Neutral Citation Number: [2007] EWCA Civ 295

Case No: A2/2007/0402

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon Mr Justice Eady
[2007] EW HC 202 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2007

Before:

SIR ANTHONY CLARKE MR
LORD JUSTICE BUXTON
and
LORD JUSTICE KEENE

- -

Between :

LORD BROWNE OF MADINGLEY	**Claimant/ Appellant**
- and -	
ASSOCIATED NEWSPAPERS LIMITED	**Defendant/ Respondent**

- -
- -

James Price QC and **Matthew Nicklin** (instructed by **Schillings**) for the **Claimant**
Victoria Sharp QC, **Catrin Evans** and **Aidan Eardley** (instructed by **Reynolds Porter Chamberlain**) for the Defendant

Hearing dates: 5 and 6 March

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PUBLIC JUDGMENT

Approved Judgment

Sir Anthony Clarke MR:

This is the judgment of the court to which all members of the court have contributed.

This judgment

1. As is explained much more fully below, in these proceedings Lord Browne of Madingley seeks to enjoin on grounds of breach of confidence the publication by the *Mail on Sunday* of various items of information or allegations. The proceedings are still at an interlocutory stage, and Eady J, from whom the appeal is brought, was therefore constrained, as we are, by the rule in section 12(3) of the Human Rights Act 1998. We have concluded that Eady J was right in holding that the publication of some, but not all, of the matters alleged by the newspaper should not be enjoined. That means that in preparing our judgments explaining our decision we are constrained by various considerations.

2. First, the general rule is that hearings must be in public unless there is good reason to take another course: *Scott v Scott* [1913] AC 417, and CPR 39.2(2). In this case, in order to protect the subject-matter of the appeal until determination we exercised the power given by CPR 39.2(3)(a) to sit in private, as had the trial judge. And under the same rubric we have prepared, solely for the information of the parties and not for any further use, a private judgment that sets out in full the facts of the case and our conclusions on them.

3. Second, however, we now have to recognise the imperative of public justice and the need to explain the outcome of the appeal, while continuing to accord proper protection to the appellant until trial. In that connexion it is clear that matter that the court has ruled should not be published until trial should not be set out in this judgment. However, on the other hand, granted that the judgment relates to some matters concerning the parties, there is no good reason why they should continue to be referred to anonymously, a course to be avoided unless justice requires it: *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966.

4. The most difficult question arises in respect of the handling of the matters that we have concluded are publishable by the newspaper in advance of trial. That question has been addressed by the House of Lords in *Cream Holdings v Banerjee* [2005] 1 AC 263. At [5] of the leading speech Lord Nicholls of Birkenhead indicated the nature of case:

> In January 2001 Cream dismissed Mrs Banerjee. When she left she took with her copies of documents she claims show illegal and improper activity by the Cream group. She passed these to the 'Echo' with additional information…..On 13 and 14 June 2002 the 'Echo' published articles about alleged corruption involving one director of the Cream group and a council official. On 18 June 2002 the Cream group sought injunctive relief to restrain publication by the newspaper of any further confidential information given it by Ms Banerjee.

The House discharged that injunction in respect of information already supplied by Ms Banerjee to the newspaper, but not otherwise. That was because the allegations

about Cream raised matters of serious public interest, and Cream was not likely to succeed at trial in rebutting those public interest arguments in support of publication.

5. The House then considered what it should say in its judgment about that conclusion. Lord Nicholls said this at his [26]:

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

The present judgment respects that guidance. In doing so, we note that it does not follow that the principle of open justice has to be trespassed on to the extent that a judgment is not merely enigmatic but incomprehensible. As we have seen, in *Cream* the House set out the general nature or category of the information sought to be enjoined, and the broad reason why that injunction was not in law available. We have taken that course in explaining our decision in this judgment, by referring in broad terms to the kind of information that the newspaper is entitled to publish, but not in any way going on to the degree of detail that may appear in any published report.

6. We have invited the comments of the parties on a draft of the present judgment and have taken note of what they have said. That step was without prejudice to the determination of what should appear in the judgment being a matter for the court.

Introduction

7. On 6 January 2007 Underhill J, on the application of the claimant, Lord Browne of Madingley, granted an injunction in wide terms restraining the defendant ('the newspaper') from publishing any details of the relationship between the claimant and Mr Jeff Chevalier ('JC') and any confidential or private information that JC had obtained in the course of that relationship, including 15 specific items of information. On 12 January, which was the revised return date, Eady J continued the injunction, pending the filing of further evidence. A full inter partes hearing took place on 23 January and on 9 February Eady J ('the judge') made the order against which the claimant seeks permission to appeal. By that order he maintained the injunction in part but refused to do so in important respects. He refused the claimant's application for permission to appeal. The claimant renewed the application on paper and I adjourned it to be heard on notice to the newspaper, with appeal to follow if permission was granted. Eady J said that the case gives rise to relatively novel and intricate questions. We agree and for that reason we grant permission to appeal.

Background facts

8. We can take the relevant background facts primarily from the judgment. The claimant is the Group Chief Executive of BP, which is of course a major international company based in London, has many thousands of employees and is large even in global terms. He and JC were partners, living together in a homosexual relationship, from about the end of 2002 until early 2006. While the relationship lasted JC adopted the claimant's lifestyle and was provided with food, travel, clothes and accommodation at a fairly luxurious level. The claimant also gave JC substantial sums of money either in cash or by cheque. The judge said that the relationship seemed to have become fairly widely known (although no mention was made of it in the media). JC accompanied the claimant at various social events and on trips, including events connected with the claimant's business activities. JC is a Canadian whose visa was due to run out early on in the relationship. So the claimant took various steps to enable him to remain in the country, including paying for a university course from 2003 so that he would acquire student status. The claimant also helped to set up a company for him to trade in mobile phone ring-tones. The claimant and another executive from BP became directors. The company secretary of this new company was also one of the claimant's colleagues from BP.

9. When the relationship ended, JC found himself in financial difficulties and having to adjust to a drastically reduced lifestyle. JC said that the claimant provided him with funds towards a twelve month lease on a flat in Toronto and the cost of furnishings. According to JC, at a meeting in June 2006, the claimant also agreed:

> "… that if needed, [he] would assist in the first year of me transitioning from living in multi-million pound homes around the world, flying in private jets, five star hotels, £2,000 suits, and so on to a less than modest life in Canada".

As the judge put it in paragraph 8 of his judgment, JC's plight was compounded by the fact that he had been out of the employment market for several years. He had some experience in IT work but had left that career path during the period when he was effectively being "kept" by the claimant.

10. There were various communications from JC towards the end of 2006 seeking further financial assistance from the claimant. On 24 December 2006 JC sent the claimant an email which included the following:

> "… I have nothing left to lose … I am facing hunger and homelessness after 4 years of sharing your lifestyle … the least I am asking for is some assistance … please respond … I do not want to embarrass you in any way but I am being cornered by your lack of response to my myriad attempts at communication".

The judge said that that last sentence could be interpreted (although JC denies it) as a thinly veiled threat.

