Sun" was said to be a factual account of the claimant's sexual encounter with SA in her flat. I accept that the story may have been set up by SA herself. The photograph of the claimant and her in the street was probably taken because she had told the journalist who took it what was going on.

26. The central principles of law were agreed. I have already referred to them.

27. I applied the requisite two-stage test: considering first whether, on the facts, the claimant's Article 8 rights were engaged and there was a reasonable expectation of privacy; and, at the second stage – the balancing exercise – deciding where the balance lay between the claimant's rights under Article 8 and those of the defendant under Article 10.

28. As to the first stage, I had no difficulty in accepting the proposition – nor was it disputed – that a sexual relationship is of the essence of private life; that Article 8 clearly was engaged in the circumstances of this case; and therefore that, in principle, the claimant had a reasonable expectation of privacy. The first part of the two-stage test was therefore met.

29. The real dispute on this application arose at the second stage, in the balancing of the claimant's Article 8 rights and the defendant's rights under Article 10.

30. For the claimant the core submissions were these: first, that there is no public interest in the mass media publishing a story about the private life of a football manager and his relationship with a woman who is not his wife; secondly, that even if, as a former England manager, the claimant is a public figure – which was not accepted – he is certainly not to be described as a role model comparable, for example, with Rio Ferdinand, who was the captain of the England team when the article about which he complained was published; and thirdly, that this is not a case of the claimant being a hypocrite.

31. On the other side the thrust of the argument was that the claimant is undoubtedly a public figure; that this case is analogous to *Terry* and *Ferdinand*; that the court must not ignore the specific context in which the defendant's story arises, which is that on a previous occasion the claimant opted to put into the public domain details of his private life, including details of another extra-marital relationship; and that the claimant is most unlikely to succeed in obtaining relief on a permanent basis.

32. As will be apparent from what I have said of the submissions made to me on the relevant law, Mr Tomlinson and Mr Spearman disagreed about certain aspects of the jurisprudence. Differences of interpretation and emphasis emerged when some of the authorities – in particular *A v B*, *Ferdinand*, *Spelman* and *JIH* – were dealt with.

33. It seemed to me, however, as Mr Spearman submitted, that in the circumstances of this case the balance clearly fell in favour of publication.

34. As a former manager of England's football team, the claimant is in my view undoubtedly a public figure within the definition recognized by Tugendhat J in *Spelman*. It is a matter of fact that he previously disclosed an extra-marital relationship in a national newspaper, saying that he was happily married and that his marriage would survive. I accepted the submission that his right to privacy is not defeated by SA's willingness or enthusiasm to see the defendant's article about their affair published. That is clearly right. But it did not, in my judgment, devalue the factors justifying publication when the balance in this case was struck. For the reasons submitted by Mr Spearman, I concluded that the defendant plainly had a legitimate interest in publishing its story. It was able to contend that the claimant belongs to the category of those from whom the public could reasonably expect a higher standard of conduct. Even if one allows for the degree of difference there must be between the position of a former manager and that of a serving captain of England's football team, he is clearly still a prominent public figure who has held positions of responsibility in the national game. Whether or not the defendant's story was a set-up – involving, as it did, a photograph taken surreptitiously by a journalist who seems to have been told where the claimant and SA would be – I saw as no more than peripheral to the balancing exercise I had to carry out.

35. I also concluded that the claimant would be most unlikely to succeed in obtaining a permanent injunction. I naturally accepted Mr Tomlinson's submission that one should not be misled by the outcome in other cases where this has been the consequence of the particular circumstances of those proceedings. In my judgment, however, as Mr Spearman submitted, it was not likely that permanent relief would be granted in the claimant's case. Striking the balance between the claimant's rights under Article 8 of the Convention and the right to freedom of expression conferred on the defendant by Article 10, I found that it came down decisively in favour of the defendant. And in my view the claimant could not expect to defeat publication were the case to proceed to trial.

36. Accordingly, I refused to grant the interim injunction for which the claimant had applied.

37. It was therefore unnecessary for me to consider the scope of the order sought. The order as drafted could be described as severe. But, as Mr Tomlinson acknowledged, it could have been fashioned more generously to the defendant had I been minded to grant relief.

38. I ordered that the application be dismissed and that the claimant pay the defendant's costs of the hearing, to be assessed if not agreed.

39. Finally, I thank counsel for the help they gave me in their clear and careful submissions.