Neutral Citation Number: [2012] EWHC 431 (QB)

Case No: HQ11X01432

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/03/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Ryan Joseph Giggs (previously known as "CTB")	**Claimant**
- and -	
(1) News Group Newspapers Ltd and (2) Imogen Thomas	**Defendants**

- -
- -

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

Hearing dates: 21 February 2012

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. There can be few people in England and Wales who have not heard of this litigation. The initials CTB have been chanted at football matches when Mr Giggs has been playing for Manchester United. And Mr Giggs has been named in Parliament, raising questions as to the proper relationship between Parliament and the judiciary.

2. In the issue of The Sun dated Thursday 14 April 2011 the First Defendants published an article on pages 1 and 4 under the heading "Footie Star's Affair with Big Bro Imogen" ("the Article"). It did not name Mr Giggs but in due course the fact that Mr Giggs was the footie star referred to became very well known. The First Defendant ("NGN") is the publisher of The Sun.

3. On the same day Mr Giggs applied to Eady J, on short notice to NGN, and without notice to Ms Thomas, for a non-disclosure injunction and other orders which are set out in an order of that date sealed on 15 April. The proceedings were famously anonymised and Mr Giggs was referred to as CTB.

4. What is famous or notorious about this litigation, is that the order for Mr Giggs to be anonymised did not achieve its purpose. But as Eady J explained in his judgment of 16 May 2011 ([2011] EWHC 1232 (QB)) at para 2

> "The purpose of the exercise was to restrain publication not only of the identity of [Mr Giggs] but also of any further account, or purported account, of [a sexual relationship between himself and Ms Thomas]".

5. The disclosure of Mr Gigg's identity necessarily disclosed that the Article related to him. But the Article had attributed the information it contained to 'pals' of Ms Thomas. Mr Giggs feared that Ms Thomas herself was proposing to sell her story, and he wanted to prevent her from doing that: see para 5 of that judgment.

6. Ultimately, the claim has been compromised between Mr Giggs and Ms Thomas. She and NGN state, and he has accepted, that she was not the source of the Article. She has also stated, and he has accepted, that she did not wish any private information to be published, and that her conduct in retaining a publicist, Mr Max Clifford, was not to procure publication, but to prevent it: see the Statement in Open Court read on her behalf on 15 December 2011 (para 39 below). Nevertheless, as part of the terms of the compromise they reached, she has given an undertaking to the court in an order dated 1 February 2012

> "not to disclose or cause or permit another to disclose any Confidential Information (as defined …) to any third party".

7. An undertaking to the court has the same effect in law as an injunction. So to that extent Mr Giggs has achieved the second of the two main things that he set out to achieve in this action. There is a final order of the court which has the effect of prohibiting publication of any further account of any sexual relationship between himself and Ms Thomas.

8. It may be that, with hindsight, it can be said that Mr Giggs did not need to join NGN in the action. If Mr Giggs had known on 14 April 2011 that Ms Thomas was not the source of the Article, and if he had believed that NGN had no more information to publish, and no intention to publish, further information as set out below (para 10), it may be that Mr Giggs would not have joined NGN in the action. But he and his advisers could not have known that in April 2011. A claimant who is, or fears that he is about to be, the victim of an unlawful act does not always know which of two (or more) people is the wrongdoer. So he will sue both, in order to protect his position in any eventuality. If he succeeds against one defendant, he may have no further basis for proceeding against the other. But coming to terms with the person who, it turns out, is the wrong defendant may not always be easy. He may have to discontinue the action and pay costs if he cannot reach a compromise.

9. The First Defendant is NGN, and there has been no compromise of Mr Giggs's claim against NGN. The claim is for damages and a permanent injunction. NGN has declined to give an undertaking or to agree to there being a permanent injunction.

10. NGN's position on a permanent injunction is that there is no basis for a court order against itself. There is no evidence that it has either the means to publish, or the intention of publishing, any further information relating to a sexual relationship between Mr Giggs and Ms Thomas.

11. NGN further submits that, as matters now stand, an injunction to restrain publication of the identity of Mr Giggs as the person referred to in the Article would be futile and unreal. The world at large has known that for many months. On any view, his identity as the subject of the Article is in the public domain. NGN also submits that Mr Giggs is not entitled to any, or any substantial, damages for the publication by it of the anonymised Article. And as Mr Spearman submitted, Mr Giggs has achieved vindication of his rights against Ms Thomas, and there is little if anything that he can obtain by way of further vindication in continuing the action against NGN.

12. It follows that NGN can hardly say that it has won this action, if it remains struck out. The fact that Mr Giggs was named as the subject of the Article was not something achieved by NGN in this action. It was a consequence of the acts of third parties out of court. As Mr Spearman submits, there is no suggestion that NGN was behind the widespread publication of Mr Giggs's identity, so this is not a case where it could be said that his identity came into the public domain as a result of a breach by NGN of the injunction. And the effect of the undertaking given by Ms Thomas and NGN's own statement (in para 10 above) is that it is no more free to publish a story about Mr Giggs today than it was immediately after Eady J had granted the injunction on 14 April. All that has happened is that it has become apparent that Mr Giggs did not need to join NGN in the action.

THE APPLICATION BEFORE THE COURT

13. On 18 November 2011, Mr Giggs failed to comply with an order for directions made by me on 2 November. As a result of this omission, the claim in this action was automatically struck out, without there being a further order to say that. That this was the effect of what had happened was not appreciated by the parties until 4 January 2012. When it was appreciated Mr Giggs issued an Application Notice dated 9

January 2012. He asked the court to give him, under CPR Part 3.9, relief from the sanction of striking out, and to re-instate the action.

14. CPR Part 3.9 provides:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
> (a) the interests of the administration of justice;
> (b) whether the application for relief has been made promptly;
> (c) whether the failure to comply was intentional;
> (d) whether there is a good explanation for the failure;
> (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;
> (f) whether the failure to comply was caused by the party or his legal representative;
> (g) whether the trial date or the likely trial date can still be met if relief is granted;
> (h) the effect which the failure to comply had on each party; and
> (i) the effect which the granting of relief would have on each party.
> (2) An application for relief must be supported by evidence."

15. In exercising its jurisdiction under CPR Part 3.9, as in the exercise of all its powers, the court must seek to give effect to the overriding objective. That is set out in CPR Part 1.1 which provides:

> "(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly; and
> (e) allotting to it an appropriate share of the court's resources"

16. By CPR Part 1.3 the parties are required to help the court to further the overriding objective.

17. It is necessary to have regard to the history of the proceedings.

THE HISTORY OF THE PROCEEDINGS

18. On 15 April, the day after Eady J's order of 14 April, Mr Giggs issued his claim form. He claimed damages for breach of confidence or misuse of private information and an injunction.

