Neutral Citation Number: [2007] EWHC 202 (QB)

Case No: HQ07X0078

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2007

Before:

THE HON. MR JUSTICE EADY

- -

Between:

Lord Browne of Madingley	**Claimant**
- and -	
Associated Newspapers Ltd	**Defendant**

- -
- -

Richard Spearman QC (instructed by **Schillings**) for the Claimant
Victoria Sharp QC and Aidan Eardley (instructed by **Reynolds Porter Chamberlain LLP**) for the Defendant

Hearing date: 23 January 2007

- -

Approved Judgment

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

....

THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

Introduction

1. The Claimant in these proceedings is attempting to restrain publication by Associated Newspapers Ltd of allegations (most of which are said to be false or misleading) on the ground that they are matters in respect of which he has a "reasonable expectation of privacy" and/or because they have been communicated to journalists in breach of a duty of confidence arising from an intimate personal relationship. The claim is not founded upon defamation, although the initial complaint did make reference to the allegations being defamatory as well as being in breach of confidence.

2. The case gives rise to relatively novel and intricate questions. These include the extent to which it is possible (there being no relevant contract) to resort to "privacy" rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms in order to prevent revelations which are primarily about one's conduct in business matters. There is also a need to consider the inter-relationship between the rule in *Bonnard v Perryman* [1891] 2 Ch 269 (as recently confirmed in *Greene v Associated Newspapers Ltd* [2005] QB 972) and the increasing recognition that the courts can, in appropriate circumstances, prevent publication of false allegations on matters in respect of which there would be a reasonable expectation of privacy: see e.g. *McKennitt v Ash* [2006] EWCA Civ 1714. Here some of the more significant allegations (unlike most of those in *McKennitt*) would at least arguably give rise to a claim in defamation and, for the most part, it would be the newspaper's wish, if necessary, to prove them to be true. This judgment which is intended to be available publicly is a slightly redacted and amended version of that handed down in private on 9 February 2007. That is because it contained some information of a private character which there is no need to reveal.

3. The Claimant has a relatively high public profile as the Group Chief Executive of BP, which has many thousands of employees and is large even in global terms.

4. During 2002 the Claimant and a Mr Jeff Chevalier became partners. The partner relationship seems to have lasted until early 2006. During that time Mr Chevalier adopted the Claimant's lifestyle and was provided by him with food, travel, clothes and accommodation at a fairly luxurious level. In addition, the Claimant also made substantial payments to him over the period in cash or by cheque. Their relationship seems to have become fairly widely known (although no mention was made of it in the media). It is significant that Mr Chevalier accompanied the Claimant at various social events and on trips, including events connected with the Claimant's business activities.

5. Mr Chevalier is a Canadian whose visa was due to run out early on in the relationship and 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. He 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.

6. When the relationship ended, Mr Chevalier found himself in financial difficulties and also having to adjust to a drastically reduced lifestyle. He said that the Claimant

provided him with funds towards a twelve month lease on a flat in Toronto and to help with furnishings. At a meeting in June, according to Mr Chevalier, 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".

7. His 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.

8. There were various communications from Mr Chevalier towards the end of 2006 seeking further financial assistance from the Claimant (referring to his claim that he had agreed to give him help in adjusting to a very different way of life). I was shown e-mails, including one of 24 December 2006, in which Mr Chevalier said that he was facing hunger and homelessness after four years of sharing the Claimant's lifestyle. He asked for "some assistance" backed by what could be interpreted (although Mr Chevalier denies it) as a thinly veiled threat:

> "I do not want to embarrass you in any way but I am becoming concerned by your lack of response to my myriad attempts at communication".

The need for an injunction

9. It then appears that Mr Chevalier, shortly afterwards, decided to go to the press and "spill the beans" in various ways. The Claimant's company press officer contacted him while he was on holiday in the Caribbean because the office had received a communication from a journalist from the *Mail on Sunday*. The first contact was made by telephone on 5 January 2007. It became clear that it was intended to publish an article based on information from Mr Chevalier falling into various categories. No draft of the article has been supplied, but certain specific allegations were raised for possible comment. An application was therefore made to Underhill J on the evening of Saturday, 6 January, and an injunction was granted addressing certain specific areas which it was then thought were likely to the subject of coverage. The application was made on the telephone by Mr Spearman QC, on the Claimant's behalf, with Miss Sharp QC participating on behalf of the Defendant. Both also appeared before me.

