



Neutral Citation Number: [2010] EWHC 2424 (Ch)

Case No: HC10C02684

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2010

Before :

MR JUSTICE MORGAN

Between :

BRITISH BROADCASTING CORPORATION

Claimant

- and -

**(1) HARPERCOLLINS PUBLISHERS
LIMITED**

Defendants

(2) BEN COLLINS

(3) COLLINS AUTOSPORT LIMITED

Richard Spearman QC and Jonathan Barnes (instructed by **Alexis Hawkes, BBC Litigation Department**) for the **Claimant**

Hugh Tomlinson QC and Laura Prince (instructed by **Davenport Lyons**) for the **First Defendant** and (instructed by **Clarke Willmott LLP**) for the **Second and Third Defendants**

Hearing dates: 31 August and 1 September 2010

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.

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MR JUSTICE MORGAN

MR JUSTICE MORGAN :

The case in outline

1. The BBC broadcasts a highly successful programme called “Top Gear”. One of the regular features of that programme involves a character known as “The Stig”. Mr Ben Collins has played the part of The Stig from around 2003 until the summer of 2010. It has been an important characteristic of The Stig that the identity of the person playing The Stig is not known to the public.
2. The BBC contended that Mr Collins owed certain duties to the BBC in relation to the identity of The Stig. In particular, it contended that Mr Collins owed a duty not to disclose confidential information, which included the identity of The Stig. In 2009, Mr Collins approached a publisher, the First Defendant, HarperCollins Limited, with a view to the publication of an intended autobiography by Mr Collins. Mr Collins has now completed the writing of his autobiography. At the time of the hearing before me, the publisher intended to publish this book in the near future so that it would be available for the 2010 Christmas market. Although the manuscript was not provided to the BBC, it was clear that Mr Collins’ autobiography would make it explicitly clear that he has played the part of The Stig from 2003 up to the summer of 2010. The BBC contended that this publication would involve a serious breach of the duties Mr Collins owed to the BBC and that he should be restrained from committing such a breach. The BBC also claimed an injunction preventing the publisher from publishing the book. A claim was also made against a service company controlled by Mr Collins; the service company is the Third Defendant, Collins Autosport Limited.
3. Further, and in the alternative, to its case that the future publication of Mr Collins’ book would be a breach of his duties to the BBC, the BBC also said that Mr Collins has already broken his duties by disclosing his identity to the publisher in 2009 and the court’s reaction to that breach should include the grant of an injunction preventing him from benefiting from that breach and an appropriate injunction for this purpose would be one which prevented the Defendants publishing such a book in time for the 2010 Christmas market.

The procedural history

4. The Claim Form in this action was issued on 17th August 2010. On the same day, the Claimant issued an application for various heads of relief. The principal relief which was sought was an injunction restraining the Defendants from disclosing certain information. The relevant information was set out in a confidential schedule to a draft order which was attached to the application notice. The Claimant also sought various ancillary procedural orders which were designed to prevent any part of the confidential information becoming public by reason of the existence of, or the pursuit of, these proceedings.
5. The parties filed a considerable body of evidence in support of their rival cases. Although the application notice was returnable on 23rd August 2010, it was recognised that there would not be sufficient time on that day for the matter to be heard. Accordingly, arrangements were made for the application to be heard on 31st August 2010, with a time estimate of one day. In the meantime, the Defendants gave certain undertakings to the Claimant which made it unnecessary for the Claimants to seek any relief from the court in relation to the period up to the effective disposal of the application.

6. The application came before me on 31st August 2010. Mr Spearman QC and Mr Barnes appeared on behalf of the Claimant. Mr Tomlinson QC and Ms Prince appeared on behalf of the Defendants. At the beginning of the hearing, the Claimants applied to me under CPR 39.2(a) for a direction that the hearing should be in private. The Defendants submitted that the hearing should be in public but that I should make certain orders which would meet the Claimant's concerns that a hearing in public would lead to disclosure to the public of the information which was the subject of the injunction which was claimed. I directed that the hearing should be in private and I gave brief reasons for my decision. The hearing then took place, in private, on 31st August 2010 and for part of the next day, 1st September 2010.
7. At the conclusion of the argument on 1st September 2010, I informed the parties that I was not prepared to grant any injunction in this case. I stated that I would, in due course, put in writing the reasons for my decision.
8. This judgment now contains the reasons for my decision not to grant an injunction in this case. These reasons are expressed as if given on 1st September 2010. I am now informed by the parties that the book has since been published. I originally released a draft of this judgment before I was made aware of that fact and I have revised the draft so that my reasons are expressed as at 1st September and without regard to the fact that the book has been published before this judgment is handed down. Although the hearing was in private, the parties have quite properly agreed that, in view of the publication of the book, this judgment could and should be given in open court.

