Neutral Citation Number: [2011] EWHC 1437 (QB)

Case No: HQ11X00782

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/06/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Sir Frederick Goodwin	**Claimant**
- and -	
NGN Ltd	**Defendant**
- and -	
VBN	**Interested Party**

- -
- -

Hugh Tomlinson QC (instructed by **Olswangs**) for the **Interested Party**
Richard Spearman QC (instructed by **Farrer & Co**) for the **Respondent**
The Claimant did not appear and was not represented

Hearing dates: 1 June 2011

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Judgment

Mr Justice Tugendhat :

1. The Defendant ("NGN") publishes The Sun newspaper. It applies to vary an injunction dated 19 May. That injunction prohibited the disclosure of information concerning a sexual relationship between Sir Fred Goodwin and a colleague of his at RBS. The relationship continued while she was working for RBS and he was Chief Executive of that bank. The lady is referred to now as "VBN". The litigation has attracted very wide publicity. This is in part due to the reputation which Sir Fred Goodwin acquired as he led RBS, at first to a number of business successes, but in the end to the brink of collapse. NGN state that he did this by cutting the number of employees and through a series of acquisitions, the last of which was of ABN Amro. RBS had to be rescued with vast sums of public money. When Sir Fred Goodwin left the bank in November 2008 he was contractually entitled to severance terms which were in very large figures. He has since attracted much adverse criticism in the media reflecting public resentment that he could receive such high rewards after presiding over the failure of one of the country's leading banks. A bank failure on this scale had not occurred in the United Kingdom since the nineteenth century. NGN state that Sir Fred Goodwin had at an earlier stage attracted much adverse criticism from those who disapproved of the policy he carried out at RBS in cutting the number of employees. It is common knowledge that Sir Fred Goodwin has figured very prominently in the media for a number of years, and that in recent years the coverage has been increasingly hostile.

2. These facts may well explain why NGN consider that articles about Sir Fred Goodwin will be of interest to the public to whom they wish to sell The Sun. But what is of interest to the public is not the same as what it is in the public interest to publish. Newspaper editors have the final decision on what is of interest to the public: judges have the final decision what it is in the public interest to publish.

3. The case raises important questions as to the circumstances in which the parties to a sexual relationship may or may not hold a reasonable expectation of privacy in respect of that relationship, and when it may or may not be in the public interest for there to be disclosure in the media of the fact (but not the details) of a sexual relationship.

4. VBN is not a claimant in the proceedings. She would be entitled to be a claimant if she wished, since her private life is as much engaged as that of Sir Fred Goodwin. But she does not have to be a party. She is a party to this application for the reasons explained more fully below. In brief, she is the person who will be the most affected if the variation to the injunction now sought by NGN is granted. Sir Fred Goodwin would not be directly affected by the proposed variation, since the variation that permitted disclosure of his name was made at the hearing on 19 May. VBN had been given no notice of that hearing and was not represented at it, so there had to be this further hearing.

THE HISTORY OF THIS LITIGATION

5. On the afternoon of 1 March 2011 a representative of The Sun contacted Sir Fred Goodwin regarding an allegation that he was having an affair with a lady who was an employee of the bank at a time. The journalist also gave the name of the lady and the department in which she worked. It was suggested to Sir Fred Goodwin that the

public interest in publication of the story was the fact that the lady was involved in determining his severance package when he left RBS. I will refer to this as NGN's "first argument".

6. No evidence for this suggestion has ever been produced by NGN and there has been no explanation as to how it ever came to be advanced. If true, it would have been a very serious matter. It would have involved a clear conflict between the lady's professional duties to RBS and her personal interest in assisting the man with whom she was in a relationship. Sir Fred Goodwin and the lady have both denied that she had any involvement in determining his severance package and that denial is not challenged. Since that initial conversation on 1 March no one on behalf of NGN has mentioned that suggestion again.