10. On 12 January (the original return date) I renewed the injunction and, with some reluctance, granted an adjournment of the substantive hearing so that the Defendant could have more time to put in evidence. On 23 January the matter came back before me. At that stage the Defendant indicated that the allegations it wished to publish were more limited in scope than those which had been discussed before Underhill J.

11. It has long been recognised that intimate personal relationships, including those of a homosexual nature, can in themselves give rise to obligations of confidence (and correspondingly to a "reasonable expectation of privacy") in respect of information gained in the course of them: see e.g. *Argyll v Argyll* [1967] 1 Ch 302; *Stephens v*

Avery [1988] 1 Ch 449. I shall need to consider the various categories of information in issue here and determine a number of questions:

i) Whether a *prima facie* duty of confidence would arise in respect of each of them by virtue of the fact of the relationship;

ii) Whether the information is such that there would, in any event, arise a "reasonable expectation of privacy", so as to engage the Claimant's Article 8 rights;

iii) If so, whether in any event the information was to a significant extent in the public domain already;

iv) Whether there is a public interest in any of the information, sufficient to justify publication – even if the law would otherwise afford the Claimant protection;

v) If it is defamatory, whether the *Bonnard v Perryman* principle should come into play so as to preclude injunctive relief in respect of any particular allegation;

vi) Whether, in other respects, the Defendant's Article 10 rights should be given priority over any right of privacy or confidence to which the Claimant might otherwise be *prima facie* entitled;

vii) Whether, in the light of s.12 of the Human Rights Act 1998, the Claimant is "likely" in respect of any or all of the categories to succeed in obtaining a permanent injunction at trial.

It is obvious that these questions overlap in significant respects.

The relevance of the Claimant's lie to the court

12. There is another issue which has to be addressed, and to which I shall return later; that is to say, what should be the consequences of the fact that the Claimant promulgated a lie which was relied upon by his counsel, unwittingly, before Underhill J and before me. Miss Sharp QC (citing *Armstrong v Sheppard & Short Ltd* [1959] 2 QB 384, 397) suggests that he should be deprived of any equitable remedy because he has not come with clean hands; alternatively, to adopt more modern terminology, because he has deliberately sought to mislead the court and thereby committed a criminal contempt of court or, perhaps, attempted to pervert the course of justice.

13. The particular lie to which the Claimant eventually admitted, just before the 23 January hearing, was to the effect that he had originally met Mr Chevalier by chance, while exercising in Battersea Park. It may be thought that the distinction between that and the true position is of little materiality to the primary issues in the case. On the other hand, what matters is that the Claimant clearly thought it important at that time and quite deliberately, and casually, chose to lie to the court about it.

14. It is true that he has now apologised, albeit after the true position was revealed in paragraph 23 of Mr Chevalier's witness statement of 16 January. The Claimant thus effectively had no choice. 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. It is a factor which seems to me relevant in three ways:

i) It may be enough to justify the injunction being discharged.

ii) It may be that it should be addressed as contempt or as some other form of criminal offence.

iii) It is potentially relevant as undermining the Claimant's credibility and thus to the issue of whether he is able to persuade me that he is likely to succeed on the merits at a trial.

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 Mr Chevalier 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 Mr Chevalier'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 Mr Chevalier is making the allegations in return for money - a factor also potentially relevant to his reliability.

16. The court nowadays often has the problematic task in such cases of forming a preliminary view on the merits of a case (albeit without conducting a mini-trial, and without full disclosure or cross-examination). That is because of the criteria to be applied under s.12 of the Human Rights Act and its interpretation by the House of Lords in *Cream Holdings v Banerjee* [2005] 1 AC 253. It would appear, therefore, to be relevant and legitimate to take into account general factors such as inherent implausibility or other matters which undermine a particular person's credibility. It is obvious, however, that the court would need reliable evidence before doing so. What the Claimant was trying to do was to land a pre-emptive strike against Mr Chevalier's credibility so that, when his evidence was submitted, I should be pre-disposed to reject it.

17. When, subsequent to the 12 January hearing, Mr Chevalier voluntarily disclosed his medical records and notes for the relevant period, it emerged that they contained virtually no support for the allegation of significant alcohol and drug dependence at the material time (although Mr Chevalier admitted some drug abuse at an earlier period in his life). The records rather revealed that he was being treated for anxiety and panic attacks. Mr Chevalier's evidence is that he has never been diagnosed with or treated for dependency. The impression the Claimant had sought to give the court, however, was that Mr Chevalier was inherently to be disbelieved for that reason. (The Claimant's allegation about alcohol seems largely to have been based on an inference he drew when his butler told him that his wine stocks were diminishing.)