Section 12 of the Human Rights Act 1998

9. The parties are agreed that Section 12 of the Human Rights Act 1998 applies to this case. Where section 12 applies, section 12(3) provides, in effect, that an injunction to restrain publication is not to be granted unless the court is satisfied that the applicant for the injunction is likely to establish at trial that publication should not be allowed.
10. The parties are also agreed that, following Cream Holdings Ltd v Banerjee [2005] 1 AC 253, the test which the court is to apply in normal circumstances is whether the applicant has satisfied the court that it would probably succeed at the trial of the claim. The parties are agreed that this is the test to be applied in the circumstances of this case. Accordingly, it is not sufficient in this case for the BBC merely to show that there is a serious issue to be tried although that is the relevant test in other cases of applications of interim injunctions: see American Cyanamid Co v Ethicon [1975] AC 396.
11. In setting out the facts on which I base my decision, I will refer to certain matters where there is no dispute but I will also need to refer to matters of fact which are in dispute. In the case of the latter, if they are material to the outcome, I will need to assess which version of the disputed facts is more likely to be accepted at any trial of this claim.

The facts

12. Top Gear is a well known and successful television programme which attracts a very large number of viewers. The original format of the programme was broadcast between 1977 and 2001. An updated format of the programme was launched in 2002

and a number of series using this new format have been broadcast from 2002 to the present time. The most recent series was series 15 which ended in August 2010. Series 15 was broadcast on BBC2, BBC3 and BBC HD and is available on BBC iPlayer. Each series is extensively licensed both in the secondary UK television market and to foreign broadcasters. The programme also has its own YouTube channel featuring clips from the programme.

13. The new format of the programme, launched in 2002, included a character called “The Stig”. Since 2002, this character has always appeared in a racing driver suit and a helmet, with a dark visor which remains closed. The BBC’s evidence on this application described The Stig as “a dramatic device used by the programme for entertainment and comedic effect”. It is a key characteristic of The Stig that he is anonymous, that he does not speak and no clue is given as to his identity. In the period since 2002, the character appears to have become more important to the programme and more emphasis has been placed on his anonymity and on speculation as to who, or what, he or it might be and as to his or its nature and character, which speculation is, in the programme, left unresolved.
14. The Stig was originally played by Mr Perry McCarthy. He wore a black racing driver suit and black helmet and appeared in the first two series after the programme was relaunched in 2002. Mr McCarthy signed a confidentiality agreement in relation to his identity as The Stig. However, he disclosed this identity in an autobiography and this led to him no longer being asked to play the part of The Stig. On the dismissal of “The Black Stig”, the BBC engaged a new driver to take the part of The Stig from series 3 onwards. This person has always appeared in a white racing driver suit and white helmet and has been called “The White Stig”.
15. The Second Defendant, Mr Ben Collins, has regularly played the part of The Stig (or The White Stig) from series 3 to the most recent series, series 15. Occasionally, other drivers are used as The Stig.
16. The Third Defendant, Collins Autosport Limited (“the service company”), is a company controlled by Mr Collins. This company operates as a service company for Mr Collins and the contracts which were made in relation to Mr Collins taking the part of The Stig were made between the service company and the BBC or, as the BBC contends, between the service company and Mr Collins on the one side and the BBC on the other.
17. The First Defendant, HarperCollins Publishing Limited, is a well known book publisher.
18. When Mr Collins was first engaged to play the part of The Stig, the essential characteristic of The Stig, namely that his identity was not to be revealed, was already established. The producer of the programme told Mr Collins, at the outset, of this characteristic. Mr Collins was also made aware of the circumstances in which the BBC had stopped using the services of The Black Stig. Mr Collins co-operated with the requirement that The Stig should be anonymous by arriving on the set wearing a balaclava to avoid being identified. The use of the balaclava was Mr Collins’ own idea and serves to show that he appreciated from the outset that it was an important part of the character of The Stig that his identity should be concealed.