19. On 20 April 2011, the return date, the matter came back before Eady J. On this occasion both NGN and Ms Thomas were represented by leading counsel, Mr Spearman and Mr David Price. Neither defendant opposed the continuation of the non-disclosure injunction made on 14 April. Other orders were made, as set out in para 20 below. Ms Thomas did not submit a witness statement to the court, as she would have been entitled to do if she had wished, either on that occasion, or at any time. Amongst the undertakings given by Mr Giggs to the court on that occasion was the following:

> "(4) [If this order ceases to have effect, Mr Giggs will immediately take all reasonable steps to inform in writing anyone to whom he has given notice of this order or who he has reasonable grounds for supposing may act upon this Order that it has ceased to have effect]".

20. The order of 20 April included the following:

> "Directions
> 12. [The following directions are given by consent as between Mr Giggs and the Second Defendant:
> (1) Mr Giggs shall serve Particulars of Claim by 4 May 2011.
> (2) The defence of each defendant should be served by 18 May 2011.
> (3) Mr Giggs shall serve any replies by 1 June 2011.
> (4) There shall be disclosure by list by 29 June 2011.
> (5) Witness statements shall be served by 28 July 2011.
> (6) The matter be listed for trial with a time estimate of three days, in a window from 3 October 2011 to 25 November 2011.
>
> The First Defendant has liberty to apply in respect of the above directions]…".

21. On 4 May 2011 Mr Giggs duly served his Particulars of Claim, the substantive part of which was in a Confidential Schedule.

22. In paragraph 3 of the Confidential Schedule Mr Giggs set out in detail the information ("the Information") to which the action relates. It is all information concerning Mr Giggs and Ms Thomas. In paragraphs 4 and following Mr Giggs alleged that on 13 April he learnt from Ms Thomas that The Sun newspaper had contacted her and was proposing to publish an article identifying Mr Giggs as the other party in an alleged sexual relationship with Ms Thomas. He pleads, as is the case, that NGN undertook that it would not, prior to 4pm on 14 April 2011, publish an article identifying Mr Giggs as the other party involved in a sexual relationship with Ms Thomas. It was pursuant to that undertaking that the Article in the issue dated 14 April was published without identifying Mr Giggs. But it did contain some of the information which is set out in six sub paragraphs in the Confidential Schedule to the Particulars of Claim. On

14 April NGN refused to extend its undertaking to Mr Giggs, Ms Thomas declined to speak to Mr Giggs's solicitors but referred them to her publicist Mr Max Clifford, and so, it is pleaded, as a result Mr Giggs believed there was a serious risk that the Information would be published and he would be identified unless, as he did, he sought and obtained an injunction. He alleges that the information is private and confidential, that there was no justification for the disclosure of any of the Information in the Article, and that for these and other reasons NGN had interfered with his right to privacy.

23. The relief claimed in the Particulars of Claim against NGN is pleaded as follows:

> "18. By reason of the publication of the information in the Article and the Sunday Mirror article and its subsequent republication in other newspapers and on the internet, [Mr Giggs] has suffered damage and distress. [Mr Giggs]'s sense of injury was justifiably heightened by the conduct of the Defendants…
>
> And [Mr Giggs] claims: … as against [NGN]
>
> (1) Damages including aggravated damages.
>
> (2) An injunction…".

24. The plea of aggravated damages appears to be directed against Ms Thomas, since no aggravating conduct is pleaded in relation to NGN. Likewise the reference to the Sunday Mirror Article is a reference to matters pleaded against Ms Thomas. It is not necessary in this judgment to set out the claims made against Ms Thomas.

25. On 12 May Mr Giggs agreed with NGN a general stay regarding service of its Defence, although this information was not communicated to the court or made public until 1 November 2011, as set out in para 30 below. This agreement was a clear breach by both Mr Giggs and NGN of CPR Part 15.5(1). And the failure to notify the court was a clear breach by NGN of CPR Part 15.5(2). CPR Part 15 includes the following:

> "15.5 (1) The defendant and the claimant may agree that the period for filing a defence specified in rule 15.4 shall be extended by up to 28 days.
> (2) Where the defendant and the claimant agree to extend the period for filing a defence, the defendant must notify the court in writing."

26. On 16 May, that is two days before the defence of NGN was due to be served, Eady J handed down the judgment in writing neutral citation number [2011] EWHC 1312 (QB). That sets out, in so far as the judge was able to do so at that stage, the reasons why he had made the orders that he did make on 14 and 20 April. The judgment had been circulated in draft in the usual way to ensure that it contained no factual inaccuracies, and to enable the parties to make representations as to what should or should not be included in the judgment with a view to protecting their privacy rights.

27. Also on 16 May, NGN applied to Eady J to vary the terms of the injunction, on the grounds that there had been such widespread coverage on the internet since the order was first granted that it would be pointless for the court to maintain Mr Giggs's anonymity. Ms Thomas was represented by David Price but took no part in the argument. On the same occasion Mr Tomlinson for Mr Giggs applied for an order under CPR 31.1.2 for specific disclosure of documents by NGN. Eady J rejected both applications.

28. On 23 May 2011 Eady J gave his reasons for rejecting both applications made on 16 May. These were in a judgment neutral citation number [2011] EWHC 1326 (QB), the second judgment delivered in these proceedings. By that time Ms Thomas and NGN were both in breach of the order of 20 April in that their defences were five days overdue. But Eady J was not informed of that.

29. Later on 23 May 2011 Mr Giggs was named in the House of Commons by Mr Hemming MP as the person referred to in these proceedings as CTB. Very shortly after that, and at a time when Eady J was no longer available, NGN returned to court and made an application to myself to remove the anonymity of Mr Giggs. I refused that application for reasons which I set out in a judgment of the same day, neutral citation number [2011] EWHC 1334 (QB), the third judgment given in this action. I was not informed that NGN were by then in breach of the order for service of its Defence.

30. Five months passed before the matter came back before the court, which it did on 2 November 2011 on an Application Notice issued by Mr Giggs on 1 November 2011. The application was to vacate the date for trial, namely 7 November 2011, as against NGN. The date for trial had been fixed pursuant to the order for directions made by Eady J on 20 April (see para 20 above). Once NGN had failed to comply with the order for service of its Defence by 18 May, and had served no Defence at all, it must have been obvious to all parties that the parties would not be ready for a trial at the date fixed. But they left it until five days before that date to apply to the court to vacate the trial date. That is a plain breach of the requirement of CPR Part 1.3:

> "The parties are required to help the court to further the overriding objective".