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 Mr Chevalier 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 Mr Chevalier'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.

19. It is necessary to note, on the other hand, that any assessment of the merits in this case does not depend entirely, as it sometimes does, on who is telling the truth. Sometimes the issue whether the Claimant is likely to succeed, in respect of a particular allegation, will depend at least in part on which version is true. In other instances, however, and especially so far as privacy is concerned, truth or falsity may not necessarily be critical. To take a general example, where allegations are made about a person's health, it is the subject-matter which gives rise to a legitimate expectation of privacy, rather than whether the particular details are accurate. I need to bear this consideration in mind as I address each category of information. Credibility may not always be relevant to a determination of the merits.

The categories of information originally sought to be protected

20. Against this unhappy background, I need now to consider the various categories of information in respect of which the Claimant originally obtained protection. They correspond to the content of the confidential schedule attached to the order made on 6 January, although I shall be less explicit in some cases because this is intended (subject to further submissions) to be a public judgment, and I am by no means satisfied that everything should be made public.

21. There were a number of categories listed in the confidential schedule attached to the 6 January order:

    i) Business plans and ideas or potential business plans and ideas of the Claimant or any company with which the Claimant is or has been involved including BP where the Claimant is currently Group Chief Executive;

    ii) The Claimant's relationships with colleagues at BP;

    iii) Discussions about business ideas between the Claimant and Gordon Brown, the Chancellor of the Exchequer;

    iv) Discussions at private and/or confidential meetings or dinner between the Claimant and Tony Blair, Peter Mandelson and others;

    v) The Claimant's personal relationships with any other individual or individuals;

    vi) Information relating to the Claimant's private investments and properties – for example the purported information that:

a) The Claimant discussed with the government/Tony Blair/Gordon Brown the prospect of BP potentially taking an important strategic decision.

b) The Claimant discussed with Gordon Brown the possibility of a scheme for the benefit of BP's customers and Gordon Brown opposed the idea.

c) There was a dinner with the Claimant and Tony Blair which a woman called Ms Hunter had organised on 8 June 2005 and at that dinner Tony Blair discussed life after government and aspects of his own character.

d) There was another dinner with the Claimant, Mr Chevalier, Ms Hunter, Peter Mandelson and the latter's Brazilian boyfriend at the time (referred to as "Reinaldo"), which was held at one of the Claimant's homes, and at which they discussed European Union policy and Chinese textile quotas.

e) There was another dinner with Peter Mandelson at which Mr Chevalier was present, but Peter Mandelson's boyfriend was not, at which Peter Mandelson made certain observations.

f) Allegations about remarks supposedly made by the Claimant about colleagues in BP.

g) The Claimant bought a flat in Venice several years ago and used the same agent to buy it as had Mr and Mrs David Beckham. Builders who had conducted renovation works presented him with two bills, one of which did not include VAT. The Claimant allegedly paid cash for that bill and "dodged" his tax bill (strongly denied by him).

h) [The circumstances in which the Claimant and Mr Chevalier met]

i) The Claimant did not wish certain aspects of his private life to be revealed as he thinks it will reflect badly on BP and its brand.

j) Mr Chevalier and the Claimant had a dispute about certain valuable items of personal property following their break up.

k) The Claimant paid for Mr Chevalier's studies at university.

l) The Claimant paid Mr Chevalier a large sum of money over a four year period.

m) The Claimant and Mr Chevalier stayed at a well known entertainer's flat in Venice in 2005.

n) While he was watching a programme on television, the Claimant jumped up and made an observation about his personal investment strategy.

o) On the two occasions when the Claimant visited Colonel Gadaffi in Libya he was accompanied by a secret service agent or a former secret service agent.

The allegations which the newspaper now wishes to publish

22. That was where matters stood at the time Underhill J granted the interim injunction. From the evidence submitted subsequently, on the Defendant's behalf, it emerges that there are now five categories of allegation which the Defendant would wish to be free to publish. Those are as follows:

a) The allegation about BP strategy being discussed with a third party.

b) The alleged misuse of BP's resources and manpower to support or assist Mr Chevalier:

i) Mr Chevalier's personal use, with the Claimant's knowledge and permission, of BP computers, and of its support staff.

ii) The involvement of BP's personnel in setting up and eventually winding up a company created by the Claimant for Mr Chevalier to run.

iii) The use of a senior BP employee to run a personal errand for the Claimant by delivering cash to Mr Chevalier.

c) The bare fact of the past relationship between Mr Chevalier and the Claimant.

d) The alleged breach of confidentiality by the Claimant in discussing with Mr Chevalier 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).

e) The Claimant's relationships with colleagues in BP.