19. Mr Collins played the part of The Stig in all the series from series 3 to series 15. His involvement was the subject of a large number of contracts made with the BBC. Mr Collins says that the contracts were all between the service company and the BBC and that he was not a party to those contracts. The BBC says that both the service company and Mr Collins were parties to those contracts. I will refer to the contracts in more detail in due course. At this point I can express my conclusion on the issue whether Mr Collins was a party to the relevant contracts.
20. My conclusion is that Mr Collins was not a party to the relevant contracts. Although Mr Collins signed the contracts, he did so on behalf of the service company which was expressed to be the relevant contracting party, for which he signed. He did not, by his signature, become a further party to the contracts. The BBC contends that Mr Collins must have been a party to, at any rate, some of the earlier contracts because those contracts contained an obligation on the other contracting party that “you will not reveal your identity”. It is said that it cannot have been intended that the service company would not reveal its identity; it must have been intended that Mr Collins would not reveal his identity. Therefore, it is argued, the contract must be directly binding on Mr Collins and it should be held that Mr Collins made himself a party to the contract for the purpose of taking on this obligation, but not, apparently, for any other purpose. I agree that the language of the obligation referring to “you” and “your” is not ideal given that the other contracting party is prima facie the service company. The real reason for that is that the parties did not think through the consequences of the fact that the contracting party was the service company rather than the individual performer. There are a number of ways for a court to react to this state of affairs. One is to take the contract literally. That produces the result that the service company contracted not to reveal its identity. That is not an absurd suggestion; if the service company had revealed its identity, that would indirectly reveal the identity of Mr Collins. Another way to read the contract is to hold that the service company contracted not to reveal its identity or the identity of Mr Collins. In my judgment, it is appropriate to hold that the contract is to be read in one or other of those ways and it is not appropriate to hold that Mr Collins himself entered into the contract for the sole purpose of entering into the obligation in question. I am encouraged to reach this conclusion by the consideration, to which I will turn in due course, that even if Mr Collins was not a party to the relevant contracts, he did nonetheless owe a duty of confidence, in equity, to the BBC.
21. The first relevant contract between the BBC and the service company was made on 17th October 2003. That contract did not contain any express term in relation to the identity of The Stig.
22. There followed, in 2003 and 2004, six contracts which contained the following clause: “[w]hilst Top Gear is in production and on air you will not reveal your identity to anyone.”
23. I have already explained that my view is that this clause meant either that the service company would not reveal its identity or that the service company would not reveal its identity or Mr Collins’ identity. There was discussion as to the duration of the period described as “whilst Top Gear is in production or on air”. It is clear to me that the reference to “Top Gear” is not confined to the particular series which was the subject of the relevant contract. The reference to Top Gear is a reference to the programme and includes future series of the programme, until the production of further series is

finally discontinued. That period is still continuing at the present time. Accordingly, it is not necessary to consider whether the reference to “on air” extends the relevant period to include the time (following the cesser of production of further series) whilst the archive is still being broadcast.

24. After those six contracts, in the period from 2004 to 2007, the BBC and the service company entered into some twenty contracts relating to Mr Collins playing the part of The Stig where the contracts contained no express term as to the identity of The Stig.
25. In the period from 2007 up to 1st April 2010, the BBC and the service company contracts contained the following clause: “[y]ou are reminded that it is a fundamental condition of this contract that you and your nominated representative(s) keep all matters concerning your contribution to this programme strictly confidential. You and your nominated representative(s) must not disclose information about the programme or your contribution to the programme without prior permission from the producer.” The same contracts defined “contribution(s)” so as to cover all “contributions made by you in connection with this engagement”.
26. There was argument as to the meaning of “nominated representative(s)” in the above provision. For the purposes of this application for an interim injunction, I think that I should proceed on the basis that at the trial of this action it is likely that a court will hold that this phrase referred to Mr Collins. Given that an important characteristic of The Stig was that his identity was not revealed, the identity of The Stig was “information about the programme”. By the contractual terms referred to in the last paragraph, the service company contracted that it and Mr Collins would not disclose the identity of The Stig. If the service company itself disclosed that identity, the service company would be in breach of contract. If it were Mr Collins alone who disclosed the identity, then in my judgment, the service company would be in breach of contract.
27. On 11th February 2008, the BBC and the service company entered into a contract relating to Mr Collins playing the part of The Stig, which contract contained no express term as to the identity of The Stig.
28. In January 2009, there were articles in the press suggesting that Mr Collins was The Stig. Those articles were written as a result of certain action Mr Collins had taken in connection with a gallery in Bristol in relation to a proposed signed print of The Stig. I will need to refer to that matter again later in this judgment.
29. At some time in the course of 2009, Mr Collins (acting through a literary agent) approached the publishers offering them the rights to publish his autobiography. Neither Mr Collins nor the publishers have revealed precisely when in 2009 this approach was made nor, indeed, what was said. It is clear, however, that Mr Collins revealed to the publishers that he was The Stig. It is to be inferred that the intended autobiography was one which would include details of his experiences as The Stig.
30. Neither Mr Collins nor the publishers have so far revealed much detail about the arrangements they made in the course of 2009. However, the publishers have stated that they asked Mr Collins to work to a timetable that would enable them to deliver the book as one of their major Christmas titles. They explained that this meant that they must have the text in time to publish for September 2010. In fact, Mr Collins

delivered a first draft manuscript of the work to the publishers in December 2009. It is to be inferred that Mr Collins had made arrangements with the publishers in the course of 2009 to this effect.