7. Later that same day Mr Tomlinson QC, on behalf of Sir Fred Goodwin, applied for an injunction against NGN to Henriques J. He was the Judge who was hearing out of hours applications at the time. The application was made by a telephone in a conference call to which Mr Spearman QC was also a party, representing NGN. At that hearing no evidence or legal submissions had yet been put on paper. That is a common situation in urgent applications. So each counsel told the Judge what he had been instructed his client would say about the facts, and a detailed note was kept by the solicitors. As the rules of court provide, an applicant for an injunction in those circumstances is required later to lodge a witness statement by him confirming the facts explained to the Judge on his behalf. A defendant is not required to do that unless, at the next hearing to be held a few days later, the defendant opposes the continuation of the injunction.

8. Mr Tomlinson asked for an injunction to prohibit the publication of any information concerning the subject matter of proceedings which Sir Fred Goodwin intended to commence, or of any information tending to identify him (save for that contained in the court order and any Judgment), or of any information concerning the facts or details of any sexual relationship between Sir Fred Goodwin and the person named in the confidential schedule to the proposed order (now referred to as VBN). At that time the proceedings were anonymised and Sir Fred Goodwin was referred to as MNB.

9. Mr Tomlinson submitted that Sir Fred Goodwin had a reasonable expectation of privacy in relation to information about his relationship with the lady because the law generally recognises that sexual relationships are private unless the parties choose to make them public. Further, he submitted, that there was no public interest in the disclosure of the fact that Sir Fred Goodwin and the lady had had this relationship.

10. For NGN Mr Spearman submitted that the affair was being conducted at the time of the disastrous acquisition by RBS of ABN Amro. That acquisition would have led to the collapse of RBS, but for the government bail out which was made with public funds. The argument for NGN was that Sir Fred Goodwin might have been distracted by the affair in particular because of other circumstances of his private life (which he identified, but which cannot be set out in this judgment). Mr Spearman stated that it was not the intention of The Sun to say anything more than that Sir Fred Goodwin was having an affair. There would be nothing published about the details of the relationship.

11. It is important to note that Mr Spearman also said that the identity of the lady was not of significance for the story, nor was it significant that she was an employee of RBS, nor in what field of employment she worked. Mr Spearman submitted that the only relevance of the fact that the lady also worked for RBS was that that might have made the affair more distracting than it would have been with someone who Sir Fred Goodwin only came across at the weekend. So for that reason the newspaper might wish to publish that she was a work colleague. It will be seen that that argument was very different from the one advanced by NGN before me. At that hearing NGN was expressly disavowing reliance on matters which it is putting at the forefront of its case before me.

12. Thus the sole argument raised by NGN at that stage was that the relationship with VBN coincided with the disastrous business deal. On that basis NGN submitted that it might have distracted Sir Fred Goodwin's attention from the business affairs of RBS at the time which was critical to the disastrous takeover. I will refer to this as NGN's "second argument".

13. Henriques J gave a short ex tempore judgment in private recording the submissions for NGN, and rejecting them. Applying the test in the HRA s12 (see below), he was satisfied on the information before him that Sir Fred Goodwin was likely to succeed at trial in establishing that publication of the information in question should not be allowed. He reached this conclusion after finding that Sir Fred Goodwin's rights under Article 8 were engaged, and that he had a reasonable expectation of privacy, whereas he found no countervailing public interest so as to make it necessary and proportionate to permit The Sun to interfere with that right in the exercise of its right of freedom of expression under Article 10. He held that it was necessary in the interests of justice that Sir Fred Goodwin's name should not be disclosed at that stage. He ordered that the matter come back before the court on 4 March.

14. VBN was not present or represented at the hearing. There was no requirement that she should be. But judges are required to have regard to the effect that any order might have on third parties who are not before the court. So Henriques J enquired as to the position of VBN, and, after making his decision, required the parties to inform her of the order he had made.