31. I made the following order namely that:

> "1. The trial of this matter listed for 7 November 2011 be vacated.
> 2. The Defence of each Defendant should be served by 30 November 2011.
> 3. [Mr Giggs] shall serve any replies by 16 December 2011.
> 4. There shall be disclosure by list by 20 January 2012.
> 5. Witness statements shall be served by 17 February 2012.
> 6. The matter be listed for trial, with a time estimate of three days in a window from 5 March 2012 to 4 April 2012.

> 7. [Mr Giggs] makes an appointment to attend on the Clerk of the Lists in order to fix a further trial date, such appointment to be not later than 18 November 2011, and give notice of the appointment to the Defendants;
> 8. In the event of [Mr Giggs] fails to comply with any of the directions above, [Mr Giggs]'s case shall be struck out;
> 9. In the event that either of the Defendants fails to comply with any of the directions ordered above, [Mr Giggs] shall have liberty to apply to enter judgment against the Defendant in default….".

32. I gave my reasons for making these orders in a judgment I delivered ex tempore (the fourth judgment given in these proceedings). A note of that judgment was prepared by solicitors. I started by reciting the history of the proceedings up till that point. The note then reads as follows, 'JT' being a reference to myself, 'HT' meaning Mr Tomlinson, 'RS' meaning Mr Spearman:

> "[1] JT said that the application notice was put before him in the expectation it would be dealt with on paper. JT said that he declined to deal with the application on paper and that he instead directed this hearing.
>
> [2] JT said that [at] this hearing [he] stated in open court the nature of the proceedings. JT said that HT had applied, unopposed by the other parties, for the other [parts of the] proceedings to be in private because the nature and details of attempts at settlement between the parties had been the subject of negotiation between [Mr Giggs] and [NGN] since April 2011. JT said that he (JT) directed that the hearing should be in private because it was in the interests of justice for him (JT) to receive those submissions.
>
> [3] JT said that this judgement was in public. JT said that he had drawn the parties' attention to CPR 15.5 [set out above] … JT said that the period specified in CPR 15.4 is 14 days after the service of the Particulars of Claim, though of course the Court could make an Order [extending that time,] as it had on 20 April 2011. JT said that this was an important provision of the [Civil Procedure Rules] as it aimed to help the Court achieve proper case management. JT said that, as the notes [in the White Book] made clear, unless a Defence was served, the Court cannot give case management directions. JT said that any purported extension beyond 28 days is ineffective, and that the notes stated that the Defendant must apply to the Court regardless of the consent of the parties. JT said that note 15.5.5 said that once the time expired a Part 12 application could be made.

[4] JT said that this was a case in which the substantive relief sought was an injunction, which meant that no judgment in default was possible. JT said that if [Mr Giggs] was at fault then [Mr Giggs] had the risk that the claim might be struck out. JT said that these rules were for the benefit of the Court and other Court users as, if time was set aside for a trial which was vacated only days before it was due to commence, the Listing Office would have refused applications made on their behalf. JT said it was not possible to use the time effectively at short notice, and that regardless of this it was unfair to other litigants.

[5] JT said that, as was the case with many cases which came before this Court, persons not a party to the action had an interest in the outcome. JT said that here there was an injunction to restrain the use of private information, other people who might wish to publish the information were unable to do so, and other people might have an interest which was less direct. JT said that the 2 hearings on 23 May identified the interests in this case.

[6] JT said that he had made clear at the start of the hearing that there was no question of [him] making an Order in the terms sought. JT said that the submitted directions contained no timetable equivalent to that in paragraph 12 of the 20 April 2011 Order. JT said that, after hearing representations from Leading Counsel, he [had] adjourned [the hearing for a short time]. JT said that on his return [to court] the parties [had] agreed that the Order should include each of the provisions of 12(2)–12(6) from the Order of 20 April 2011 [with the following variations as set out in para 30 above].

[7] …

[8] JT said that in the course of the submissions made in private, another application that [Ms Thomas] might wish to make was mentioned. [This was a reference to the application to read a Statement in Open Court]. JT said that he had made clear that the application would have to be made promptly to enable it to be heard and disposed of without putting the other dates listed in the directions at risk. JT said that if the application is allowed, the date for the oral hearing would need to be applied for before close of business on Friday 4 November 2011. JT said that [Mr Giggs] and [Ms Thomas] would be conscious of the submission made by RS for [NGN] that the application is likely to be one of which [NGN] is entitled to notice, and maybe to [disclosure of] some or all of the documents before the Court. JT said that he would give no more precise directions about this before the application.

[9] JT said that whatever steps were taken between today and 30 November 2011 they must not be allowed to disrupt the

> timetable. JT said that he had been informed, and had no reason to doubt, that the reason the parties have ignored CPR 15.5 and directions is that they hope to settle. JT said that the Court is always ready to encourage the parties to settle their differences out of Court, and that if the parties apply for a variation to the timetable to enable such a settlement this application would be treated sympathetically. JT said that he should also mention that solicitors had been in touch with the Listing Office [about the possibility of the trial date being vacated], and that this was not discouraged, but that it was not a substitute for filing a notice with the Court. JT said that the Court cannot allocate a Listing on the basis of an informal conversation, and that this was not a substitute for an application for extension of time or to take a case out of the list.
>
> [10] JT said that he would direct that a transcript of this judgment be made as soon as possible [although none has apparently been prepared]… ".

33. Following that hearing attempts were made to reach a settlement of the proceedings between Mr Giggs and Ms Thomas. Ms Thomas was particularly concerned at the fact that, in the judgment of Eady J delivered on 23 May in which he had explained why he had made the orders he did make on 14 and 20 April, the judge had used the word "blackmail", and that there had been no mention of her side of the story. The reason for that was, of course, because she had not put forward her side of the story. She now wanted to "set the record straight", as she put it, in the form of a Statement in Open Court.

34. Drafts of a statement to be made unilaterally by her were circulated, initially to myself, and subsequently to Eady J. The circumstances in which that was done are set out in a judgment that Eady J handed down in writing on 25 November 2011 neutral citation number [2011] EWHC 3099 (QB) following a hearing on 11 November 2011 (the fifth judgment in these proceedings). See paragraphs 15 and following of that judgment. At the hearing on 11 November 2011 Ms Thomas made an application for permission to read a statement in the form of a draft submitted to the Court. For the reasons given in his judgment Eady J refused permission at that stage. In short, as Eady J said at para [27]:

> "At the moment, it appears that the parties concerned wish to disavow "blackmail" without making it clear whether the allegation that Ms Thomas asked for £50,000 and later £100,000 is also disavowed; or whether it is accepted, for example, that she did so but on some legitimate ground. Not only does that fudge the issue, but because the allegations were so widely published at the time, the ambiguity will be noted by any interested onlookers. The statement thus would not be effective to achieve Ms Thomas' objectives, whether of putting the record straight or of achieving vindication. It appears to disavow the concept of "blackmail", but that word did not have an independent life of its own. It only appeared in the judgment as a summary of the allegations made by the Claimant."