31. By August 2009, Mr Collins had taken the part of The Stig in series 13 of Top Gear. However, his service company had not signed a contract with the BBC prior to the filming of series 13. That was because Mr Collins, on behalf of the service company, had raised various points on the terms of the draft contract which had been proffered by the BBC. In particular, by an email of 19th August 2009, Mr Collins expressed a concern about the terms of what he called the confidentiality clause. He asked for confirmation of what he said was his understanding, namely, that the confidentiality clause applied “just to the term of the contract i.e. until the show broadcasts”. After a non-committal reply from the BBC, Mr Collins repeated his request in an email of 20th August 2009. On the 20th August 2009, the BBC replied stating that it was not prepared to “change” the standard wording and that it was of the utmost importance that the identity of The Stig remained confidential and “so can not be disclosed at any time.”
32. Mr Collins was not happy with the BBC’s answer of 20th August 2009 and he pursued the matter with it. On 6th September 2009, an email to him from the BBC reported that the producer of the programme felt that “the archive needed to be protected” and that the confidentiality clause should remain. The email continued by justifying the need for a continuing obligation of confidentiality “for future years” in particular “by keeping the mystery of your identity unknown”. Mr Collins replied to this email by stating that he was surprised at the line the producer was taking.
33. On 16th September 2009, the BBC sent a further email to Mr Collins in terms similar to the earlier email of 20th August 2009. The September 2009 email added that it was “necessary to retain complete confidentiality of The Stig.”
34. On 11th November 2009, Mr Collins raised the matter directly with the producer of Top Gear. Mr Collins’ evidence is that the producer confirmed to him that which Mr Collins had been wanting to hear, namely, that the confidentiality clause only applied up to the broadcast of the programme. The producer’s evidence is that he did no such thing and he gives his reasons as to why it was inconceivable that he would have given Mr Collins that confirmation.
35. For the purposes of this interim application, I do not have finally to resolve the conflict of evidence as to the conversation on 11th November 2009. However, I ought to decide which version of the conversation is more likely. In my judgment, the BBC’s contentions as to that conversation are significantly more likely than Mr Collins’ contentions. If the producer had given the confirmation sought by Mr Collins that would have involved an unexplained *volte face* on the part of the BBC.
36. On 12th November 2009, the day following the conversation between the producer and Mr Collins, Mr Collins on behalf of the service company signed a contract in relation to series 13. On 19th November 2009 and 21st April 2010, he did the same in relation to series 14 and 15. Each of these contracts included the clause, which has been described as the confidentiality clause, which I have referred to in paragraph 25 above. As I have explained, the service company would be in breach of contract if it, or if Mr Collins, revealed the identity of The Stig.

37. There may be an issue as to the extent of the confidentiality obligations of the service company pursuant to the contracts signed in relation to series 13 – 15. In one sense, those obligations are prospective in that they will only be broken by events which occur after the contracts are entered into. However, the question arises whether those obligations would be broken if it were revealed by the service company or by Mr Collins that Mr Collins had been The Stig in earlier series from series 3 onwards while not disclosing that he had also been The Stig in later series and, in particular series 13 - 15. In my judgment, it is strongly arguable that the obligations would be broken if after the date of taking on the obligations, the identity of Mr Collins as The Stig at any earlier time were to be revealed. Putting it another way, the references in the relevant clause to “this programme” can arguably be read as referring to Top Gear and not just to the later series and in particular series 13 - 15.
38. On 14th July 2010, Mr Collins told the producer of Top Gear that he had been approached about writing a book and was thinking of leaving the programme. This led to certain discussions between the BBC and Mr Collins and his agent and communications with the publishers. It emerged that the book was to be an autobiography, to be called “The Man in the White Suit”, and that it was to be published in September 2010. In response to the BBC’s requests for more information, the publishers have declined to provide a copy of the manuscript or to provide any further detailed information.
39. As I have already described, the present proceedings were launched on 17th August 2010.
40. I will next refer to the material before me on the question of whether the identity of Mr Collins as The Stig had entered the public domain prior to 1st September 2010 when I announced my decision to refuse to grant an interim injunction in this case.
41. The evidence before the court refers to a large number of statements in the press as to the identity of The Stig. Mr Tomlinson, who appeared for the Defendants did not seek to rely on every such reference. He was prepared to accept for the purposes of the present application that some of the material might be regarded as speculative and as falling short of a sufficiently positive statement that Mr Collins was The Stig. Mr Tomlinson adopted the same approach to material on the internet.
42. Mr Tomlinson drew up a list of some 22 references to statements in the press which, he submitted, positively identified Mr Collins as The Stig. It is not necessary for me to refer to the detail of all of that material. The list begins with an article in the News of the World on 4th December 2005. The list then refers to an article in The People on 31st December 2006 and in The Mirror on 28th December 2008. There are then references to six press articles in January 2009. These came about as a result, directly or indirectly, of Mr Collins’ visit to a gallery in Bristol. There is a conflict of evidence as to whether Mr Collins told the gallery owner that he was The Stig. Mr Collins denies that he did. The BBC relied upon a witness statement from the gallery owner; he says that he did not tell the press the identity of The Stig. If that is right, then the press put forward their suggestions that Mr Collins was The Stig as a result of earlier speculation that Mr Collins was The Stig.
43. The list of references to the press include thirteen references to articles which appeared between 19th August 2010 and 29th August 2010. The newspapers were The