The possible impact of Bonnard v Perryman

23. I shall need to consider each of these categories of information or allegations individually but, as I have indicated, there are a number of general principles to be addressed before I do so. It will now be apparent that some of the categories of information enjoined under the existing order would give rise to a potential claim in defamation. It is in this context that Miss Sharp made submissions about the interface between the law of defamation and the developing law in relation to issues of privacy. She argues that there is a tension between the interpretation given by the House of Lords to the concept of "likelihood of success" in s.12 of the Human Rights Act and the survival of the *Bonnard v Perryman* test in circumstances where an application is made for an interim injunction in libel proceedings.

24. In *Cream Holdings* Lord Nicholls set out the interpretation to be applied at [22]:

> "… Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. 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".

25. On the facts of this case, Miss Sharp submits that the Claimant could not bring the circumstances within either of Lord Nicholls' two exceptions and that, accordingly, the burden is upon him to satisfy the court that he will be "more likely than not" to succeed at trial in obtaining a permanent injunction. That requires a consideration of the evidence, such as it is at the moment, the credibility of the two main protagonists, and where the balance will ultimately be held to lie as between the competing rights under Article 8 and Article 10.

26. Miss Sharp highlights the fact that the Claimant complains, in relation to most of the information, that it is false and submits that this factor is relevant at each stage of the necessary analysis. She argues as follows:

> "It may be legitimate to bring a misuse of private information claim in respect of information which the Claimant claims is substantially false, but in such a case an interim injunction will not be granted if:
>
> a) the claimant's essential concern is to protect his reputation and the defendant indicates that he intends to prove that the information is true; and/or

> b) truth or falsity is a material issue in the case (for example because, as here, the claim is made that the information is false in order to undermine an anticipated defence that publication would be in the public interest) and the court is unable to conclude what will probably be established at trial on this issue. In that case, a claimant is simply unable to satisfy the court that he will probably succeed at trial, and therefore fails to surmount the threshold for the grant of interim relief laid down in s.12(3) of the Human Rights Act 1998".

27. It was at first thought that there was a possibility that s.12 of the 1998 Act would have the effect of introducing a uniform test for interim injunctions, judged by "likelihood" of success at trial, which would have entailed actually lowering the threshold in libel cases, as compared to that derived from *Bonnard v Perryman* and modern cases to similar effect. It shortly emerged, however, in the light of *Greene v Associated Newspapers* that the statute was effectively fixing a minimum test, and that it would still be necessary, in a libel context, for a claimant to demonstrate that the proposed defence of justification would be bound to fail and that the words complained of were "manifestly untrue": see e.g. *Wolman v Williams*, 30 January 1990, CA (*Lexis*) and *Holley v Smyth* [1998] QB 726.

28. It is thus important that the policy underlying *Bonnard v Perryman* should not be undermined too readily by claimants opting for other causes of action: see e.g. the observations of Lord Denning MR in *Fraser v Evans* [1969] 1 QB 349, 360-361 where reliance was also placed on breach of confidence:

> "The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. As the court said in that case
>
> > 'The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done'
>
> There is no wrong done if it is true, or if it is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication."

29. It is, therefore, appropriate in my view to ask the question in such a case as the present, whether, even though the claim is brought on the basis of breach of confidence, nevertheless the true object of the complaint is the protection of reputation. If it is, then it is probably right that the higher hurdle contemplated in *Bonnard v Perryman* should have to be surmounted.

30. This matter was touched upon by Buxton LJ in *McKennitt v Ash* at [79] where he commented:

> "If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of falsity of the allegations, and that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process. That might be so at the interlocutory stage in an attempt to avoid the rule in *Bonnard v Perryman*: …"

Miss Sharp boldly submits that Buxton LJ was "wrong" to speak in terms of abuse of process, since that view would not accord (she submits) with the decision of another constitution of the Court of Appeal in *Joyce v Sengupta* [1993] 1 WLR 337 (not referred to in *McKennitt*). I need not comment on that point, but what emerges clearly is that one cannot obtain an easier route to an injunction preventing publication, where the gravamen of the complaint is as to reputation, by merely choosing another cause of action: see also *Service Corporation International v Channel Four Television* [1999] EMLR 83, 89-90, Lightman J. As will emerge shortly, this issue is not critical to my determination on the facts of the present case.