The application for an injunction

11. At some stage JC contacted the newspaper, which was the *Mail on Sunday*. The application for an injunction was made on 6 January because the day before, on 5 January, the newspaper contacted BP and said that it intended to publish an article about the claimant on Sunday 7 January, just two days later. Although the newspaper did not supply a draft of the article to the claimant (and has not done so since), a number of specific allegations were made for comment. It is common ground that when the application was made, counsel for the claimant, on the claimant's instructions, told what the claimant (but not his counsel or solicitors) knew to be a deliberate lie about the circumstances in which Lord Browne and JC had originally met. There was much debate about the significance of that lie before the judge, as there has been before us. We will return to it below.

12. There was a confidential schedule attached to the order of Underhill J which set out the categories of information which the newspaper was restrained from using or disclosing or communicating to any party. In accordance with the principles set out above we do not reproduce that schedule here. By the time the matter came before the judge on 23 January, the newspaper had indicated that it wished to be free to publish five categories of information. The judge enjoined the publication of two of those categories. The remainder, the publication of which he did not enjoin, which decision we uphold, were as follows (retaining the original notation for ease of reference):

> b) the alleged misuse of BP's resources and manpower to support or assist JC:
>
> i) JC's personal use, with the claimant's knowledge and permission, of BP's computers, and of its support staff;
>
> ii) the involvement of BP personnel in setting up and eventually winding up a company created by the claimant for JC to run;
>
> iii) the use of a senior BP employee to run a personal errand for the claimant by delivering cash to JC;
>
> c) the bare fact of the past relationship between JC and the claimant;
>
> d) the alleged breach of confidentiality by the claimant in discussing with JC confidential BP matters and showing him confidential BP documents (the newspaper would wish to identify such matters generally, by reference to the documents and topics discussed, rather than revealing the detail).;

Some of the information which it is now sought to publish was not included in the confidential schedule to the order made by Underhill J.

13. At the hearing before the judge on 23 January the argument focused on the five categories of information which the newspaper said that it intended to publish. As we understand it, the newspaper did not offer an undertaking that it would not publish other information which had previously been enjoined. There was however no discussion before the judge about any of those categories, but there was much discussion about the lie and what effect it might have on the judge's decision.

The decision of the judge

14. The judge sent the parties a draft of his judgment on 6 February. In the draft he granted (or continued) the injunction with regard to categories a) and e) in the list referred to in [12] above, but otherwise refused to grant an injunction. As to the other matters originally enjoined, the judge held that the claimant was entitled to an injunction in respect of private information disclosed to JC in confidence in the course of their relationship but not otherwise. Thus he permitted the newspaper to publish information about the claimant's alleged misuse of BP's resources and manpower, information about the claimant's alleged breach of confidentiality in revealing corporate information and documents to JC and the fact of the claimant's relationship with JC. We will return to the detail of the judge's approach, reasoning and conclusions below.

15. On 9 February there was a further hearing at which the debate centred on what parts of the judgment should be published. The judge excised some passages but not others, with the result that there are now in existence two judgments, which we will call 'the judgment' and 'the public judgment' respectively. The judge stayed his order and continued Underhill J's order pending any appeal. One of the matters debated at some length at the hearing on 9 February was whether the part of the judgment which discussed the content of the lie should be published. The judge held that it should. There was no separate debate as to whether the judge should reimpose an injunction in respect of the matter to which the lie had related.

16. In this appeal Mr Price submits on behalf of the claimant that we should reimpose the whole of Underhill J's order and that we should reverse the judge's decision to refuse to excise the part of his judgment which records the detail of the lie, which the claimant accepts was asserted on behalf of JC to be a lie from the outset. Indeed Mr Price puts this last point at the forefront of the claimant's appeal. We will consider first the legal principles, then their application to the facts and finally the issues arising out of the lie.

The legal principles

17. There has been a considerable development of the principles applicable to cases of this kind in recent years. The cases now show that the critical question is to examine how the provisions of articles 8 and 10 of the European Convention on Human Rights ('the Convention') apply to the facts of the particular case.

18. Article 8 is entitled "Right to respect for private and family life" and provides:

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

> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Article 10 is entitled "Freedom of expression" and provides, so far as relevant:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, …. for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

19. The best known statement of principle in recent times is perhaps that of Lord Nicholls in *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457, at [13] and [14]. At the end of [13] he observed that the 'confidence' in the phrase 'breach of confidence' is the confidence arising out of a confidential relationship. In [14] he said that the cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. He added:

> "Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation as awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."

20. Lord Nicholls added in [17] that

> "[t]he time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence … and are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority"

and in [21] that

> "[e]ssentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy".

21. The position was recently summarised by Buxton LJ, with whom Latham and Longmore LJJ agreed, in five propositions set out in [8] of his judgment in *McKennitt v Ash* [2006] EWCA Civ 1714, [2007] EMLR 113. The five propositions are these:

> "i) There is no English domestic law tort of invasion of privacy. Previous suggestions in a contrary sense were dismissed by Lord Hoffmann, whose speech was agreed with in full by Lord Hope of Craighead and Lord Hutton, in *Wainwright v Home Office* [2004] 2 AC 406 [28]-[35].
>
> ii) Accordingly, in developing a right to protect private information, including the implementation in the English courts of articles 8 and 10 of the European Convention on Human Rights, the English courts have to proceed through the tort of breach of confidence, into which the jurisprudence of articles 8 and 10 has to be "shoehorned": *Douglas v Hello! (No3)* [2006] QB 125 [53].
>
> iii) That feeling of discomfort arises from the action for breach of *confidence* being employed where there was no pre-existing relationship of confidence between the parties, but the "confidence" arose from the defendant having acquired by unlawful or surreptitious means information that he should have known he was not free to use: as was the case in *Douglas*, and also in *Campbell v MGN* [2004] 2 AC 457. Two further points should however be noted:
>
> iv) At least the verbal difficulty referred to in (iii) above has been avoided by the rechristening of the tort as misuse of private information: per Lord Nicholls of Birkenhead in *Campbell* [2004] 2 AC 457[14]"
>
> v) Of great importance in the present case, as will be explained further below, the complaint here is of what might be called old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information.

22. As Buxton LJ put it in [11] in *McKennitt*, articles 8 and 10 are now the very content of the domestic tort that the English court has to enforce. We consider first article 8 and then article 10, but first we should note that this appeal relates to the grant of an interlocutory injunction to restrain the publication of information. The judge was thus considering "whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression", within the meaning of section 12(1) of the Human Rights Act 1998 ('the HRA'). Section 12(3) and (4) provide:

> "(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-
>
> (a) the extent to which-
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

23. As we see it, the approach required by section 12 arises in this way. The court should first consider whether this is a case in which article 8 is engaged. It should then consider whether article 10 is engaged and, critically, whether the applicant for relief has shown that he is likely to establish at a trial that publication should not be allowed within the meaning of section 12(3) of the HRA.