Telegraph, The Sunday Times, The Mail (on six occasions), The Guardian, The Daily Star, The Sun, The Express and the Sunday Mirror. These newspapers all reported the fact that the BBC was seeking to prevent the publication of an autobiography which would reveal the identity of The Stig. On 22nd August 2010, The Sunday Times referred to the contents of the publicly available accounts of the service company and explained its view that statements made in these accounts sufficiently identified Mr Collins as The Stig. The thirteen press articles between 19th and 29th August 2010 made increasingly confident and increasingly clear statements that Mr Collins was The Stig.

44. I will first consider the position of Mr Collins, then the position of the publishers and lastly the position of the service company.

The claim against Mr Collins

45. The claim against Mr Collins is essentially put on the basis that he is threatening to act, and has already acted, in breach of contract and in breach of an equitable duty of confidence owed to the BBC. There is reference in the skeleton argument for the BBC to a claim in tort, in particular, on the basis that Mr Collins is threatening to procure, or has procured, a breach of contract by the service company. That third way of putting the claim was not really developed by Mr Spearman in written or oral argument. I will deal with it briefly when I consider the possible involvement and liability of the relevant contracting party, the service company.
46. I have already stated my view that Mr Collins was not a party to the contracts made between the BBC and the service company. It follows that there is no contractual obligation directly binding him in relation to the disclosure of the identity of The Stig.
47. The BBC contends that even if Mr Collins is not the subject of a direct contractual obligation, he is subject to a duty of confidence in accordance with equitable principles. There was no real dispute between the parties as to the test for determining when a duty of confidence arises in equity. I was referred to the way in which the test was described by Lord Goff of Chieveley in A.G. v Guardian Newspapers (No. 2) [1990] 1 AC 109 at 281B as follows:

“I start with the broad general principle (which I do not intend to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.”

48. In some respects, that formulation of the test is not ideal for present circumstances. The formulation applies to a case where a confider reveals information to a confidant. In the present case, the BBC did not reveal to Mr Collins that he was The Stig. However, what is clear is that when Mr Collins took on the role of The Stig, he understood that The Stig was meant to be anonymous and that the identity of The Stig was confidential to himself and the BBC.
49. Indeed, Mr Collins does not really challenge the BBC’s contention that he was subject to a duty of confidence. The difference between the parties is as to the length of the

period during which the identity of The Stig was to remain confidential. The BBC says that the identity of The Stig was to remain confidential at all times and in particular this was necessary to protect the value of the archive of Top Gear. Mr Collins says that the identity of The Stig was only to remain confidential until the particular series in which he played The Stig was broadcast.

50. I think that the BBC is right on this point. Strictly speaking it is only necessary for me to determine which of those submissions is likely to prevail at the trial of this claim. In my judgment, the submissions of the BBC are more likely to prevail. I base my preference on the initial discussions as to the involvement of Mr Collins as The Stig, the fact that the Top Gear programme has considerable commercial value in the secondary television market, the express terms of the contracts between the BBC and the service company and the communications between the BBC and Mr Collins which preceded the signing of the contracts for series 13 - 15. I do not distinguish between confidentiality in the identity of The Stig in the earlier series from series 3 onwards and the identity of The Stig in the later series, in particular series 13 - 15. Particularly in view of the communications between the BBC and Mr Collins which preceded the signing of the contracts for series 13 - 15, Mr Collins is to be taken to have agreed (albeit not pursuant to a contractual obligation) that his identity as The Stig at all times in the past was to remain confidential. Mr Collins has sought to counter the BBC's case by asserting that it would be very onerous for him to be bound by a duty of confidentiality "in perpetuity". In my judgment, however long it was envisaged the duty of confidentiality was to last, it was to last long enough so as to continue (at least) until the present time or until, if earlier, the information ceased to have the character of confidential information.
51. If, as I hold, Mr Collins owed a duty of confidentiality, the next question is whether his identity as The Stig has ceased to be confidential information and, if so, the legal consequences of that fact.
52. The test as to whether information has ceased to be confidential by reason of it having entered the public domain is stated by Lord Goff in A.G. v Guardian Newspapers (No. 2) [1990] 1 AC 109 at 282 C-D, where he said:
- "The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it."
53. Lord Goff refers to the information being "so generally accessible" and to "all the circumstances". The parties are agreed that the question as to whether information has entered the public domain is a matter of fact and degree. There will be some cases where although the information has been published, the nature of the publication or the places where the publication is available or the period for which the published information was available might lead a court to conclude that the information was not "so generally accessible" to have lost its confidential character.