35. I interpose to say that the legal definition of blackmail is set out in the Theft Act 21(1)

> "A person is guilty of blackmail if, with a view to gain for himself … he makes any unwarranted demand with menaces; and for this purpose a demand made with menaces is unwarranted unless the person making it does so in the belief (a) that he has reasonable grounds for making the demand; and (b) that the use of the menaces is a proper means of reinforcing the demand".

36. It follows that if a claimant (C) alleges that a defendant (D) has made an unwarranted demand for money from C, and at the same time that D threatened to disclose C's private information through the media, the court will recognise that as an allegation by C that D has attempted to blackmail C. Claimants contemplating making such an allegation against a defendant should understand the seriousness of what they are alleging. If a claimant does make such an allegation in his witness statement, Judges will be bound to recognise the allegation for what it is, whether or not the word "blackmail" is one that either C or D have themselves used in that context.

37. On 18 November 2011 the time for compliance with paragraph 7 of the order that I had made on 2 November 2011 expired. No appointment had been made on behalf of Mr Giggs to attend the Clerk of the Lists. The action was therefore automatically struck out. But it appears that nobody noticed that at the time.

38. On 30 November 2011 NGN served its Defence. It contended that Mr Giggs could have no cause of action for breach of confidence, nor any reasonable expectation of privacy, in respect of publication of information which was anonymised, as the Article had been. Accordingly NGN denied that Mr Giggs was entitled to any remedy. NGN stated that it reserved the right to publish information which would not be an unlawful breach of confidence or misuse of private information.

39. On 15 December 2011 a revised form of Statement in Open Court was read with the permission of Eady J. Prior to the reading of the statement Eady J posed in court a question as to whether anonymity needed to be retained. The Statement in Open Court included the following:

> "7. The Sun has now made it clear that Ms Thomas was not responsible for the article of 14 April. CTB accepts this and also accepts that Ms Thomas did not wish any private information to be published. She had retained Max Clifford to try to prevent a story from coming out. Ms Thomas in turn, accepts that the decision to publish her name was taken by The Sun, and CTB did not want that to happen.
>
> 8. Ms Thomas denies that she asked CTB for money and says that he offered to assist her in the flat purchase. Whatever the difference is in recollection between the parties CTB now accepts such discussions were not linked to any threat to disclose information to the media.

> 9. In these circumstances, CTB accepts that there is no basis to accuse Ms Thomas of blackmail. He also accepts that her conduct in the period leading up to the publication of The Sun article was motivated by a desire to avoid the publication of private information.
>
> 10. CTB and Ms Thomas have now resolved matters between them. Ms Thomas did not want to disclose private information concerning CTB. That remains her position now that the record has been set straight".

40. Also on 15 December 2011 solicitors for Mr Giggs circulated a document headed "Legal Notice" addressed to News Desks and Legal Departments of news publishers. It read as follows:

> "As you will be aware Imogen Thomas has today read a Statement in Open Court ("SIOC") in this matter, the Claimant's claim against her having been settled.
>
> Prior to the reading of SIOC Mr Justice Eady posed a question regarding whether anonymity needed to be retained. He did not make any judgment or affirmative statement on this point, nor amend the order of 20 April 2011 ('the Injunction') granting anonymity to the Claimant.
>
> Mr Justice Eady also stated that his judgment regarding Ms Thomas's application to read the SIOC could be released. This will be done in due course. He was not referring to the lifting of the Injunction, which still remains in place.
>
> As part of the resolution of CTB's claim against Imogen Thomas, Ms Thomas has agreed to be bound by a final order in similar terms to the existing Injunction.
>
> You have been served with the Injunction and should therefore comply with it. We would ask you to ensure that anything that you may publish regarding this case or the SIOC complies with the Injunction and accurately reflects the true position.
>
> CTB's case against News Group Newspapers continues".

41. That Legal Notice was erroneous. Since 18 November about four weeks previously the whole action had been struck out.

42. On 4 January 2012 solicitors for NGN wrote to Mr Giggs's solicitors stating that, having made enquiries that day, they had discovered that no listing appointment had been made as required by the order of 2 November, with the consequence that Mr Giggs's claim had been struck out.

43. On 9 January 2012 the Application Notice now before me was issued. In it Mr Giggs asked for an order pursuant to CPR 3.9 that he be granted relief from sanctions imposed by the order of 2 November 2011, and so that his action be re-instated.

44. The reason for the breach of the order was given in a witness statement of Mr Benaim and dated the same date. He stated that it was as a result of an oversight in his office that the date of 18 November 2011 had not been noted. He took full responsibility for this and apologised to the Court. He said:

> "I should emphasize that [Mr Giggs]'s intention has always been to continue with these proceedings in the absence of a suitable resolution".

45. He recounted that it was on 12 May 2011, while settlement negotiations were ongoing, that Mr Giggs had agreed to a general stay regarding service of NGN's defence, as recounted above. Negotiations were being pursued between Mr Giggs and Ms Thomas but not NGN. He referred to the negotiations about the Statement in Open Court, and to the applications to the court for permission to read it. He then addressed the matters to which the court is required to have regard by CPR Part 3.9.

46. It is not necessary to set out paragraph by paragraph what Mr Benaim says in relation to each of the sub paragraphs at CPR Part 3.9(1). He states that Mr Giggs's solicitors were concentrating on settling the proceedings with Miss Thomas and simply overlooked the need to comply with the 18 November deadline in the order of 2 November. This was certainly the concern of the lawyers, and not of Mr Giggs himself. At the time of this statement, enquiries with the Queen's Bench Listings department led to him being informed that the trial could commence on 19 March, if the estimate was 3 days. He said that the non compliance with the order therefore had no practical effect, since the remainder of the order could still be complied with.

47. On 16 January 2012 Mr Charalambous made a witness statement for NGN. He noted that making of the appointment by no later than 18 November was the only step required to be taken of Mr Giggs before service of the Defence by NGN. And that following service of the Defence no Reply had been served. Mr Benaim had said that Mr Giggs did not wish to serve a Reply. Mr Charalambous noted that there were a number of matters in the Defence which Mr Giggs might reasonably have been expected to admit or deny in a Reply.

48. However, the main thrust of Mr Charalambous's witness statement is that Mr Giggs would not lose anything of value if relief were refused and the claim were not reinstated. It was by that time obvious that no order for anonymity could be continued, even if the order made by Eady J on 20 April was still in force, which he did not accept.