Article 8

24. The first question under article 8 is whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy in the particular circumstances of the case. That is the relevant question whether there was a previous confidential relationship between the parties or not. As stated above, Lord Nicholls said that the cause of action for breach of confidence has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In *Douglas v Hello! (No 3)* [2005] EWCA Civ 595, [2006] QB 125, Lord Phillips CJ, giving the judgment of this court, said at [55]:

> "It seems to us that information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should be available to others."

He added at [83]:

> "What is the nature of "private information"? It seems to us that it must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public. The nature of the information, or the form in which it is kept, may suffice to make it plain that the information satisfies these criteria"

In *HRH The Prince of Wales v Associated Newspapers Limited* [2006] EWCA Civ 1776, Lord Phillips CJ, again giving the judgment of this court, said at [34] that the court considered that these observations remain sound and that they are in no way discordant with the statement of Lord Nicholls in *Campbell v MGN* at [21] (quoted above) that essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy. In *The Prince of Wales* case Lord Phillips noted in the same paragraph that Lord Hope of Craighead advanced a similar test at [85], that Lady Hale advanced the same test at [134] and that Lord Carswell endorsed it at [165]. Lord Hope said at [96] that there was no need for such a test where "the information is obviously private". *The Prince of Wales* case was just such a case.

25. In *McKennitt* at [15], which is quoted in full below, Buxton LJ said that in the case where there is no pre-existing relationship of confidence, as in *Campbell v MGN*, *Douglas v Hello!* and *von Hannover v Germany* (2005) 40 EHRR 1, the primary focus is on the nature of the information. In a case like this, where there is a previous relationship of confidence, the focus is different.

26. The cases make it clear that, in answering the question whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy in the particular circumstances of the case the nature of any relationship between the relevant persons or parties is of considerable potential importance. This can be seen from proposition v) in [8] (quoted above) and from [15] to [24] of *McKennitt*. It can also be seen from *The Prince of Wales* case at [67] to [68], albeit in the context of the balance to be struck between rights under article 8 and article 10.

27. The issue between the parties in this appeal centers on the relevance of the nature of the information which it is sought to publish. Ms Sharp QC submits that the mere fact that the parties had a pre-existing relationship, such as marriage or a relationship of friendship, as in *McKennitt*, or an intimate and sexual relationship, such as that between the claimant and JC, does not create a reasonable expectation of privacy in relation to all information learned or activities witnessed during the relationship. In this regard Ms Sharp relies, for example, upon this statement of Lord Hope in *Campbell* at [92]:

> "The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect: see *A v B* [2003] QB 195, 206, para 11(vii)."

Lord Hope added:

> "In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities."

28. Mr Price reminded us of the wide scope that has been accorded to the notion of privacy. For instance, Lord Mustill said in this court in *R v Broadcasting Standards Commission ex p BBC* [2001] QB 885 at [48] that the privacy of a human being denotes at the same time the personal 'space' which should be free from intrusion. He added that "an infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate. Also, in *McKennitt* [2005] EWHC 3003, [2006] EMLR 178 (QB) Eady J found at first instance that it was the intrusive nature of the revelation of the minutiae of one's home life which is offensive to article 8. When considering publication of details of Ms McKennitt's home, Eady J said at [135]:

> "[Home] is one of the matters expressly addressed in Article 8(1) of the Convention as entitled to "respect". Correspondingly, there would be an obligation of confidence. Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs."

This court approved Eady J's approach: see eg [22].

29. Nevertheless we accept Ms Sharp's submission that the *mere* fact that the information was imparted in the course of a relationship of confidence does not satisfy Lord Nicholls' test of "expectation of privacy". An example would be a husband telling his wife that Oxford or Cambridge won the boat race in a particular year. However, the relationship may be of considerable importance in answering the question whether there was an expectation of privacy. Buxton LJ put the point thus in *McKennitt* at [15]:

> "Recent leading cases in this area, such as *Campbell*, *Douglas* [ie *Douglas v Hello! (No 3)* [2006] QB 125] and the most recent case in the ECtHR, *von Hannover v Germany* (2005) 40 EHRR 1, have wrestled with the problem of identifying the basis for claiming privacy or confidence in respect of unauthorised or purloined information: see § 8(iii) above. There, the primary focus has to be on the nature of the information, because it is the recipient's perception of its confidential nature that imposes the obligation on him: see for instance per Lord Goff of Chievely in *A-G v Guardian Newspapers (No2) ["Spycatcher"]* [1990] 1 AC 109 at p 281A. But, as Lord Goff immediately goes on to say, in the vast majority of cases the duty of confidence will arise from a transaction or relationship between the parties. And that is our case, which accordingly reverts to a more elemental enquiry into breach of confidence in the traditional understanding of that expression. That does not of course exempt the court from considering whether the material obtained during such a

> relationship is indeed confidential; but to enquire into that latter question without paying any regard to the nature of the pre-existing relationship between the parties, as the argument for the appellant in this court largely did, is unlikely to produce anything but a distorted outcome."

30. We stress in particular the last sentence, in which we regard the point made after the semi-colon as of particular importance. Similarly, in *The Prince of Wales* case Lord Phillips said at [36]:

> "It is not easy in this case, as in many others, when concluding that information is private to identify the extent to which this is because of the nature of the information, the form in which it is conveyed and the fact that the person disclosing it was in a confidential relationship with the person to whom it relates. Usually, as here, these factors form an interdependent amalgam of circumstances. If, however, one strips out the fact of breach of a confidential relationship, and assumes that a copy of the Journal had been brought to the Newspaper by someone who had found it dropped in the street, we consider that its form and content would clearly have constituted it private information entitled to the protection of article 8(1) as qualified by article 8(2)."

31. In our judgment, the cases support the conclusion that the relationship between the relevant persons or parties is of considerable importance in answering Lord Nicholls' question, namely whether there was a reasonable expectation of privacy. In answering that question there are a number of potentially relevant questions, depending upon the circumstances. They include whether the person concerned (here JC) received information which he knew or ought reasonably to have known was fairly and reasonably to be regarded as confidential or private.

32. There was some discussion in the course of the argument as to whether it was sufficient for the claimant to show that there was a relationship of confidence and whether, once such a relationship is shown, all information obtained in the course of the relationship is confidential without regard to the nature of the information. In our judgment, the answer to those questions is no. That is clear, for example from Lord Nicholls' formulation of the test, namely whether *in respect of the disclosed facts* the claimant has a reasonable expectation of privacy – our emphasis. As we see it, the test must be applied to each item of information communicated to or learned by the person concerned in the course of the relationship.

33. The nature of the relationship is of considerable importance. For example, the mere fact that the piece of information can be regarded as trivial does not seem to us to be decisive against answering Lord Nicholls' question in the affirmative. As the passage quoted above from [135] of Eady J's judgment in *McKennitt* shows, it may or may not be. We agree with the general proposition advanced by Ms Sharp that the question whether any particular piece of information qualifies as private and the claimant has a reasonable expectation of privacy in respect of it, requires a detailed examination of all the circumstances on a case by case basis. The circumstances include the nature of

the information itself and the circumstances in which it has been imparted or obtained. We will return to this consideration in the context of the facts.