54. Mr Tomlinson relies upon the press coverage to which I have referred above and, in particular, on the press coverage in August 2010 as producing the result that the identity of The Stig is no longer a secret but is now generally accessible as public knowledge with the result that it is no longer confidential information.
55. Mr Spearman contends that what the press coverage shows is that the identity of The Stig is still a matter of speculation only. His submission runs as follows. The identity of The Stig has not truly become a matter of public knowledge. If the intended book is published, then the identity of The Stig will become explicitly clear and will then become a matter of public knowledge. Even if the press coverage to date has caused some damage to the BBC, the clear statement by Mr Collins in his intended book will cause considerable further damage. At the present time, the identity of The Stig remains sufficiently confidential so that the court ought to protect it by the grant of an injunction in order to prevent the further harm which the book would cause to the BBC.
56. I will apply the test I have identified above to the facts of this case. I will ask whether the identity of The Stig is so generally accessible so that, in all the circumstances, it can no longer be regarded as confidential. In my judgment, the press coverage, in particular the press coverage in August 2010, goes well beyond speculation as to the identity of The Stig. The statements in the press that Mr Collins was The Stig would be understood by the public as statements of fact. The number of different newspapers which have stated that fact is such that the fact is now generally accessible. For all practical purposes, anyone who would have any interest in knowing the identity of The Stig now knows it. The identity of The Stig is no longer a secret and it is no longer confidential information. I conclude that at the latest by 29th August 2010, the date of the last of the thirteen publications (between 19th and 29th August 2010) to which I referred above, the fact that Mr Collins was The Stig was so generally accessible that that information had lost its confidential character. At the lowest, I think it is likely that the court at any trial of this action would reach that conclusion.
57. In view of my conclusion in the last paragraph, Mr Tomlinson submits that it is no longer appropriate to grant an injunction to prevent a future publication which states that Mr Collins was The Stig. He submits that a future publication of that kind is publication of something which is no longer confidential information. There is no continuing duty owed by Mr Collins in relation to such information. Accordingly, a future publication of Mr Collins' identity as The Stig is not a breach of duty by him and the court should not restrain him from doing something which will not be a breach of duty.
58. Mr Tomlinson relied upon the speech of Lord Goff in A.G. v Guardian Newspapers (No. 2) and also on the more recent treatment of this subject by Arnold J in Vestergaard Frandsen A/S v Bestnet Europe Ltd [2010] FSR 2. In that case, the learned judge reviewed the authorities on this point in detail and at [76] expressed his conclusion that an injunction will not be granted to prevent a future publication of information that has ceased to be confidential. He qualified this statement in relation to information that could be regarded as having a limited degree of confidentiality even though it could be ascertained from public domain sources. He also separately discussed the question whether a court had power to grant an injunction to prevent a defendant from benefiting from a past misuse of confidential information even at a time when the information has ceased to be confidential.

59. In response to these submissions, Mr Spearman for the BBC relied heavily on the decision of the Court of Appeal in Schering Chemicals Ltd v Falkman Ltd [1982] 1 QB 1. He submitted that, properly understood, this was authority for the court retaining the power to prevent a person, who was under an equitable duty not to disclose confidential information, from disclosing that information at any time even after the information had come into the public domain.
60. The decision in Schering Chemicals was analysed in Vestergaard. In the latter case, it was held that Schering Chemicals was to be regarded as a case where the information always had a limited degree of confidentiality and it was that which was protected by the injunction in that case. I accept that analysis of Schering Chemicals. Further, in my judgment, there is later authority which shows that Schering Chemicals cannot any longer be, if it ever could have been, relied upon as establishing the proposition that the court can restrain publication of material which is no longer confidential. I refer to the treatment of that decision by Lord Oliver of Aylmerton in A.G. v Guardian [1987] 1 WLR 1248 at 1319 D-E, referred to by Bingham LJ in the Court of Appeal in A.G. v Guardian Newspapers (No. 2) [1990] 1 AC 109 at 217C. I stress that I am only concerned at the present point with the equitable duty of confidence and not with the effect of any contractual restriction on disclosure of information.
61. It follows from the above, that if Mr Collins' identity as The Stig is no longer confidential information, then I should not grant an injunction to prevent Mr Collins revealing that identity. In view of my findings that the information is no longer confidential, it is not appropriate to hold that this is a case where there is a residual or limited confidentiality in the information which should be protected by the grant of an injunction.
62. For the sake of completeness, I add that Mr Spearman did not in the end submit that I should reach a different conclusion by reason of the possibility that the information in question had entered the public domain as a result of previous breaches by Mr Collins of his duty. Although Mr Spearman made detailed submissions on such a possibility in his skeleton argument, at the hearing he accepted that he could not show that the statements in the press in January 2009, following Mr Collins' visit to the Bristol gallery, were the result of a breach of duty by Mr Collins. Further, he did not argue that the statements in the published accounts of the service company involved a breach of duty by Mr Collins or by the service company. Accordingly, it is not necessary to discuss whether the result would have been different if the information had entered the public domain by reason of a breach of duty by Mr Collins although it seems to me that the balance of authority is that this does not make a difference in connection with future publication of information that has lost its confidential character.
63. At the hearing, Mr Spearman sought to bring this case within the principles identified in Vestergaard as applying where a court is asked to grant an injunction to prevent a defendant from benefiting from a past misuse of confidential information even if it is no longer confidential. That question was discussed in detail by Arnold J at [82] to [92] and he expressed his conclusions at [93].
64. Mr Spearman submits that Mr Collins must have broken his duty when he revealed his identity to the publisher in 2009. He submits that the information was still confidential at that stage and that the earlier discussion in the press about the identity