49. On 1 February 2012 Eady J made the Consent Order embodying the settlement agreement between Mr Giggs and Ms Thomas. Mr Giggs had initially submitted a draft in which he would have been permitted to continue to enjoy anonymity. Eady J declined to make an order in that form. The order that he made names Mr Giggs in the title to the action as follows: "Ryan Joseph Giggs (previously known as 'CTB')". The order makes provision for preserving the confidentiality of the confidential schedules

to the witness statements and other documents. It records the undertaking to the court given by Miss Thomas as set out in para 6 above.

50. The order provides that all further proceedings as between Mr Giggs and Miss Thomas be stayed upon the terms set out in the Confidential Schedule to the Order. The order as drawn also contained an endorsement on the back sheet, "copy orders sent to Claimant's solicitors for service on Defendants".

51. Mr Giggs's solicitors did not inform NGN of the making of this order. But, assuming that it must have been made, solicitors for NGN wrote on 17 February asking for a copy. A copy was provided on 20 February, excluding of course the Confidential Schedule.

52. On that date solicitors for NGN replied in highly critical terms. They wanted to know why Mr Giggs had not notified them or anyone else of the lifting of the anonymity pursuant to undertaking (4) given and recorded in the order of 20 April 2011. They contended that this was a plain breach of that undertaking in which Mr Giggs had persisted for at least 19 days.

53. By letter of the same date solicitors for Mr Giggs maintained that the anonymity provision in the order of 20 April 2011 remained in force. They stated it was their understanding that it would remain in force until an application was made to vary that order. They reported that when, on 1 February, they had submitted to Eady J's clerk the final version of the order made on that date, they had included in the email the following paragraph:

> "For completeness, I should draw the Court's attention to the developments in the main actions against the First Defendant, News Group Newspapers Limited. As a result of Mr Giggs's failure to comply with the direction requiring the taking out of the listing appointment, the main action stands struck out as against the First Defendant. Mr Giggs has made an application for relief from sanction which will be heard before Mr Justice Tugendhat on 21 February 2012. When this application is resolved, if no relief is granted, no further steps will be required. If relief is granted, Mr Giggs will agree to the variation of the interim order so as to remove the anonymity provisions and thereafter inform third parties served with the order of this provision. We trust that this is a satisfactory approach."

54. In reply, Eady J's clerk communicated the judge's approval to the revised order, but he said nothing about that paragraph. The paragraph is surprising. There is not a "main action" and another action. There is one action. The whole action had been struck out on 18 November. That includes of course the action against Ms Thomas in respect of which the solicitors were submitting a draft order to be made by the judge. They did not inform him that it had been struck out. If he had been told that the whole action had been struck out, as he should have been, he would not have made the order he did make without further enquiries.

SUBMISSIONS OF LAW

55. For Mr Giggs Mr Tomlinson submits that the court should have regard to each of the matters listed in CPR Part 3.9(1) which appears to be relevant to the case that he has to decide. The fact that the delay is attributable to fault on the part of a litigant solicitor rather than the litigant himself is a factor which weighs in his favour: see *Flaxman-Binns v Lincolnshire CC* [2004] EWCA Civ 424 [2004] 1WLR 2232 para 41. In *Welsh v Parnianzadeh* [2004] EWCA Civ 1832. Mance LJ had said in relation to CPR Part 3.9(1)(f) and *Flaxman-Binns*:

> "A claimant who is reduced to a claim which would per force be on a percentage basis for loss of chance against her legal advisors is not only suffering a real loss in the sense of being caused further delay and expense, but is also suffering a real reduction in the value of her claim."

56. He submits that relief from sanctions is often refused where there has been deliberate non compliance, or where the consequences of non compliance have been extremely serious. But that should not happen in a case such as the present.

57. He submits that the interests of the administration of justice are that the case should proceed. The case relates to Mr Giggs's Article 8 rights and is of great importance to him. The application has been made promptly. The failure to comply was unintentional, as is not in dispute. The explanation is a simple administrative error.

58. The position in relation to CPR Part 3.9(1)(e) is more complicated. Mr Tomlinson accepts that there was a failure on the part of Mr Giggs to comply with CPR Part 15.5 as stated in the judgment I delivered on 2 November. But that was a failure by all parties. As to the non service of the Reply, he submits that there is no obligation to do that. He submits that there has been no breach of the undertaking (4) in the order of 20 April 2011, namely to give notice to third parties if that order ceased to have effect. He submits that the order has not ceased to have an effect. The failure was caused by the legal representative, and the trial date can still be met if relief is granted. The failure to fix the trial date has had no adverse effect on NGN. The nature of the information subject to the action is such that there is no legitimate public interest in it and so no or no significant interference with NGN's freedom of expression. Striking out the action would be in addition to an interference with Mr Giggs's Article 8 rights, an interference with his Article 6 right of access to court.

59. As to the merits of the claim, Mr Tomlinson accepts that when considering whether to grant to relief to a party the court is entitled to consider such matters see *Chapple v Williams* [1999] CPLR 731, noted in the White Book (2011) at note 3.9.1. But it is not the function of the court on such an application to conduct a mini trial. It is a developing area of the law and the facts are unusual.

60. During the course of his oral submissions Mr Tomlinson made clear that the damages which Mr Giggs wished to claim would be substantial damages. Mr Tomlinson made clear that Mr Giggs wished to claim damages on the basis that, although the Article published on 14 April was anonymous, subsequent events have led to many people identifying Mr Giggs as the person referred to, NGN should in law be responsible for that.

61. Mr Spearman submits that it is not open to Mr Giggs on the present pleadings to advance claims for damage suffered by the disclosure of Mr Giggs's identity after 4 May, because it is not pleaded how, if at all, NGN is said to be responsible for that. Publication of anonymous information does not constitute an interference with privacy: *R v Dept of Health ex p Source Informatics Ltd* [2001] QB 424 at para [34], *Peck v UK* [2003] EMLR 287 at paras [61], [62] and [80]-[85], *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42; [2011] 1 WLR 1645 at para [25]. There are further points advanced to which it is not necessary for me to refer.

62. Therefore, submits Mr Spearman, any damages would be very modest. There is nothing pleaded by way of aggravation of damage against NGN. There is therefore no real or substantial tort. If the action had not been struck out in the way that it has, an application to strike it out as an abuse of the process of the court would be well founded.

63. Mr Spearman accepts that, under the CPR (and if the action were not struck out), it would be open to Mr Giggs to apply for permission to amend the Particulars of Claim to plead matters which have occurred since the claim form was issued. But he submits that that would be a necessary step.