Assessing conflicts of fact in the context of "public interest"

31. Where the truth or falsity of an allegation is otherwise material, for example to the issue of public interest, I need to have in mind the caution which judges traditionally exercise at the interlocutory stage. There is as yet little authority in the context of privacy, but courts are well used to considering such matters in defamation cases. In *Spencer v Sillitoe* [2003] EMLR 207 at [30]-[31] Simon Brown LJ made the following observations:

> "With some hesitation I too agree that the appellant is entitled to have that factual issue decided by a jury. I hesitate in reaching this conclusion because, in common with the judge below, I regard the claimant's case on the facts as singularly unconvincing and as highly likely to fail at trial. All the probabilities appear to me to favour the respondents. …
>
> All that said, I do not think that the court's r.24 power properly extends to denying a claimant the chance of persuading a jury, albeit against all the odds, that his account of a meeting is the truth and his adversary's is not. Were the jury in this case actually to find for the claimant I do not think that this court could then strike down their verdict as perverse; and that, as I believe, is the touchstone by which the r.24 power falls to be exercised in a case like this, in which the defendants admit having made the defamatory statement, and in which the burden of proving justification, namely, on the facts of this case, that the alleged threats were uttered, accordingly lies on them".

Of course, the context of summary judgment under Part 24 is quite distinct from the present. Nor will there be a jury if the present case comes to trial. Even so, when one

comes to make an assessment of the merits of the case at the interlocutory stage, for the purposes of s.12 of the 1998 Act, in order to determine whether or not a permanent injunction is "likely" to be granted at trial, it is right to have in mind that it is difficult to make a proper assessment on incomplete evidence and, also, that matters can look quite different when the issues come to be fully canvassed.

32. On the other hand, it is in the nature of the test laid down by their Lordships in *Cream Holdings* that the assessment of likelihood has to be made at the stage when the interim injunction is sought and, inevitably, in many cases the evidence will be in an incomplete state. The test is whether a particular claimant is "likely" to succeed – not whether it would be "perverse" to find against him. Thus, despite the problems to which Simon Brown LJ adverted, a judge exercising the interim injunction jurisdiction, at least outside what Miss Sharp calls the "reputational" context, is apparently required to take a rather more robust attitude in assessing the merits.

The relevance of Article 8 to conduct in business or professional life

33. The other general issue which has to be addressed is that of the role of Article 8 in relation to business affairs. It is concerned with protecting *personal* integrity, dignity, reputation, documents, family and domestic life, which includes by extension (as the recent case of *Von Hannover v Germany* (2005) 40 EHRR 1 makes clear) a "social dimension". One might think as a matter of first impression that business and commercial activities, as such, would fall outside its policy objectives.

34. Naturally, if someone is working at home or even in his office and the papers are stolen, or copied without permission, there would be an encroachment upon personal privacy by reason of the intrusive acts, rather than because of the nature of the information contained in the documents themselves: *cf Niemetz v Germany*, 16 EHRR 97; *Stés Colas Est v France*, App. 37971/97, 16 April 2002. There may be other routes whereby the law can protect business and commercial information (e.g. by copyright or contracts of employment), but Article 8 would not necessarily be engaged. BP, of course, is not a party to these proceedings. The Claimant is seeking to protect what are claimed to be *his* rights of privacy and confidentiality.

35. The matter was considered in 1990 by the Committee on Privacy and Related Matters (Cm 1102), when recommending to Parliament a possible formulation for a statutory tort of privacy. It was said to be important to define its scope clearly without restricting the court's capacity for dealing flexibly with the wide variety of unforeseeable circumstances that might arise. As always when privacy is considered by legislators or law reformers, the Committee (generally referred to as "the Calcutt Committee") had to guard against circumstances arising in which criminal activity or other wrongdoing might escape detection if the perpetrators were able to avail themselves of legal protection on grounds of privacy. It was ironic that, 18 months before his downfall, it was Robert Maxwell who warned the Committee that "a law of privacy would lead to many a rogue going undetected". Yet it was a common theme.