of The Stig had not made Mr Collins' identity as The Stig generally accessible. He further submits that Mr Collins' autobiography will only be ready for the 2010 Christmas market because of the earlier disclosure to the publishers in 2009. If Mr Collins had waited until his identity was in the public domain (which was in August 2010 for the first time) his book would not be ready for the 2010 market but only for the 2011 Christmas market. Indeed, if Mr Collins is no longer going to play the part of The Stig, then the book might not be of any interest for the 2011 Christmas market and for commercial reasons might never be published. Accordingly, it is submitted that I should grant an injunction to prevent Mr Collins taking advantage of the fact that he revealed his identity to the publisher in 2009 as compared with the situation he would be in if he only now revealed his identity. For the purposes of considering this submission, I will assume in favour of the BBC that it can establish the factual matters which are relied upon for this purpose.

65. In my judgment, the discussion in the cases which are collected in Vestergaard, such as Terrapin v Builders Supply Co (Hayes) [1967] RPC 375, Roger Bullivant Ltd v Ellis [1987] FSR 172 and Universal Thermosensors Ltd v Hidden [1992] 1 WLR 840, all involve circumstances where an injunction granted by the court would prevent damage which would ensue to the claimant if no injunction were granted. If the apprehended damage has already been inflicted in any event, or could be inflicted pursuant to lawful action by a defendant, then in my judgment it is not appropriate to grant an injunction. Such an injunction would not protect the claimant from harm caused by the unlawful action of a defendant. Although such an injunction would deprive the defendant of a benefit, it is not a proper use of the court's power to grant an injunction merely to punish a defendant for his previous unlawful action, where the injunction does not protect the claimant against further harm, unlawfully caused. The court may award a financial remedy to a claimant in such a case, but that is not the remedy sought by the BBC on this application.
66. In the present case, the identity of Mr Collins as The Stig is in the public domain. If that has caused and/or will cause harm to the BBC, I do not see how any further harm will be caused to the BBC if Mr Collins is allowed to publish his autobiography in time for the 2010 Christmas market.
67. For the above reasons, in so far as the case against Mr Collins is based on an alleged equitable duty of confidence, I decline to grant an injunction to restrain Mr Collins from revealing his identity as The Stig. Further, I decline to grant an injunction to prevent his autobiography being published in time for the 2010 Christmas market.
68. Mr Spearman lightly suggested that I could consider granting an injunction against Mr Collins on the basis that he owed to the BBC a duty of good faith and that he had broken that duty and that an injunction remained appropriate even though his identity as The Stig was now public knowledge. In my judgment, it is not likely that a court trying this claim would conclude that Mr Collins owed any duty of good faith to the BBC. Further, if further disclosure of his identity as The Stig would not cause further harm to the BBC, I ought not to grant the injunction sought.

The claim against the publishers

69. The claim against the publishers is put on the basis that it is threatening to commit a breach of an equitable duty of confidence owed by it to the BBC. In my judgment, the

claim to an injunction against the publishers fails for the same reasons as the claim against Mr Collins, based on the equity of confidence, failed. The information in question is no longer confidential and neither Mr Collins nor the publishers is under a continuing equitable duty which prevents them publishing the information.