64. Mr Spearman submits that it is not until the present application is determined that it will be possible to know whether, if the action is re-instated, the trial can take place within the dates set out in my order of 2 November 2011.

65. If the trial cannot take place within the dates envisaged in the order of 2 November 2011, Mr Spearman submits that the continuance of this action would be an interference with the Art 10 rights of NGN. It will also be an interference with the Art 10 rights of third parties. Eady J's order of 20 April effectively binds third parties: see *Jockey Club v Buffham* [2003] QB 642 and *Hutcheson v Popdog* [2011] EWCA Civ 1580 at [26] (it cannot be assumed that final injunctions do not bind third parties).

66. He also accepts that if no relief is given, and the action remains struck out, it is open to Mr Giggs to commence fresh proceedings claiming damages on the basis that NGN is in law responsible for the publication and identification of Mr Giggs by other news publishers. He does not accept that such a claim would be well founded (even contending that it would be an abuse of process), but he does not dispute that it could be advanced, at least in principle, and subject to seeing an appropriate draft. However, if that claims is to be advanced in this action, the action would be longer than 3 days and there would be other steps to be taken in preparation for a trial. If a new action is started, the trial date would be likely to be much later than the dates at present contemplated for a trial.

EFFECT OF GRANTING OR REFUSING RELIEF – THE MERITS

67. It is under this heading that I consider the merits of the claim, and what Mr Giggs would lose if the claim is not reinstated. I leave out of account at this stage matters of costs. Whatever decision I reach, I will then have to go on to consider costs, and the order for costs will have to be one that meets the justice of the case as it stands at that stage.

68. It is common ground that if relief is not granted, Mr Giggs can start a new action against NGN. It follows in my judgment that to refuse relief would not be a material interference with the rights of Mr Giggs under Art 6 or Art 8.

69. The submission that the continuance of this action would be an interference with the Art 10 rights of NGN does not seem to me to be consistent with NGN's stance in these proceedings. NGN has stated that it does not have either the means to publish, or the intention of publishing, any further information relating to a sexual relationship between Mr Giggs and Ms Thomas (see para 10 above). So it is hard to see what serious interference with NGN's Art 10 rights there can be.

70. In my judgment cases such as *Source Informatics* and *Peck* cannot provide a complete answer to any possible claim by Mr Giggs against NGN. By way of analogy, there is no libel if defamatory words are published of a person who is not referred to. But that does not mean that no action for libel may ever be brought on words that do not name the claimant. A defendant may be responsible if the words complained of would reasonably be understood to refer to the claimant. Possible circumstances are exemplified in numerous cases. See eg Duncan & Neill on Defamation 3rd ed ch 8.

71. However, it is necessary for a claimant to plead the matters he relies on when he alleges that the publisher of an anonymous article is to be held liable for the fact that it is understood to refer to the claimant. Mr Giggs has not done that in this case. It is understandable that he did not do that on 4 May 2011, because it was only after that date that his identification became a matter of widespread public knowledge. If he were to wish to do so, he would have to amend his Particulars of Claim, or start a new action. So as at present pleaded, it cannot be said that the claim for damages could give rise to any significant award, even if it could give rise to an award at all.

72. The claim for an injunction has equally been overtaken by events, for the reasons given in para 11 above.

73. It follows that there is in my judgment no purpose to be served by granting relief under CPR Part 3.9, and I would refuse to do so.

74. I shall however express my views on other points raised.

EFFECT OF GRANTING OR REFUSING RELIEF – THIRD PARTIES

75. Since *Hutcheson v Popdog* [2011] EWCA Civ 1580 at [26], it must be assumed that the undertaking given to the court by Ms Thomas on 1 February may affect the Art 10 rights of third parties.

76. It is only if the final order of 1 February does not bind third parties that Mr Spearman's submission that the rights of third parties would be interfered with by the continuation of the action against NGN adds anything. If the final order of 1 February 2012 is valid and binding on third parties (and the order of the High Court is always valid until it has been set aside), the interim injunction of 20 April 2011 has been overtaken by that final order.

77. However, Mr Spearman's submission on the effect upon third parties is relevant to the manner in which this action has been conducted by both Mr Giggs and NGN, which is considered below.

DEFAULT IN COMPLIANCE WITH THE CPR AND COURT ORDERS

78. Non-disclosure orders affect the Art 10 right of freedom of expression not only of the defendant, but also of others who may wish to publish or receive information. This is referred to as the '*Spycatcher* principle' (see *Attorney-General v Newspaper Publishing plc* [1988] Ch 333, 375 and 380). That they have that effect on third parties is one of the main reasons that claimants apply for non-disclosure or privacy injunctions. But the court is required by HRA s.6 not to act in a manner incompatible with the Convention rights. It follows that in cases in which relief granted may affect the exercise of the Convention right of freedom of expression, the court cannot give the same consideration to the autonomy of the parties to the action as it commonly gives to the autonomy of the parties to litigation which does not have the same effect on the Convention rights of third parties.

79. The Practice Guidance on Interim Non-Disclosure Orders issued by the Master of the Rolls in August 2011 addressed this point specifically:

> "**Active Case Management**
>
> 37. Interim non-disclosure orders, as they restrict the exercise of the Article 10 Convention right and, whether or not they contain any derogation from the principle of open justice, require the court to take particular care to provide active case management. …
>
> 41. Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent,…"

80. The directions given by Eady J on 20 April (para 20 above) preceded this Guidance, but his order is fully in accordance with it. The effect of privacy injunctions on the Art 10 rights of third parties was well recognised before the Practice Guidance. The directions of Eady J were designed to achieve as quick a trial of this matter as practicable.

81. It might be thought that where the defendant is a media organisation it would give priority to freedom of expression, and so require that a claimant progress a claim to trial as expeditiously as possible, with a view to vindicating its Art 10 rights, if it can. But experience has shown that media defendants rarely do that in privacy cases. That may be on account of the high costs of litigation, or it may be for other reasons. In some cases it may be because the media recognise that there can be no defence in law to the claim. But the result is that the court must be particularly alert for the need to have regard to the rights of third parties.

82. It is in this context that the breach of the CPR Part 15 by both parties on 12 May must be viewed. That agreement to extend generally the time for service of the Defences had the effect of interfering with the Art 10 rights of third parties, including by the continuation of the anonymity order.