34. Ms Sharp submits that there is no authority for the proposition that information relating to business activities will be characterised as private merely because it is communicated or learned in a domestic environment, or in the course of a personal relationship. We accept that that is so but, again, it appears to us that all depends upon the circumstances of the particular case. The judge suggested at [33] that as a matter of first impression the characterisation of business information as private would appear inconsistent with the policy objectives behind article 8, namely that this is a human right concerned with protecting personal integrity, dignity and domestic life. We are not sure that that is quite right because it seems to us that business information passed by a company director to his sexual partner could readily be held to be information which the latter knew or ought reasonably to have known was fairly and reasonably to be regarded as confidential or private and in respect of which the former had a reasonable expectation of privacy. However, it seems to us that the judge recognised that that was or might be so at [33] and [34].

35. At [35] and [36] the judge quoted from the 1990 Report of the Committee on Privacy and Related Matters (Cm 1102), which pointed up some of the problems but ultimately concluded that the courts must be left to determine issues as they arise on a case by case basis. We have not found the contents of the report to be of any real help. Nor is there much assistance in the English cases which have been decided so far. However, the judge referred at [34] to *Niemetz v Germany* (1992) 16 EHRR 97 and *Stés Colas Est v France*, App 37971/97, 16 April 1997. We were also referred to *Amann v Switzerland* (2000) 30 EHRR 843. These decisions do not advance the argument very much. *Niemitz* shows that article 8 should not be construed as necessarily excluding business activities, while *Amann* shows that "telephone calls received on private or business premises are covered by notions of 'private life' within the meaning of article 8.1."

36. In short, each case must be decided on its own facts and the judge was correct to say, as he did at [42] that, without entering into a preliminary inquiry as to whether any particular piece of information should be allocated a 'business' or a 'personal' characterisation, the question to ask, in relation to each of the categories individually, was whether there was a reasonable expectation of privacy.

37. If, in respect of particular information, there is a reasonable expectation of the privacy, article 8 is engaged. The question is then whether interference with those rights should be permitted under article 8.2. Where, as in the present case, the article 8 right is based on the protection of private information, the basis for that interference will usually, though not in every case, be found in the rights and freedoms created by article 10.

Article 10

38. The newspaper wishes to exercise its freedom of expression under article 10(1). It should be noted that article 10(2) provides that the right to freedom of expression includes the freedom to receive information. It is not in dispute that, other things being equal, the newspaper has the right to publish information of the type that it wishes to publish in this case. However, that right must be balanced against any

article 8 rights of privacy. Thus, at a trial a balance will have to be struck between the claimant's rights under article 8 and the newspaper's rights under article 10. In the case of each of the pieces of information in dispute, the court must consider whether the justification in article 10(2) is established. By its express terms article 10(2) provides that the freedom of expression may be subject to such restrictions (and the like) as are prescribed by law and necessary in a democratic society for the protection of the reputation or rights of others and for preventing the disclosure of information received in confidence. The question is sometimes said to be to ask where the public interest lies. It is a question of balance.

39. It is now well settled that neither article as such has precedence over the other: see eg *In re S (a child)* [2004] UKHL 47, [2005] 1 AC 593, per Lord Steyn at [17], where he identified four propositions which he said emerged from *Campbell v MGN*:

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

See also *McKennitt* per Buxton LJ at [46] to [48] and *HRH the Prince of Wales v Associated Newspapers Limited* at [52].

Section 12 of the HRA

40. The judge was not of course conducting a trial but considering an application for an interlocutory injunction. Under section 12(3) of the HRA the question for decision in relation to each such piece of information is whether the court is satisfied that the applicant is likely to establish, presumably at a trial, that publication should not be allowed. For the purposes of this case, the relevance of section 12(4) is simply that the court must have regard to the importance which the Convention attaches to freedom of expression. In this regard Ms Sharp relies upon the fundamental role of the press in a democratic society and, in particular upon the survey of Strasbourg and English authority by Munby J in *Re Brandon Webster* [2006] EWHC 2733, [2007] EMLR 199 (Fam) at [29] to [33].

41. In *Cream Holdings Limited v Banerjee* [2004] UKHL 44, [2005] 1 AC 253, the House of Lords considered the meaning of 'likely' in section 12(3). Lord Nicholls, with whom the other members of the appellate committee agreed, explained that 'likely' could mean different things depending upon its context. He held that it meant something more than "the commonplace *Amercian Cyanamid* standard of 'real prospect' but not necessarily more probable than not". It should be given a flexible meaning depending upon the circumstances.

42. Lord Nicholls summarised his conclusions at [22] as follows:

> "… But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section

> 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

43. Mr Price submits that where the claimant shows that there is a real expectation of privacy but the question whether publication would satisfy the public interest cannot be made until trial the interests of justice would, other things being equal, require that the claimant's expectation of privacy should be protected until trial. He submits that it must be for the newspaper to show that it is more likely than not that it will be permitted to publish by reason of article 10. We are unable to accept that submission because it is contrary to section 12(3), which proceeds on the footing that where there is uncertainty publication should be permitted unless the claimant can show that he is likely to succeed at the trial, using the word 'likely' in the flexible manner described by Lord Nicholls. Thus, on the facts of this case it was for the claimant to persuade the judge, in respect of each category of information, that his prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case, the general approach being that the courts should be 'exceedingly slow' to make interim restraint orders where the applicant has not satisfied the court that he will probably ('more likely than not') succeed at the trial. By 'succeed at trial' we understand Lord Nicholls to mean that the claimant is likely to succeed after the court has carried out the relevant balance between the claimant's rights under article 8 and the newspaper's rights under article 10. We see no reason not to apply the general approach here.

Bonnard v Perryman

44. The judge gave some consideration to the rule in *Bonnard v Perryman* [1891] 2 Ch 269, as recently confirmed by this court in *Greene v Associated Newspapers Limited* [2005] QB 972. That rule applies to defamation proceedings. The relationship

between the rule and the correct approach in actions for breach of confidence was considered by Buxton LJ in *McKennit* at [33] to [36] and [78] to [80]. It is not necessary for us to consider that relationship here because in this court Ms Sharp does not rely upon the rule in order to defeat the claimant's claim for an injunction or to uphold the decision of the judge.

Correct approach on appeal

45. The approach which should be adopted on an appeal of this kind is not, we think, in dispute. Although the exercise upon which the judge was engaged was not the exercise of a discretion it was similar in that it involved carrying out a balancing exercise upon which different judges could properly reach different conclusions. In these circumstances it is now well settled that an appellate court should not interfere unless the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could reasonably reach: see eg *Assicurazioni Generali SpA v Arab Insurance Group* [2003] 1 WLR 577 at [9] and [16] to [20], *Campbell v MGN* at [87] to [101], [158] and [165], *Galloway v Daily Telegraph* [2006] EWCA Civ 17 at [68], [2006] EMLR 221, *McKennitt* at [45] and *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101 at [35] .

The facts

46. We turn to consider the application of the principles stated above to the facts. As we said earlier, the newspaper told the judge that it wished to publish five categories of information. The judge held that the newspaper could not publish categories a) and e) in the list referred to in [12] above. There is no appeal on the part of the newspaper from those conclusions. It is relevant to note that, in considering items a) and e), the judge had regard to the principles which we identified earlier. The judge had correctly directed himself by reference to those principles.