15. On 2 March 2011 a claim form was issued and Sir Fred Goodwin made a witness statement. In it he stated that the relationship between himself and the lady was an entirely private matter which neither of them had disclosed to the public, and which had not previously been discussed or mentioned in the media. He said that any suggestion that the lady was responsible for his severance packet was wholly untrue, and that she had nothing whatsoever to do with it. He gave information as to her position in the company. He denied that the affair could have had any impact on his judgment or distracted him from his work at the time of the take over of ABN Amro. He set out facts about the takeover which were well known at the time and which he said demonstrated that his own role in the affair was that of one man amongst very many. There were two other banks involved in the take over (Fortis and Santander); the proposal was approved overwhelmingly by the shareholders of all three banks; there were external advisors; there was another British bank, Barclays, who had been pursuing a possible takeover in competition with RBS; the deal had been approved by regulators in approximately fifty countries and by the FSA; and in December 2010 the FSA concluded that there had been no breakdown of corporate governance in relation

to the takeover and that there was no individual wrongdoing. He expressed fears as to the intrusion into his private life that would follow if there were publication of the information about the relationship in question.

16. On 4 March 2011 the matter came back before the court. Sharp J continued the injunction in substantially similar terms. At that hearing Sir Fred Goodwin was still referred to only by the letters MNB.

17. NGN abandoned its second argument before the hearing on 4 March. If NGN had wished to oppose the continuation of the injunction at the hearing on 4 March, it would have had to put evidence before the court as the basis of its legal submissions. NGN put no evidence before the court. The same applies to any other newspaper or person notified of the order. If any such third party had wished to oppose the continuation of the injunction on 4 March (or at any later date) it would have had to put evidence before the court, and make submissions. No third party has done that.

18. Sharp J gave a public judgment [2011] EWHC 528 (QB). This was a reserved judgment given on 9 March. In paragraph 1 of that judgment she recorded how the matter had come to be heard on 1 March 2011 by Henriques J. She stated that, of two public interest justifications for the proposed publication advanced initially for NGN, one had already been abandoned by the time of the hearing before Henriques J. In para 5 of her judgment she stated that, at the start of the hearing before herself, she had been told that the application for an interim injunction was no longer opposed. Subject to its right to apply to discharge or vary the order, NGN had agreed that the order should continue until trial or further order. Thus the second public interest argument (that Sir Fred Goodwin might have been distracted by the affair) was also abandoned by then.

19. Sharp J went on to state in para 6 of her judgment the following:

> "There is no doubt in my view that the Claimant's article 8 rights are engaged, both in relation to the subject matter of the action, and the identification of him as the Claimant. There is no doubt either that publication of the information as to the fact or details of the affair will result in some interference with the Claimant's private life. It is not currently suggested by the Defendant that there is a public interest in the publication of the information or that there is any other reason for it to be disclosed. It is not suggested for example that the information was in the public domain. I am satisfied in accordance with section 12(3) of the Human Rights Act 1998 that the Claimant is likely to establish at trial that publication of the information should not be allowed."

20. The remainder of her judgment was devoted to explaining why the hearing was in private, why Sir Fred Goodwin was being granted anonymity, and what could be published about the case.

21. This part of Sharp J's judgment has been substantially misreported. It was reported that in Parliament Mr Hemming MP had said that she granted an injunction prohibiting calling Sir Fred Goodwin a banker. She did not. What she prohibited was

reporting the proceedings in terms which identified Sir Fred Goodwin as the claimant. This prohibition included referring to the applicant for the injunction as a banker, because that would be information which might tend to identify Sir Fred Goodwin as being the applicant. That would defeat the court's purpose in granting anonymity to him. The reporting of the supposed injunction prohibiting the identification of Sir Fred Goodwin as a banker did not explicitly identify Sir Fred Goodwin as the claimant in this case, although some understood the publicity as giving a hint that it was him.

22. On 19 May 2011 in the morning there were numerous media reports that in the House of Lords Lord Stoneham, speaking on behalf of Lord Oakeshott, had identified Sir Fred Goodwin as the applicant for the injunction in question. Lord Stoneham was frustrating the purpose of the court order and thus impeding the administration of justice, but he was doing so under the protection of Parliamentary privilege. If he had identified Sir Fred Goodwin in words spoken outside Parliament he would have been interfering with the administration of justice, or committing a contempt of court, as it is called.