83. In these circumstances, why NGN was secretly willing to agree to defer service of its defence, and thus the trial of the action, is hard to understand, and has not been explained. In May 2011 NGN was prominent amongst those complaining about the injunction that had been granted to Mr Giggs, and how, so it said, that injunction interfered with the Art 10 rights of itself and the public in general. It was at the same time making similar complaints in a separate action. *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1309 (QB) came before the court three times at about the same period: 23 May 2011; [2011] EWHC 1341 (QB) (27 May 2011) and [2011] EWHC 1437 (QB) (09 June 2011). Yet, as in this case, so in *JIH* in November 2010, NGN had been willing to consent (again secretly) to a non-disclosure order interfering with the Art 10 rights of third parties. When in *JIH* the proposed consent order was submitted to the court, supposedly to be dealt with in private on paper, I declined to deal with it in private, or to make it in the form agreed: [2010] EWHC 2818 (QB) para [3] and [9]. The Court of Appeal made an anonymity order, but permitted disclosure of information about the action, which would not have been permitted by the form of consent order proposed by NGN (see [2010] EWHC 2818 (QB) para [7]).

84. It is against this background that I regard the breach by Mr Giggs and NGN of CPR Part 15.5(1) and (2) as a serious breach of the rules of court. It was clearly an intentional breach (whether or not they overlooked the requirements of CPR Part 15), and the explanation (that this was with a view to settling the action) is not a good one. It had the effect that the trial date could not be met. It was in response to that breach that I made the order that I did make on 2 November, and explained it fully in my judgment of that date. It is all the more serious in that it was not disclosed to Eady J or myself on either of the two applications to the court to lift the anonymity order made on 23 May 2011.

85. The application made on 1 November 2011 is a further example of the same disregard by Mr Giggs and NGN of the Art 10 rights of the third parties, which in the present case means in practice a substantial section of the public at large. The application to vacate the trial date was submitted to me to be dealt with on paper, that is in private (see para [1] in para 32 above). The draft directions submitted to the court contained no timetable equivalent to that in paragraph 12 of the 20 April 2011 Order. In other words, the court was being asked by Mr Giggs and NGN to continue the interim injunction made on 20 April (including the anonymity order) for an indefinite period into the future, without explaining why that interference with the Art 10 rights of third parties was necessary or proportionate.

86. Mr Spearman placed more emphasis on the point that Mr Giggs was in breach of his undertaking (4) given on 20 April immediately to take all reasonable steps to inform in writing anyone to whom he has given notice of this order or who he has reasonable grounds for supposing may act upon this Order that it has ceased to have effect.

87. In my judgment it is plain that there was a breach of this order no later than 1 February 2012. The order that the solicitors invited Eady J to approve that day, and which he did approve and make, named Mr Giggs in the title. That court order was a

public document. It is difficult to see what further steps needed to be taken to demonstrate that the anonymity granted in the order of 20 April no longer persisted.

88. Nor can I understand the rest of the text of the e-mail addressed to the judge's clerk on 1 February, and to which he did not respond. The whole action had been struck out on 18 November. By that time the solicitors were well aware of that fact, even though it was not until 4 January that they became aware of it.

89. I would refuse to grant Mr Giggs relief under CPR Part 3.9 on the grounds that he had been party to these two serious and (in the sense explained above) intentional breaches, one of the rules of court and one of the order of 20 April 2011.

CONCLUSION

90. It is for these reasons that I refuse to grant relief to Mr Giggs, and the action will remain struck out. And for reasons set out in para 12 above, this can hardly be said to represent a victory for NGN.

FURTHER OBSERVATIONS ON THIS CASE

91. The way that this case has been conducted by the parties has done much to undermine confidence in the administration of justice. There are two matters in particular on which further comment is called for.

92. The first matter is the sense of injustice which was harboured by Ms Thomas, and which led to her seeking permission to read, and ultimately reading, a unilateral statement in open court.

93. The reason why Eady J had to give the public judgment that he did give on 16 May, in spite of the fact that he had not heard the case for Ms Thomas, is explained in my judgment in *Coward v Harraden* [2011] EWHC 3092 (QB) at paras [19]-[21] as follows:

> "19. *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 is one of a number of judgments in recent years in which the importance of open justice has been emphasised. Lord Woolf MR cited with approval a passage from Sir Jack Jacob's Hamlyn Lecture, The Fabric of English Civil Justice (1987), pp. 22–23 which included the following:
>
> > "The need for public justice, which has now been statutorily recognised, is that it removes the possibility of arbitrariness in the administration of justice, so that in effect the public would have the opportunity of 'judging the judges:' by sitting in public, the judges are themselves accountable and on trial. … The opposite of public justice is of course the administration of justice in private and in secret, behind

> closed doors, hidden from the view of the public and the press and sheltered from public accountability.,…"
>
> 20. In that case a large number of plaintiffs brought actions against the defendants, three tobacco companies, claiming damages for personal injuries by reason of cancer which they claimed was caused by smoking cigarettes manufactured by the defendants. On 10 October 1997 a hearing for directions was heard 'in chambers' and an issue arose as to what the parties could say about that hearing. The judge had not delivered a judgment, and had said that a copy of his directions could be released to the public, but that the parties and their advisers were not to make any comment to the media in relation to the litigation without the leave of the court. Lord Woolf said at p1073G:
>
> > "What has happened since the order has been made strongly suggests that it would have been preferable to have given all the directions which were made on 10 October in open court, together with a judgment explaining why they were made, so that it would not have been necessary for the legal advisers to communicate with the media in order to explain what had happened."
>
> 21. It is in accordance with this guidance of Lord Woolf that it is now common for judges sitting in the Queen's Bench Division to give formal judgments setting out their reasons for decisions on interim applications (that is any hearing other than a trial), just as they had always done after a trial (and just as judges in the Chancery Division had always done in interim applications). The giving of reasoned judgments is one of the ways in which judges are accountable to the public. The practice advances the public interest in a climate of opinion where there is increased emphasis on the need for accountability in the institutions of the state…"

94. The practice of giving such judgments was endorsed by the Master of the Rolls in his Practice Guidance as follows:

> "45. The court should wherever possible give a reasoned, necessarily redacted, judgment [upon making an interim non-disclosure order]."

95. It follows that judges must give every opportunity they can give to a defendant to put her case before the court. But a judge cannot compel a party to put her case before the court. Eady J delayed until 16 May 2011 to give his reasons why he had granted the injunctions he did grant on 14 and 20 April. He had meanwhile circulated the judgment in draft. Ms Thomas had the opportunity of putting her case and correcting any errors of fact.

96. It also follows that parties (and their advisers) who consider not putting their case before the court at a hearing on notice of an interim application, such as the one that Ms Thomas attended by leading counsel on 20 April, must take into account that the judgment may have adverse consequences for them. No one has suggested that there is anything more that Eady J could have done to give Ms Thomas an opportunity to present her case. And none of the parties has suggested (or could suggest, given that they had received the judgment in draft) that it contained any errors as to the facts as they had been put before the court at that stage.