47. The judge refused relief in respect of items b), c) and d). Although, perhaps inevitably, the judge discussed the items separately in different paragraphs, it is in our judgment important to consider them both separately and together. It will be recalled that they are:

> b) the alleged misuse of BP's resources and manpower to support or assist JC:
>
> i) JC's personal use, with the claimant's knowledge and permission, of the BP computers, and of its support staff;
>
> ii) the involvement of BP personnel in setting up and eventually winding up a company created by the claimant for JC to run;
>
> iii) the use of a senior BP employee to run a personal errand for the claimant by delivering cash to JC;

c) the bare fact of the past relationship between JC and the claimant;

d) the alleged breach of confidentiality by the claimant in discussing with JC confidential BP matters and showing him confidential BP documents [the newspaper would wish to identify such matters generally, by reference to the documents and topics discussed, rather than revealing the detail]

48. For the reasons given earlier, the relationship between the claimant and JC was central to the question whether article 8 was engaged in respect of particular items of information and how the balance between the claimant's rights under article 8 and the newspaper's rights under article 10 should be struck. When setting out his task at [11] of his judgment, the judge correctly directed himself that he had to ask himself whether a prima facie duty of confidence would arise in respect of each of the items sought to be enjoined by virtue of the fact of the relationship. There is no doubt that, in determining items b) and d), the judge followed that direction by having the implications of the relationship well in mind. In each case the judge held that the claimant had no legitimate expectation of privacy with regard to the information and, in any event, that, if he did, he had not shown that publication was 'likely to establish that publication should not be allowed' at the trial.

49. The judge's conclusions can be seen at [43] to [46] of his judgment as follows:

> "43. For example, there are two matters which directly concern the claimant's conduct in relation to [BP] information, personnel and resources. There is the alleged use of some of its equipment and personnel for the benefit of JC and, also, the revelation of confidential information and documents to him. One may ask whether there can be a reasonable expectation that the law will protect the privacy of a senior executive, in relation to the use of corporate information and resources, when the effect would be to keep such allegations from those who might ordinarily be expected to make the relevant judgments, or exercise supervision; that is to say, shareholders and colleagues on the board of directors. For example, they might wish to know that a company was set up (to enable JC to deal in ring-tones for mobile phones) with the assistance of [BP] personnel. It is at least accepted by the claimant that his personal assistant helped with "secretarial tasks". The company no longer trades.
>
> 44. Mr Spearman has argued that these matters, if they are to be criticised at all, should be regarded as relatively trivial. There is, for example, a dispute as to the *extent* to which [BP] personnel were involved in the project. He may well be right, but it seems to me that it is not

> desirable for the court to make a value judgment on such behaviour in a corporate context: more specifically, if the circumstances call for a judgment to be made on relative gravity, it is not for a judge to help him keep the information from those whose right and responsibility it is to make it.
>
> 45. On the other side of the line, or so it seems to me, would fall private conversations in a domestic environment (including at any rate some discussion about business matters). For example, one would expect most people from time to time to come home from work and to feel free to unburden themselves about the horrors of the day – whether to a wife, husband, lover, mistress or partner (homosexual or otherwise). People feel free in the privacy of their own homes to have a moan about colleagues or employers. What puts such communications, potentially, under the protection of the law is that revelations of such information would infringe the reasonable expectation people have that intimate and uninhibited discussions in a domestic environment will be respected.
>
> 46. It is not the subject-matter which determines the issue in those cases, but the circumstances in which the opinions or information may be imparted. The entitlement to protection springs from the nature of the confidential relationship itself: cf *Argyll v Argyll* (cited above) at 329-30. It is necessary to have regard to any such pre-existing relationship, and the duties of confidence to which it correspondingly gives rise. This kind of case calls for what Buxton LJ in *McKennitt* at [15] termed "… a more elemental inquiry into breach of confidence in the traditional understanding of that expression" (rather than addressing the different question of whether a stranger could be restrained, who has "purloined" confidential or private information outside the context of such an existing relationship). Of course, even within a domestic environment or relationship, there may be circumstances where the public interest genuinely requires the confidence to be overridden (e.g. in order to reveal significant wrongdoing or perhaps to protect the public from being seriously misled)."

50. The judge had already concluded, in his [42], that he should not seek to isolate particular items as falling into a 'business' or 'personal' category, but should ask directly in relation to each separate item whether there was a reasonable expectation of privacy. That demonstrates, contrary to the submission made to us at one point, that the judge did not simply hold that the claimant could not establish an article 8

right because the information concerned was characterised as business information or business activity. He asked himself the correct question. We do not think that the judge's conclusions of principle in those paragraphs can fairly be criticised. The question in this appeal is not whether we would have answered the question in the same way but whether the judge was wrong to reach the conclusion he did.

51. As to item b), the judge's conclusions of fact are essentially contained in [50]:

> "50. This is not concerned with *information* communicated in circumstances of confidence, but rather with *activities* involving [BP] resources. The matter was not raised on 5 or 6 January and the claimant claims that the first he knew of it was on receipt of JC's witness statement of 16 January. I cannot see that anything turns on this. In my judgment, there is no reasonable expectation of privacy. The extent to which JC's allegations may be true or false is thus in the present context largely irrelevant: see *McKennitt v Ash* at [78]-[80] and [86]. The argument fails at the first stage of the inquiry and I am not thus concerned with whether there might be a public interest; in that context, of course, the accuracy or otherwise of the allegations might be a relevant factor: see e.g. *McKennitt* at [87]. But I could not say, even if I had to assess where the truth lies in this respect, that the claimant would be "likely" to succeed in any event. He would not be able at this stage to discharge that burden."

52. We are not sure that it is helpful to draw a distinction between 'information' and 'activities'. JC came by the information as a result of his relationship with the claimant and he was provided with company assistance as a result of the same relationship. Nevertheless, as can be seen, the judge asked himself the correct question and his reasons for answering the question in the negative are to be found at [43], quoted above. They are in short that, on JC's account, the claimant used or procured the use of BP resources and personnel for the benefit of JC and not of BP. The question asked by the judge at [43] is a pertinent one; namely whether there can be a reasonable expectation that the law will protect the privacy of a senior executive, in relation to the use of corporate information and resources, when the effect would be to keep such allegations from those who might ordinarily be expected to make the relevant judgments, or exercise supervision; that is to say, shareholders and colleagues on the board of directors. It was in our opinion open to the judge to answer that question in the negative. As the judge put it, such people might wish to know that a company was set up to enable JC to deal in ring-tones for mobile phones with the assistance of BP personnel.

53. Further, it was in our view open to the judge to conclude that, while some may regard the assistance provided to JC, whatever it was, as relatively trivial, that was a matter for BP and not for the court to decide. In short it was open to the judge to hold that the claimant had no reasonable expectation of privacy with regard to the use of BP equipment and resources. In reaching this conclusion it was not necessary for the

judge or this court to resolve the issues between the parties as to what precise use was made of what laptops by JC.