23. In the light of this development NGN gave notice to Sir Fred Goodwin that it would apply to vary the injunction so as to permit the name of Sir Fred Goodwin to be published in the newspapers as the person who had applied for the injunction. That afternoon there was a hearing before myself. Sir Fred Goodwin appeared as did NGN, MGN (the publisher of the Mirror and the Sunday Mirror) and Associated Newspapers Ltd ("ANL", the publisher of the Daily Mail and the Mail on Sunday). At the start of that hearing Sir Fred Goodwin accepted that the injunction should be varied so as to permit the identification of himself as the claimant and applicant for the injunction.

24. At hearing neither NGN nor the two third parties put any evidence before the court.

25. NGN also sought a wider variation of the injunction, which I did not accept. The order continued in a form which prohibited the publication of any information identifying, or tending to identify the person named in the confidential schedule, as being the person with who the claimant was alleged to have had a sexual relationship (save for that contained in the order of the court and any public judgment of the court given in this action). The order also prohibited publication of any information concerning the details of any alleged sexual relationship between the claimant and the person in question.

26. But the order did permit NGN to apply to vary the order on condition that if the variation it sought might affect the rights of the lady named in the confidential schedule or her family, she must be given three clear days' notice in writing of the application. Notice was later given to the lady of the present application. It was not three clear days notice, but no point is taken on that.

27. On 23 May I handed down a public judgment [2011] EWHC 1309 (QB). In it I set out what had happened in the case, and my reasons for making the order that I made on 19 May. These reasons included the fact that the lady had not been given any notice that the court was to be asked to withdraw the anonymity which the injunction of 4 March gave to her (paras [24]-[26]). I also corrected a number of inaccuracies that had been published about the case (paras [9]-[10]).

28. ANL appeared at that hearing, as any third party affected by an injunction is entitled to do. ANL (then represented by Mr Caldecott QC) raised a new (the third) argument on public interest, namely that if there was a relationship between Sir Fred Goodwin and a lady who was a work colleague, then that by itself would be a serious failure of corporate governance and might be in breach of the RBS Group Code of Conduct on Integrity Matters (dated 2007) ("RBS Code"). I shall refer to this as the "third argument". However, as stated in paragraph [21] of the judgment, no notice of this new case had been given to Sir Fred Goodwin or to the lady, and there was no evidence that it had been investigated by or on behalf of ANL or anyone else.

29. No one on behalf of NGN has ever asked VBN anything about this case. On 1 March NGN did not ask for her comments on the suggestion that she had been involved in arrangements for Sir Fred Goodwin's severance package. NGN has not adduced any evidence as to the enquiries that it has made with RBS (but see now para 149 below), or anyone else who might have been concerned in the ABN Amro takeover, whether Sir Fred Goodwin was distracted, or as to any other aspect of the case. But in the evidence for VBN adduced before me VBN states that it came to her knowledge that NGN had contacted RBS in February. There is no other evidence about that contact.

30. On 27 May the matter came back before the court for the fourth time. On this occasion the applicant was VBN, although she was not yet referred to in that way. Mr Tomlinson QC appeared for her. He asked me to refer to the Attorney General a publication made in the issue of the Daily Mail dated 20 May 2011, which he submitted was in contempt of court, in that it impeded the purpose the court had sought to achieve by making the previous orders in this case. I declined to make the reference as requested, but I did set out a number of facts relating to the case which, if the Attorney General so chose, he would be able to consider.

31. In the Daily Mail ANL had published certain pieces of information about VBN. She complained that some of the information was accurate and would tend to identify her. She also noted other information which had been printed which she said was incorrect. A piece of information she said was incorrect was that the Daily Mail said that she had been promoted while Sir Fred Goodwin was in charge of RBS. Counsel for ANL (Mr Caplan QC) did not disagree when Mr Tomlinson informed the court that that information was false.