36. There are various solutions to hand. There could, for example, be what is loosely termed "a public interest defence" available to those who are genuinely intending to expose wrongdoing. The Committee's more fundamental proposal, on the other hand, was that business matters should be excluded altogether from the definition of privacy

– it would thus be unnecessary to rely on a defence at all. The point was explained at paragraphs 12.17 and 12.18:

> "12.17 We are satisfied that it would be possible to define a statutory tort of infringement of privacy. This would specifically relate to the publication of personal information (including photographs). … Personal information could be defined in terms of an individual's personal life, that is to say, those aspects of life which reasonable members of society would respect as being such that an individual is ordinarily entitled to keep them to himself, whether or not they relate to his mind or body, to his home, to his family, to other personal relationships, or to his correspondence or documents.
>
> 12.18 We would not see any advantage in laying down a more detailed definition of personal information on the face of any statute. The courts could develop their interpretation on a case by case basis. We would, however, see merit in specifically excluding any material:
>
> (a) concerning any company or other corporate entity, or any form of partnership; or
>
> (b) concerning an individual in relation to his conduct in the way of any trade, business, calling or profession, or in relation to his carrying out of any functions or duties attaching to, or to his suitability for, any office or employment (including elective office); or
>
> (c) required by law to be registered, recorded or otherwise available for inspection".

37. Although this proposal did not become law, and ministers said from time to time that it would be for judges to develop a law of privacy on a case by case basis in the light of Article 8, the underlying dilemma reflected in those paragraphs still requires to be addressed. Counsel were unable to draw to my attention any jurisprudence from Strasbourg which offers a definitive solution. Indeed, it may appear surprising that there is so little case law on the point.

38. It is right now to consider such matters in the light of the "new methodology" identified in such cases as *Campbell v MGN* [2004] 2 AC 457 and *Re S (FC) (A Child)* [2005] 1 AC 593 and followed in *McKennitt v Ash* [2006] EWCA Civ 1714. This requires consideration of whether Convention rights (specifically under Articles 8 and 10) are engaged and, if so, a balancing operation is then to be carried out having regard to the following principles:

    i) Neither article has, as such, precedence over the other.

    ii) Where conflict arises between the values under Articles 8 and 10, and "intense focus" is necessary on the comparative importance of the specific rights being claimed in the individual case.

iii) The court must take into account the justifications for interfering with or restricting each right.

iv) So too, the proportionality test much be applied to each.

39. These principles need to be applied against the background of s.12(4) of the Human Rights Act 1998 which provides, when injunctive relief is sought, that particular regard must be paid to Article 10 rights. That would naturally happen in the course of applying the "intense focus".

40. The court needs to consider each relevant category of information sought to be enjoined separately, not only to decide whether in each case the threshold test for privacy is passed (that is to say, whether or not there would be a reasonable expectation of privacy), but also to consider, if that initial test has been satisfied, whether any other "limiting factor" comes into play, such as public domain or public interest: see e.g. *McKennitt v Ash* (cited above) at [46]-[48].

41. It would probably now be wise, in applying this methodology, to avoid being distracted by generalisations, in accordance with the warning of Sir Mark Potter P in *A Local Authority v W* [2005] EWHC 1564 (Fam) at [53] that the exercise to be performed is not a mechanical one to be decided on the basis of rival generalities. Thus, it may not be helpful to concentrate on whether or not particular information is to be labelled as business or as purely personal, since that might well be classified as allowing a "generality" to obscure the "intense focus" or, as Sir Mark described it, the "parallel analysis", which requires the court to examine the justification for interfering with each of the relevant Convention rights and the issue of proportionality.

42. Thus, without entering into a preliminary inquiry as to whether any particular piece of information should be allocated a "business" or a "personal" characterisation, it seems that I should ask, in relation to each of the categories individually, whether there is a reasonable expectation of privacy. In the course of that process, no doubt, there are likely to be reflected some of those policy considerations which exercised the Calcutt Committee so many years ago.

The "business" issues in the present case

43. For example, there are two matters which directly concern the Claimant's conduct in relation to BP's information, personnel and resources. There is the alleged use of some of its equipment and personnel for the benefit of Mr Chevalier 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 Mr Chevalier 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).

Applying the "new methodology" to the facts

47. In the light of these general considerations, I now return to focus upon the various categories of information, concentrating first on the five matters which the Defendant currently wishes to make public:

a) *The allegations about a potential BP strategy discussed with a third party*

48. This was a major area of dispute between the parties, which I would resolve in the Claimant's favour. There is no doubt that Mr Chevalier's latest account has shifted from the original version, both of which are strongly denied by the Claimant. He uses words such as "ridiculous", "outrageous" and "fantasy". It concerns a supposed conversation between the Claimant and a third party, learned of by Mr Chevalier, if at all, plainly as a result of his relationship with the Claimant. There would thus be an obligation of confidence and correspondingly a reasonable expectation of privacy. This issue turned, therefore, primarily on the question of public interest. It is not suggested that the adoption of the strategy is a real possibility and certainly not that anything has been done to implement it. The evidence suggests, at most, a purely

throw-away hypothetical remark made in private circumstances in 2005. If such a remark had been made, it would hardly in itself be a matter of public interest.