54. As we read [50] and [51], the judge also considered the position under article 10 and concluded that the claimant cannot show that he is likely to succeed at the trial, even if he had a reasonable expectation of privacy. We have already set out [50]. The judge added at [51]:

> "51. There are various analyses available, each of which leads to the same conclusion. As I have said, whether or not JC's allegations are accurate or exaggerated (and to an extent they seem not to be in dispute), and whether they reflect adversely on the claimant's judgment, are matters for the shareholders and board members to consider. It would be wrong for the court to prevent them finding out about it. In any event, I would need also to reflect the similar, but distinct, doctrine that even information subject to a *prima facie* duty of confidence can be revealed if it discloses evidence of wrongdoing."

55. As we understand that reasoning, the judge was deploying the interests of BP, through its shareholders and directors, in support of his conclusion that the public interest in publication may prevail over the claimant's private interest under article 8, with the result that the claimant cannot discharge the burden under section 12(3) of the HRA. Again, we are of the opinion that the judge was entitled to reach that conclusion and that it is a conclusion with which this court should not interfere. We should add in this connection that we do not accept the submission that there was no warrant to publish the information in b) in the press because it could have been simply communicated to BP. We can imagine cases in which that might be so but BP is a large international public corporation with very large numbers of shareholders. This is in our view a relevant consideration in favour of publication of the information in the public interest.

56. We should add that at the end of [51] and in [52] the judge also referred, as a separate strand in his reasoning, to *Bonnard v Perryman* and to the possibility of an action for libel if JC's allegations are untrue. As indicated earlier Ms Sharp does not rely upon the principle in that case in this court. Nor do we.

57. As to item d), the considerations are essentially the same as in the case of b). In any event we can see no basis upon which we could properly interfere with the decision made by the judge.

58. We return to item c), which is the bare fact of the relationship between the claimant and JC. The judge gave three reasons for his conclusion that the newspaper should be permitted to report that fact. The first is stated in [53] as follows:

> "53. Although it is not suggested that the newspaper wishes to publish any intimate details about the relationship, such as sexual matters or minutiae of domestic life, Miss Sharp has made clear that the Defendant would

> wish to refer to the fact that the relationship took place – not least because it may be important background in authenticating in readers' minds the other allegations they wish to publish. That is, of course, a legitimate consideration: see e.g. *Campbell v MGN* … at [63]-[66]."

59. In our judgment, that is a sufficient reason to permit publication of the bare fact of the relationship. Publication of the information in categories b) and d) would make no sense without publication of the nature of the relationship between the claimant and JC. We therefore dismiss the appeal in this respect on this ground alone.

60. What is implicit in paragraph 53 of the judge's judgment is that categories (b), (c) and (d) are bound up with one another when it comes to publication. Mr Price recognizes that and argues that, because publication of (b) and (d) requires publication of (c), which undoubtedly concerns the claimant's private life, categories (b) and (d) are consequently protected by Article 8 and should not be published. We can see some force in that line of argument but we are not persuaded that it is likely to succeed at trial when the eventual balance comes to be struck.

61. The judge gave two other reasons in [54] and [55]. The first was that the relationship was already in the public domain, such that it would be unrealistic to restrain publication and the second, which is closely related to the first, is that the information had become "so generally accessible that, in all the circumstances, it cannot be regarded as confidential". The judge referred to *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109, per Lord Goff at 282. We doubt whether we would have concluded that these were sufficient reasons to permit publication of the fact of the relationship, if it were not for the judge's decision on items b) and d). It appears to us that there is potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper. However, in the light of our decision with regard to b) and d), it is not necessary to discuss this point further.

62. It follows from the above that we dismiss the appeal with regard to items b), c) and d). As indicated above, with the exception of the matter in respect of which the lie was told, the judge also considered the other items enjoined by Underhill J. He continued the injunction in some respects but not others. Although Mr Price submits that we should allow the appeal in the case of the others, he did not address any separate argument with regard to them and we see no reason to interfere with the judge's decision in respect of them.

63. Mr Price further submits that we should restore the form of Underhill J's injunction, so that, instead of restraining the publication of specific categories of information, the order should restrain 'the publication of any confidential or private information or communications that JC obtained in the course of or as a result of his relationship with the claimant and in particular' specific categories of information. At the hearing on 9 February the judge accepted Ms Sharp's submission that the general principle is that, before an injunction is granted restraining publication, there must be evidence that the defendant intends to publish the information and the claimant must establish with particularity what is alleged to be confidential because it is a cardinal rule that an injunction must be framed in such a way that the party affected can know with

certainty what he is or is not allowed to do. In support of those submissions Ms Sharp referred us, by way of example, to the decisions of Eady J in *A v B, C and D*, [2005] EWHC 1651 (QB); [2005] EMLR 851 at [12] and *X & Y v Persons Unknown* [2006] EWHC (QB) 2783 at [39] to [40].

64. The general principles are not in dispute (and are in any event correct) but Mr Price submits that, where an informant is providing information learned in a confidential relationship in plain breach of confidence, as for example in the case of the lady who leaked the Prince of Wales' journal in *The Prince of Wales* case, the principles can be satisfied by an injunction along the lines of that granted by Underhill J. There may be such cases. All depends upon the facts of the particular case. The essential points are that there must be evidence from which the court can infer that the defendant intends to publish particular information or a particular class of information so that a judgment can be made as to the balance between article 8 and article 10 rights in the light of section 12(3) of the HRA. It is impermissible to grant a speculative injunction and the defendant must know with particularity what he is or is not allowed to do.

65. The precise form of an injunction in a particular case is a matter for the judge's discretion after applying the relevant principles. In the instant case the judge was, in our judgment, entitled to conclude that he should not grant a general injunction of the kind made by Underhill J but an injunction confined to specific categories of information or activity. The facts of this case demonstrate that the judge's approach was correct. He decided to grant an injunction in respect of some information which was said to be protected by article 8 and refused to grant one in respect of some which was not. A general injunction would leave the newspaper in a state of potential uncertainty. For these reasons we decline to interfere with the form of the injunction granted by the judge.

The lie

66. In his judgment the judge set out the facts relating to the lie in some detail. As indicated earlier, the submission made to him at that time by Ms Sharp was that, because of the lie, he should refuse all relief. It was not separately submitted that he should refuse relief in respect of the information that was the subject-matter of the lie.

67. A number of cases were cited to the judge (and have been cited to us) which consider the correct approach of a court where an applicant for injunctive relief has misled the court or has failed to be full and frank with the court on an ex parte application. It is plain that the judge had them in mind when he decided not to refuse injunctive relief because of the lie. That decision is not challenged. He added at [68] that he could refer the matter to the Attorney General but that he could not think that anything would be achieved by doing so. He then said:

> "In any event, it is probably sufficient penalty that the claimant's behaviour has had to be mentioned in this judgment."

That suggests that he intended to publish that part of the judgment. It had not by that stage been submitted to him that he should not do so, or at least that he should not include the specific information to which the lie related.