32. So up until this point, no evidence had been put before the court on behalf of NGN or any third party in opposition to the continuation of the injunction.

THE PRESENT APPLICATION

33. On 26 May 2011 NGN gave notice of its intention to apply to vary the order I made on 19 May so as to permit the identification of the lady named in the confidential schedule. The form of draft order made clear that there was no intention to seek a variation of the order which might permit publication of any sexual or salacious information, or any photographs of the lady or any members of her family.

34. The application was supported by two witness statements, the first evidence to be put before the court by NGN in this case. Mr Hawkes, the business editor of The Sun, raised two matters in his witness statement. First he stated that he believed that the

lady had been promoted while Sir Fred Goodwin was Chief Executive of RBS. The grounds for his belief that he gave were in a document.

35. Miss Proudler of Olswang was by now instructed to act as solicitor by VBN (in addition to her previous instructions to act for Sir Fred Goodwin). In her witness statement dated 31 May 2011, Ms Proudler explained that Mr Hawkes had misinterpreted the document he referred to. Ms Proudler stated that VBN has not been promoted as Mr Hawkes believed. NGN now accept that that is the true position. The suggestion that the lady had been promoted while Sir Fred Goodwin was Chief Executive is no longer pursued by NGN. I shall refer to this as NGN's fourth argument. It is the third argument that has been abandoned.

36. The second point advanced by Mr Hawkes in his witness statement related to the position in RBS held by VBN, and to the fact, as he asserted it to be, that there had been no disclosure to anyone else at RBS of the relationship between herself and Sir Fred Goodwin. Mr Hawkes stated that the relationship between them led to a serious conflict of interest on the part of both of them. This is the third argument, the one initially raised on 19 May by ANL.

37. The RBS Code includes the following provisions on page 11.

> "Conflicts of Interest
>
> So that you can undertake your job properly, maintain your objectivity and impartiality and ensure that your judgment could not be compromised, you should not put yourself in a position where your personal interests could conflict with the interests of the Group. For these purposes the term "Interests of the Group" is taken in its widest sense.
>
> You have a responsibility to act in the interest of the Group and must not misuse your position or any information obtained in the course of your employment to further your private interests – or those of anyone you have a relationship with…
>
> How will I know if I have a conflict of interest?
>
> If, in the context of performing your duties, it could be suggested that you are acting in your own interests or those of another person with whom you have a relationship, rather than in the interests of the Group, you may have a conflict of interest.
>
> Possible conflicts of interest relationships and associations.
>
> For these purposes, the term "relationship" is taken in its widest sense – from playing football with a customer to sharing membership of the same private club or society with a supplier to forming a close personal relationship with a colleague.

> While the Group entirely respects the right of every one of us to form friendships and personal relationships at work, there will be occasions when it will be appropriate to tell your manager about a relationship that may impact on your work by creating a conflict of interest.
>
> Here are some examples of when it would be appropriate to notify your manager of a potential conflict of interest:
>
> - You are working under a dual control procedure and have a close personal relationship with your dual control partner
>
> - You are conducting an investigation or a hearing under the disciplinary procedure in which an employee with whom you have a personal relationship is implicated…"

38. At page 12 of the RBS Code it is stated that the onus is on the employee to identify when it is appropriate to inform a manager of any relationship or association that had potential to create a conflict of interest.

39. At page 29, in a part of a section of the RBS Code of Conduct related to Group Security, and under the heading "Making a Disclosure within the Group", there is guidance as to what amounts to an event which ought to be notified to more senior management. These events include matters which are commonly referred to as whistle blowing. The guidance is that such matters should first be raised with an employee's immediate line manager, and if this is felt to be inappropriate, then it should be raised with a more senior manager or other persons whose job description is given in the RBS Code.

40. Mr Hawkes also referred to a publication from the FSA encouraging whistle blowers to "first use whistle blowing procedures in the workplace".