49. If the supposed strategy were implemented, I am prepared to accept that there could be major repercussions which would be of genuine public interest. But that is not the case. Evidence has been produced, not only by the Claimant himself, but by other witnesses which satisfies me that there is no real likelihood of the strategy ever being brought into effect and, therefore, any argument based on public interest is likely to fail at trial. Mr Chevalier is in no position to refute that. Accordingly, in this respect, the Claimant is able to discharge the relevant burden imposed by s.12 of the 1998 Act.

b) *The alleged misuse of BP's resources and manpower to support or assist Mr Chevalier*

50. This is not concerned with *information* communicated in circumstances of confidence, but rather with *activities* involving Company 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 Mr Chevalier'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 Mr Chevalier'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.

51. There are various analyses available, each of which leads to the same conclusion. As I have said, whether or not Mr Chevalier'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. In addition, these allegations would be defamatory, so that the *Bonnard v Perryman* principle is another factor which militates against interim relief.

52. If Mr Chevalier's account turns out to be substantially inaccurate, the Claimant would have a remedy in damages – if he were to sue in libel.

c) *The bare fact of the relationship*

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 Ltd* [2004] 2 AC 457 at [63]-[66].

54. It is clear that the Claimant chose to appear frequently over the period of their relationship with Mr Chevalier at parties, gatherings, meetings and functions. Mr Chevalier stated in his witness statement of 16 January that:

> "The Claimant, realising that my clothing was not formal enough for being in public with him, took me to the Venice Prada shop to buy me more formal wear. He would continue to buy me an array of clothing so that I could be presentable once he began to introduce me to his friends and acquaintances".

55. I consider it would therefore be quite unrealistic to enjoin publication in these circumstances. There are again two possible analyses. I would hold that there is no longer, in the light of the evidence, a reasonable expectation that this fact should be kept private. Alternatively, the facts fit within Lord Goff's first "limiting principle": see *Att. Gen. v Guardian Newspapers (No.2)* [1990] 1 AC 109, 282. That is to say, the relevant information had become "so generally accessible that, in all the circumstances, it cannot be regarded as confidential". I understand that the Claimant prefers to keep his relationships, and sexual orientation, out of the media and that he has made strenuous efforts in the past to avoid it being mentioned, but that is a different matter from having a reasonable expectation of privacy. (I record, as part of the narrative, that this particular point did not play a part in the initial application to Underhill J. It was raised first on 12 January.)

d) *The alleged breach of confidentiality in revealing corporate information and documents to Mr Chevalier*

56. Here again, I consider that there would be no legitimate expectation of privacy. I would apply the same reasoning as under section (b) above. It is not proposed by the newspaper to reveal the information in question but only the fact of its having been communicated to Mr Chevalier. There is a factual dispute, which would again be potentially relevant on "public interest" if that stage were reached, but I am unable to resolve that sufficiently clearly in the Claimant's favour for him to discharge the necessary burden. In any event, it seems clear that at least some confidential BP material was found on computers passed on by Mr Chevalier to his relatives in Canada. It is clearly identified in the Defendant's evidence. That supports its case and is inconsistent with the Claimant's evidence.

e) *The Claimant's relationships with colleagues in BP*:

57. What is in issue here is the private expression of views by the Claimant to his partner about colleagues. Those views are entitled to the protection of privacy because of the circumstances of communication and the nature of the relationship. Moreover, there is in my judgment nothing to override that duty of confidentiality. There is no particular public interest in knowing how the Claimant may have described his personal feelings about colleagues. It would rank simply as a bit of gossip.

The other categories covered by the 6 January order

58. I have now considered the matters of immediate concern to the Defendant, but I should also no doubt return briefly to some of the other categories of information which originally fell within the injunction granted by Underhill J on 6 January. In so

far as the injunction is to remain in force, sound reasons need to be given. I can do this generally by reference to particular categories.