68. When the matter came back before the judge on 9 February Mr Spearman [counsel then representing Lord Browne] submitted that specific information should not be included in the judge's judgment, and indeed that an injunction should be granted in respect of it. In the event the judge held that the information should be included in his judgment; so that it was not necessary for him to address the issue of an injunction separately. We have a transcript of the hearing on 9 February which includes both the argument and the judgment which he gave when the argument concluded. The judge's views can be seen both from what he said in the course of the argument and from the judgment. He also gave a short ruling subsequently on 23 February.

69. The thrust of the argument on the question whether the details should be included in the judgment was that, as Mr Spearman put it, they were of a highly intrusive nature and it was sufficient by way of penalty that the judgment should simply state the fact that the claimant had lied about the circumstances of the way he and JC met, without reference to the details. The transcript shows that both counsel and the judge recognised that the problem potentially raised two issues, the privacy issue and what Mr Spearman called the sanctions or explanation issue.

70. An important point which was taken by Mr Spearman before the judge and which has formed the centrepiece of Mr Price's submissions before us is that the court should not publish something which, if it were published by a newspaper, would or might give a claimant a claim for breach of confidence (or privacy) against the newspaper. Reliance was placed upon the principle stated by Lord Nicholls in *Cream Holdings v Banerjee* that we have described in [4]-[5] above. Mr Price submits (as had been submitted to the judge) that that principle applies here. In the absence of an injunction, it is a matter for the newspaper to decide whether or not to publish that information. It may or may not choose to do so but, if it does, the claimant will have whatever remedies are open to him for breach of confidence if he succeeds at the trial. Mr Price then submits that an injunction should be granted in respect of the subject-matter of the lie, correctly recognizing that the lie affects the balance to be struck between the claimant's rights under article 8 and the newspaper's rights under article 10.

71. Before considering whether those submissions should be accepted, we should refer to the nature of the lie and the way it was deployed before the judge because both sides rely upon it and upon the judge's approach to it. When the newspaper spoke to BP on 5 January and told it what it was proposing to publish, based upon what it had been told by JC, one of the items of information which it said that it was intending to publish was JC's account of the circumstances of the original meeting between Lord Browne and JC. The claimant's lawyers naturally took instructions from him. He told them that JC's account was untrue.

72. Counsel for the claimant deployed the claimant's version before the judge on 6 January and it was included in his solicitor's first witness statement, dated 10 January, which confirmed what the court had been told. The information was not corrected in the claimant's first witness statement, which was also dated 10 January. When the matter came before the judge on 12 January, the claimant opposed an application on behalf of the newspaper for an adjournment in order to enable it to collate relevant evidence for a full inter partes hearing. Mr Spearman pressed for the injunction to be continued until trial on the basis of the evidence then available, which included the two statements to which we have referred. Ms Sharp stresses that, if that opposition

had succeeded, the lie would have played its part in the decision. It was part of the claimant's case that much of JC's evidence was untrue. In the event the judge adjourned the application.

73. Thereafter both sides prepared their evidence for the full hearing. On 16 January the newspaper served the first witness statement of JC, which included a detailed rebuttal of the lie. On 18 January the claimant's second witness statement was served. It too did not retract the lie. On 19 January the newspaper's solicitors wrote to the claimant's solicitors asking whether he maintained that his account of how he met JC was true. By that time, it was apparent that JC's account was supported by apparently corroborative material. On 20 January the claimant signed his third witness statement in which he retracted the lie and accepted that he had met JC just as JC had said they did.

74. In the claimant's third statement he apologised for misleading the court and explained that he had panicked. He said that the fact that he had not been honest had been gnawing away at him and he had decided that he must put the record straight. Mr Price properly accepts that the claimant was wholly wrong to mislead the court as he had but submits that his explanation has the ring of truth and that to publish the details would be a disproportionate penalty.

75. The judge deprecated the lie. He said at [13] of his judgment that, while it might be thought that the lie was of little materiality to the primary issues in the case, what mattered was that "the claimant clearly thought it important at the time and quite deliberately, and casually, chose to lie to the court about it". The judge recognised that he had apologised for it, albeit after the true position had been revealed. The judge said at [14]:

> "Nevertheless, he said that he wished, in any event, to put the record straight as a matter of conscience. I am not prepared to make allowances for a "white lie" told to the court in circumstances such as these – especially by a man who prays in aid his reputation and distinction, and refers to the various honours he has received under the present government, when asking the court to prefer his account of what took place."

76. The judge then said that he could take it into account in three ways, two of which he subsequently rejected. The third was that it was potentially relevant to his reliability. The judge added at [15]:

> "It is ironic that the claimant should choose to tell this lie at a time when he was maintaining (particularly at the hearing before me on 12 January) that I should heavily discount the factual account of JC and also any evidence from him (at that time yet to be served). A wholesale attack was being made on his credibility. It was said that he is a liar, unstable and adversely affected by dependence on alcohol and illegal drugs. As Mr Spearman himself put it, "the case on unreliability was based on [JC's] use of drink and drugs, and his instability, which was submitted to be 'highly relevant to the source of the information'". What is more, although the contract has not been

> disclosed, there is a likelihood that JC is making the allegations in return for money - a factor also potentially relevant to his reliability."

77. At [16] the judge noted that credibility may be relevant in applications of this kind and concluded:

> "What the claimant was trying to do was to land a pre-emptive strike against JC's credibility so that, when his evidence was submitted, I should be pre-disposed to reject it."

He added at [18]:

> "It is thus clear that it is not only the claimant's willingness to tell a deliberate lie to the court, persisted in for about two weeks, that is relevant in assessing his own credibility and the overall merits. So too is his willingness casually to "trash" the reputation of JC and to discredit him in the eyes of the court. In due course, I shall therefore need to decide what weight I should attach to these factors. I should certainly be careful in taking anything the claimant says at face value or in accepting too readily from him that any particular story is inherently unlikely. Yet I need to be cautious also in relation to JC's reliability. There are plainly a number of changes and contradictions in his story. This is a case where it is thus especially difficult to know where the truth lies in the absence of full disclosure and cross-examination."

78. At [19] the judge correctly directed himself that, in deciding the issues, truth or falsity may not be critical or even, in some respects, relevant. However, it is plain from the judgment that, in so far as credibility was relevant, on the one hand, the claimant deployed the lie to improve his case, whereas, on the other hand, the lie damaged his position because the judge took a less favourable view of his credibility than he might otherwise have done. We should add that there is another aspect of the case in respect of which the claimant was treated differently from the way he would otherwise have been treated but for the lie. The judge made it clear that his order for costs, which was that the claimant should pay JC's costs on an indemnity basis was much affected by the lie.

79. Mr Price submits that in all the circumstances the claimant has suffered enough on account of the lie, that the judge was wrong to publish the details of the subject-matter of the lie in his judgment and that the correct course now is to restrain the publication of those details by the newspaper. Ms Sharp submits that, given the general principle that justice should be done and seen to be done in public, the judge was entitled to include those details in his public judgment and an injunction should be refused.