The claim against the service company

70. The claim against the service company is based on the terms of the contracts which it entered into with the BBC and on the equity of confidence. So far as the equity of confidence is concerned, the position of the service company is the same as that of Mr Collins. The identity of The Stig is no longer confidential information and the service company is not bound by a duty in equity not to disclose that identity.
71. The claim in contract against the service company raises a large number of issues, to some of which I refer below. However before mentioning those issues, there seem to me to be two points which need to be discussed. Those two matters, whether taken together or separately, seem to me to justify the refusal of an injunction against the service company.
72. The first point is that the involvement of the service company in the publication of the intended book and in the discussions between Mr Collins and the publishers in 2009 is completely obscure. As to the position in 2009, it seems likely that the revelation to the publishers that Mr Collins was The Stig would have been made by Mr Collins himself, or possibly his agent, rather than by the service company. I was told by Mr Tomlinson that both Mr Collins and the service company had at some point entered into contracts with the publishers in connection with the publication of the intended book. In the absence of any further information, I infer that the purpose of there being two contracts is that some of the revenues from the publication will be received by the service company. If there were any revelation by the service company to the publishers in 2009 it can only have been of the most technical kind and following the principal revelation made by Mr Collins himself.
73. Similarly, not much is disclosed in the evidence as to the involvement of the service company in the publication of the intended book. The book was written by Mr Collins, not by the service company. The manuscript was provided to the publishers principally, if not exclusively, by Mr Collins. The process of publication will now be handled by the publishers. Although there is a contract of some sort between the service company and the publishers, I infer that the role of the service company will be confined to receiving some of the resulting revenues.
74. The second point is to consider whether the grant of an injunction against the service company which prevented it from stating that Mr Collins was The Stig would confer anything of benefit on the BBC. I do not see how it could. The fact that the service company might be prevented from stating that Mr Collins was The Stig does not undo the fact that the identity of The Stig is already in the public domain. Further, such an injunction will not prevent Mr Collins and the publishers from stating that Mr Collins was The Stig. Even if I restrained Mr Collins from procuring the service company to break its contract by stating that Mr Collins was The Stig, that would not prevent Mr Collins himself stating the same thing as he is otherwise entitled to do. That means that I do not need to consider whether Mr Collins' control of the service company would render him liable in tort for the company's breaches of contract.

75. Having regard to the two points discussed above, I do not think that I ought to grant an interim injunction against the service company whatever the answers might be to the various questions which arise in relation to the meaning and effect of the contracts.
76. Further, for the same reasons as I gave when I declined to grant an injunction against Mr Collins to prevent him benefiting from a past breach of duty by him (by disclosing his identity to the publisher in 2009), I will not grant an injunction which would prevent the service company benefiting from the fact that the intended book is now ready for the 2010 Christmas market. It is therefore immaterial to inquire whether the service company was a party to any disclosure of the identity of The Stig in 2009 and, if so, whether its conduct was a breach of contract or a breach of the duty of confidence and whether it was induced by Mr Collins.
77. In these circumstances, I will make some brief comments only on the many points that might arise in relation to the claim in contract against the service company.
78. The relevant obligation in the contracts which referred to series 13, 14 and 15, stated that all matters concerning the contribution of the service company and Mr Collins were to be kept confidential. That obligation would not be broken by a statement as to Mr Collins' identity as The Stig when that fact is no longer confidential. The relevant clause also states that the service company and Mr Collins must not disclose information about the programme. It is not clear whether that obligation applies only to information which remains confidential. The point seems to me to be well arguable either way.
79. There may be an issue as to whether the terms of the contracts which referred to series 13, 14 and 15, which dealt with the subject of revealing information about the programme, superseded the earlier term in some of the earlier contracts which stated that the service company was not to reveal its identity to anyone. Again the point is arguable. Further, there is an issue as to whether the reference to the service company not revealing its identity should be interpreted so that it means that it is not to reveal Mr Collins' identity.
80. In view of my earlier conclusion that it is not appropriate to grant an injunction against the service company, it does not seem to me to be helpful to discuss these points further.

Other claims

81. So far I have considered the claims made by the BBC in relation to the fact that Mr Collins was The Stig. The application notice served by the BBC also claims a more general injunction to prevent the Defendants from disclosing other matters about Top Gear which might be confidential.
82. Mr Tomlinson submitted that it was not appropriate for the court to grant what was in effect a *quia timet* injunction when the BBC had not shown that there was a strong case that a breach of the apprehended kind would actually occur. He also objected to the proposed order on the ground that it was not clear and precise and the Defendants would not know, if such an order were made, what was permitted and what was prohibited.

83. Although the BBC has asked the publishers for a copy of the manuscript of the intended book, this has not been provided. Mr Spearman very realistically accepted at the end of the argument that, essentially for the reasons put forward by Mr Tomlinson, he could not ask the court to make the more general injunction which was claimed in the application notice.

The result

84. The above reasons led me to announce on 1st September 2010, at the conclusion of the hearing, the overall result of this interim application which was that I would not grant an interim injunction against any of the Defendants.