97. The second observation concerns the grant of interim injunctions. In *American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1; [1975] AC 396 at p406 Lord Diplock explained the need for interim injunctions as follows:

> "… when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction ; …. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The Court must weigh one need against another and determine where 'the balance of convenience' lies. In those cases where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination…. "

98. In that case the House of Lords at p408 laid down the famous test summarised in three questions in the White Book (2011) Vol 2 para 15-7:

> "(1) is there a serious question to be tried? If the answer … is Yes…
> (2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction?
> (3) If not, where does the 'balance of convenience' lie?"

99. In relation to cases where the relief sought will affect the Convention right to freedom of expression of the defendant (or of any third parties), Parliament considered that question (1) in *Cyanamid* set too low a threshold. So by the Human Rights Act 1998 s.12(3) it set a higher threshold:

> "(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".

100. But the "likely to establish" threshold under s.12(3) is still lower than the threshold that a claimant must pass at trial (if it were not, there would no practical possibility of getting an interim injunction).

101. There is a requirement in s.12(2) (and Practice Direction 25A para 5(3)) that a respondent be notified. This is to ensure (so far as possible) that the Judge will hear both sides of the story: an elementary requirement of justice. But even if he does hear both sides of the case at that stage, he will only hear them on paper, and will not have the benefit of any disclosure or cross-examination, as he would at trial. So it is more difficult for a respondent to challenge a claimant's claim. In urgent cases the judge may be obliged to make that assessment even before a respondent has had an opportunity to put evidence before the court (as happened in this case on 14 April). And even when the respondent has had an opportunity to put evidence before the court, he or she may choose not to avail themselves of that right (as happened in this case on 20 April).

102. As Eady J put it in his judgment in this case on 25 November 2011 [2011] EWHC 3099 (QB) at para 7:

> "whatever reasons may have underlain [Miss Thomas's] decision not to give her own account of the background events [before the judgment handed down on 20 May 2011], the fact remains that the allegations contained in the Claimant's evidence remained unanswered up to (and beyond) the handing down of my public judgment. It was in the light of the evidence before me, one-sided and limited though it was, that I was obliged to make a judgment in accordance with s.12(3) of the Human Rights Act 1998 as to the "likelihood" of the Claimant's succeeding at trial in obtaining a permanent injunction to similar effect: see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253."

103. The effect of s.12 (and the *Cyanamid* rules on interim injunctions) being so favourable to claimants is that defendants generally offer undertakings, or do not oppose the grant of an interim injunction, as happened in this case on 20 April. But because the law is favourable to claimants in this way, there is an incentive upon claimants to abuse the process of the court, so as to avoid the need to prove their cases at trial. Having obtained an interim non-disclosure order, it may appear to be in a claimant's interest to hold on to it as long as possible, and proceed to trial as slowly as possible, if at all.

104. HRA s.12 and the other rules on interim injunctions assume that there will be a trial. Moreover, the anticipated delay between the hearing of the application for an interim injunction and the expected date of the trial is relevant to the further questions which a court has to consider if and when the court is satisfied that the claimant is likely to establish that publication should not be allowed. The court must then go on to consider (as it has to in any application for an interim injunction): (2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction? (3) If not, where does the "balance of convenience" lie?

105. In particular, the shorter the anticipated delay, the more likely it is that the balance of convenience (or balance of justice as it is better referred to) favours the preservation of the status quo (ie non-disclosure). An interim injunction must be no more than is necessary and proportionate to achieve the legitimate aim of protecting the rights of the claimant (including Art 8 rights). So the shorter the period likely to elapse between the making of the interim order and the trial, the more ready the court will be to find that the interference with the Art 10 rights of the claimant and third parties is proportionate. And, of course, *vice versa*.

106. It was for this reason that Eady J, in his order of 20 April, laid down a timetable for the matter to proceed to trial. And it is for this reason that the agreement between the parties on 12 May to depart from that timetable was so serious. It was not just a breach of CPR Part 15.5. It was an abuse of the process of the court to interfere with the Art 10 rights of third parties, which had not been approved by any judge.

107. There is, it is often said, a further reason why claimants do not wish to proceed to trial. It is said that for a claimant a trial will defeat the purpose of the proceedings, in so far as it gives publicity to the private facts which the claimant is seeking to keep private. But that argument overlooks the fact that a trial may be conducted in private if that is strictly necessary. A trial of a privacy claim has recently been conducted in private for that reason.

108. Although CPR Part 15.5 restricts the rights of parties to agree to extensions of time for filing a defence, that does not mean that they are free to extend time for filing particulars of claim. The courts have recently been concerned in another context with the tendency of parties to ignore the time fixed for service of particulars of claim (14 days after service of the claim form) in cases where there is an application for an interim injunction. In *Caterpillar Logistics Services (UK) Ltd v de Crean* [2012] EWCA Civ 156 (21 February 2012) paras [71]-[73] the Court of Appeal endorsed the view that:

> "that it is in the interests of justice and the efficient and fair conduct of proceedings that the claimant's case be defined and pleaded as soon as possible, so that the defendant knows precisely what is the case against her, and so does the judge."

109. That the claimant should serve his statement of case promptly following an application for an interim injunction is not a new requirement: *Hytrac Conveyors Ltd. v Conveyors International Ltd* [1983] 1 W.L.R. 44, 47 and *R.H.M. Foods Ltd. v. Bovril Ltd.* [1982] 1 W.L.R. 661, 665. That should not add to the costs, but rather it should tend to reduce them, in ensuring that the witness statements and the arguments are addressed to the real issues in the action.

110. For these reasons, particulars of claim should normally be served within 14 days in cases where there is an application for a non-disclosure order. And if an extension of time is sought, applicants should explain why the extension sought is necessary and proportionate in so far as it prolongs any interference with the Art 10 rights of third parties.

111. In short, claimants and defendants must prosecute a claim for breach of confidence and privacy so as to ensure that the interference with the Art 10 rights of third parties is kept to as short a time as is possible. Where applications are made for interim non-disclosure orders, both parties must have in mind that the judge is normally bound to give a reasoned judgment, even at that early stage of the proceedings. The allegations that a claimant makes, and what a defendant states, or does not state, may be made public in that judgment, if it is necessary for the judge to do so in order to explain why he has acted as he has. If a judge grants an order without notice he will normally have to explain why he considered it necessary to do so, notwithstanding the requirements as to the giving of notice set out in Practice Direction 15A para 4.3(3) and/or HRA s.12(2). And the court should not grant extensions of time for service of statements of case, or any other step in the action, unless satisfied that the extension of the period during which there will be an interference with the Art 10 rights of third parties is necessary and proportionate.