59. Discussions at private dinner parties about the plans or personal affairs of fellow guests, are in my judgment, on the face of it, entitled to protection. Mr Chevalier only learned this information by virtue of his partnership with the Claimant. People are entitled to speak freely on such social occasions, within reason, without expecting to have the conversations regurgitated in the press. Moreover, there is no countervailing public interest in any of the dinner party "chit chat" described. It certainly could not be characterised as "contributing to a debate in a democratic society relating to politicians in the exercise of their functions": see e.g. *McKennitt v Ash* at [58], following *Von Hannover v Germany* at [63]-[64]. It is more akin to what has recently been described in *Jameel v Wall Street Journal* [2006] UKHL 44 at [147] as "vapid tittle-tattle". Thus it would fall outside the "vital role of watchdog" which the European Court at Strasbourg so frequently attributes to the media.

60. The allegations about the financial arrangements for the flat in Venice seem to me to be mainly private but also in one respect defamatory. Accordingly, I should have in mind the *Bonnard v Perryman* principle. There is powerful evidence to suggest that Mr Chevalier has, to say the least, got hold of the wrong end of the stick. But it is too early for me to come to a clear conclusion on that. If the Defendant wished to publish these allegations and to prove their truth, I would not grant an injunction to prevent it doing so. I have no doubt, however, that its advisers have the risks attaching to a defamation suit in that context well in mind. That may be why it finds no place in Miss Sharp's priority list.

61. The financial arrangements between Mr Chevalier and the Claimant would be matters which are entitled to Article 8 protection, save in so far as any BP resources were involved. On the other hand, whether or not they stayed in the entertainer's flat in Venice seems to be purely anodyne and not so personal as to require the granting of an injunction. There has to be a minimum level of seriousness to engage Article 8: see e.g. the observations of Lord Walker in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 at [83]. In any event, the allegation seems now to be accepted as untrue.

62. Where the Claimant chose to invest his own personal funds would appear to be a private matter and, if he revealed certain plans for his personal investment strategy to Mr Chevalier, I would have thought he was entitled to keep that conversation private: cf *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63 at [42], *per* Gleeson CJ.

63. Whether or not the Claimant was accompanied by a secret service agent, or a former agent, when he went to visit Colonel Gadaffi in Libya does not seem to be a matter which should attract protection under Article 8. There might be other reasons for not publishing the information, but I am asked to rule solely on the Article 8 aspect. In so far as it matters, the Claimant has positively stated that he was not so accompanied.

64. The Claimant denies that he has a fear that any aspect of his private life should be revealed for the reason that it would reflect badly on BP ("which respects diversity and has a well publicised policy of equality and tolerance"). He simply did not want details of his private life made public. But the fact that he is gay is likely to come out for reasons I have given.

65. The arrangements between them about personal property would ordinarily be thought private, as would any dispute about such matters following termination of the relationship.

66. Finally, whatever was said about a possible scheme for BP's customers, in private conversations with a third party, falls within a similar category to what I referred to earlier as the "strategic decision". It would be entitled to protection, and there is no evidence which persuades me that there is any element of public interest which would justify breaching that confidence. Again, the Claimant disputes what Mr Chevalier says and asserts that no such discussion ever took place, but that would not determine the matter. Whether or not Mr Chevalier misunderstood the position, as he may well have done, the context in which he picked up the story is such that he should keep quiet about it.

Should I refuse relief because of the lie?

67. I return to Miss Sharp's submissions about the lie. It will have become apparent that I am not going to refuse injunctive relief for that reason. That is partly because breaches of Mr Chevalier's duty of confidence would affect third parties' rights adversely as well as those of the Claimant. Apart from that, there is a serious issue to be considered as to how the ancient "clean hands" doctrine can any longer be applied in this context, since it has to be reconciled with an applicant's Article 6 right of access to justice. A similar question has been considered with reference to the long recognised discretion to refuse to hear a party for so long as he remains in contempt: see e.g. *Polanski v Condé Naste Publications* [2005] 1 WLR 637 at [17]-[18] and *Motorola Credit Corp v Uzan (No. 2)* [2004] 1 WLR 113 at [56]-[58]. Fortunately, I do not need to address this any further because, as I have said, I am not refusing the Claimant a remedy on that ground.

68. I could refer the matter to the Attorney-General but I cannot think that anything would be achieved by doing so. In any event, it is probably sufficient penalty that the Claimant's behaviour has had to be mentioned in this judgment.

Disposal

69. An injunction will remain in force but on a much more limited basis than before. There are significant respects in which it would not be appropriate in my judgment, having considered the available evidence, to impose any restriction on publication. No doubt counsel will have submissions to make on the final terms of the injunction.