80. We turn to the application of the principle set out in [26] of *Cream Holdings* which we have quoted above. Ms Sharp has told us that there was no argument on this point in the House of Lords. Whether that is so or not, the principle was part of the *ratio decidendi* because it was the application of the principle which led the House not to refer to the information, the publication of which the judge at first instance had

enjoined. The principle is that a court should not, at any rate other things being equal, publish the information because to do so would pre-empt any publication by the defendant and would or might pre-empt any remedy in damages which a claimant might have if the information were published by the defendant. It appears to us that we should follow that principle, unless for some reason it does not apply to the facts of the instant case. In any event, although Ms Sharp seemed to suggest at one stage in the course of the argument that the House of Lords was wrong on this point and that it is open to us to say so, we are of the opinion that the principle stated is correct as a general principle.

81. There may be exceptions to that principle, and Ms Sharp suggests that this case is an exception because of the lie told by the claimant. We can imagine a case in which a lie might be such as to lead to such a conclusion on the facts of a particular case but this is not, in our judgement, such a case. We see the force of the point that a judge faced with a situation such as that which confronted the judge here should explain in a published judgment what had happened so that the reader can understand the nature of the point and the reason for the various conclusions reached by the judge. However, the question is whether it was necessary for the judge to set out the details.

82. Both parties made detailed submissions to the judge on the point on 9 February. So far as we can see, the judge did not express a view on the point in the course of the argument. When he gave his judgment *ex tempore* at the end of the oral argument he did not mention what we may call the *Cream Holdings* point. At [3] of his draft judgment he had set the details out. In his judgment on 9 February the judge said that most of that was necessary to contextualise the lie which the claimant told. He added that it was also part of the general narrative which was relevant to whether the newspaper should be allowed to reveal the bare fact of the relationship. The judge noted that Ms Sharp submitted that, if much of the detail were removed it would disembody the lie and that it was essential to give context to the lie so that it could be judged 'by others' in the light of the judge's assessment of its gravity and what he decided to do or not to do about it. There was some discussion in argument before us as to who the 'others' might be. No-one suggested that they were us. It is, we think, clear that the judge accepted Ms Sharp's submissions. He refused to excise the requested passages.

83. The problem with this part of the judgment is that the judge does not focus at all on the *Cream Holdings* point. Nor did he give reasons for rejecting Mr Spearman's submissions in the course of oral argument. So we do not know on what basis he rejected the point. Ms Sharp submits that he carried out an article 8/10 balance as part of the reasoning process on this point. This is not, however, clear to us. The reference to the newspaper's case that it should be permitted to publish the bare fact of the lie does not suggest to us that the judge was carrying out a balance with regard to the details of the lie. This is not perhaps surprising because, although the details were referred to in the course of the oral argument on 9 February, it played no part in the argument as to the article 8/10 balance on 23 January. It appears to us that the judge was simply proceeding on the basis that it was necessary to recount the details, partly for reasons of exposition, as he put it in the passage from his oral judgment quoted above, and partly by way of sanction, given that (as stated above) he had said at [68] that it was probably sufficient that the claimant's behaviour has had to be mentioned in the judgment.

84. We have reached the conclusion that, if the judge had focused on the principle in C*ream Holdings*, he should (and probably would) have concluded that it was not necessary to set out the details of the way the claimant and JC met in order to contextualise the lie or explain the conclusions which he had reached, or indeed by way of penalty or sanction. Some other form of words could have been used. Nor was it necessary in order to contextualise the issue as to whether or not to enjoin publication of the bare fact of the lie. It appears to us that the correct approach was to consider whether the publication of the details should be enjoined by the application of the principles which we set out earlier (and which the judge set out in his judgment), but taking account of the circumstances of the lie. Indeed Mr Price concedes that in carrying out the relevant balance, the court should have regard to the lie. If it was decided to grant an injunction on that basis, notwithstanding the lie, then so be it. On the other hand, if it was decided not to grant an injunction on that basis, then again so be it; but on that footing, applying the principle in *Cream Holdings*, the correct approach would not be to include the details in the judgment but to leave it to the newspaper to decide whether or not to publish them.

85. For these reasons we have reached the conclusion that the judge erred in refusing to excise the details from his judgment but that we should now consider whether the newspaper should be enjoined from publishing those details by the application of the principles stated earlier. As to article 8, we are of the opinion that both the claimant and JC had a reasonable expectation of privacy with regard to those details. As Keene LJ put it in *Douglas v Hello! Limited* [2001] QB 967 at [168]:

> "The European Court of Human Rights ruled in *Dudgeon v UK* (1984) 4 EHRR 149 that the more intimate the aspect of private life which is being interfered with, the more serious must be the reasons for interference before the latter can be legitimate: see p 165, [52]. Personal sexuality, as in that case, is an extremely intimate aspect of a person's private life."

In *Stephens v Avery* [1988] 1 Ch 449 Sir Nicholas Browne-Wilkinson VC held that information relating to the sex lives of lesbian partners was confidential

> "… to most people, the details of their sexual lives are high on the list of those matters which they regard as confidential."

Without going further into the matter, we are satisfied that in this case the article 8 threshold is met.

86. Two questions then arise. The first is whether there is a public interest in the publication of the details under article 10 and the second is whether the claimant can show that he is likely to establish at trial that the publication of the details should not be allowed within the meaning of section 12(3) of the HRA. We have reached the conclusion that the answer to the first question is that there is a public interest in the publication of the details and that the answer to the second question is no. Whatever the position would have been in the absence of the lie, as already stated Mr Price correctly concedes that the fact and content of the lie are relevant to the balance to be struck between the claimant's rights under article 8 and the newspaper's rights under article 10. It is relevant to note that in this regard the judge plainly regarded the lie as a serious matter. At trial a balance will have to be struck after a detailed

consideration of the evidence on both sides. It is never easy to predict how the balance will fall but it is quite impossible for us to conclude now that at trial the claimant is likely to establish that the publication of the very matter which the claimant sought to conceal from the court by lying should not be published. That is so however flexible a meaning is given to 'likely'. In short, the claimant has failed to discharge the burden which is on him under section 12(3) of the HRA.

87. In these circumstances, although we direct that appropriate excisions be made from the judge's proposed public judgment, we decline to grant an injunction in respect of the details relevant to the lie that were set out in item (h) of the confidential schedule placed before Underhill J that is referred to in [12] above.

Witness statements

88. There remains a dispute as to whether more excisions should be made from those parts of the witness statements which the judge directed (in Annex B to his order) could be published. In our judgment, the only parts of the witness statements which should be further excised in the light of the conclusions set out above are the references to the details set out item h). Subject to argument on the question what alterations should be made to the judge's conclusions on this point in the light of the conclusions reached above, we do not see any reason to interfere with the judge's decisions in this regard.

CONCLUSIONS

89. For the reasons we have given, subject to one point, we dismiss the appeal. The one point upon which the appeal is allowed is that the details of how the claimant and JC met should not be published in the judge's public judgment and must be excised from it. We will receive submissions upon what those excisions should be. However, we decline to grant an injunction restraining publication of the details of how the claimant and JC met, as specified in item h). We will also hear argument on the question whether, in the light of our conclusions, any amendments are required to Annex B.