41. Mr Hawkes went on to state that the position in RBS held by the lady is sufficiently senior that she might be a person to whom a whistle blower might turn to make a disclosure. The fact that she was in a relationship with Sir Fred Goodwin while he was Chief Executive created the obvious risk (he said) that confidential information disclosed to her might, perhaps inadvertently, be disclosed to him, or that she might feel herself to be in a position where her duty to RBS conflicted with her personal obligations to him in relation to the disclosure made to her. Mr Hawkes stated that any employee who might have wished to consider making a disclosure to the lady would be entitled to know of her relationship with the Chief Executive. That may be relevant to the employee's decision whether to address concerns, or give notification, to the lady or to some other senior manager.

42. Mr Hawkes stated that it is a matter of public interest that Sir Fred Goodwin and the lady permitted this state of affairs to continue whilst he was Chief Executive.

43. Mr Hawkes referred to press cuttings about three other cases where a relationship between the Chief Executives of a large corporation and an employee had given rise to conflicts of interest. In one case the cutting reported that the lady had left the

company, in another it was the Chief Executive who was ousted and in a third the Chief Executive had resigned.

44. Mr Hawkes referred to the investigation which the FSA is currently making into the allegations about the relationship between Sir Fred Goodwin and the lady. He stated that there should be full public discussion of these matters at this stage and that such discussion should not await the outcome of that investigation.

45. He further exhibited an article in the Financial Times dated 24 May 2011. He noted that, according to that article, an internal enquiry by RBS has concluded that the lady "played no part in key strategic decisions at the bank" and "did not compromise the bank in any way". But he stated that that misses the point that is important in the present application. The public is still entitled to discuss these matters, and discussions are not concluded by that internal investigation.

46. The article in the Financial Times also reports a source who is not identified as saying "We have only known about this for several weeks" and the writer adds:

> "It is not believed Sir Fred or the woman in question disclosed the alleged relationship to their superiors – neither Sir George Matthewson nor Sir Tom McKillop, who both held the role of chairman when Sir Fred ran the bank, were told. Similarly, the Financial Services Authority is not thought to have had prior knowledge of the alleged affair…"

47. The application is also supported by a witness statement from Mr Hancock, who is the Member of Parliament for West Suffolk. He worked as an economist at the Bank of England until 2005. He now sits on the Public Accounts and Standards Privilege Select Committees. He stated that it is his belief that it is strongly in the public interest that there be published the information that the lady holds the senior position that she does with RBS, and that she did so during the time she was having an affair with Sir Fred Goodwin at the time when he was head of the bank and the affair was not disclosed. He refers to the number of employees for whom the lady is likely to have had responsibility and that that responsibility included possible whistle blowing disclosures. He stated that the matter cries out for independent investigation and that public confidence in any investigation can only be maintained if the public are given the facts now.

48. Mr Hancock's evidence is not evidence of any fact in the case. It was adduced in support of an argument which NGN has advanced, but which, in the event, I have not had to consider. The argument is that a reasonable belief on the part of an editor that a matter is of public interest is a factor that the court has to take into account in deciding whether it is in the public interest for something to the published.

THE EVIDENCE FOR VBN

49. Ms Proudler stated that VBN did not notify her relationship to her manager (and the person she reports to is identified) "because there was no relationship that might impact on her work by creating a conflict of interest". RBS has known about the relationship since February 2011, when they were informed by a journalist from The Sun. An internal investigation has been conducted by RBS. VBN has not been

criticised or disciplined as a result and it has not been suggested to her by anyone at RBS that she was in a position of conflict or in breach of the RBS Code. The parts of the Financial Times article referred to by Mr Hawkes are consistent with VBN's understanding of the position, namely that RBS is satisfied that there was no necessity for her to disclose a personal relationship with the Chief Executive Officer.

50. VBN remarked that NGN has provided no explanation of why any conflict of interest should arise out of a relationship between the Chief Executive Officer, who is responsible for strategic direction of a substantial business, and a person in her position, which she described.

51. VBN confirmed that no employee of RBS had ever made a whistle blowing disclosure to her, and she stated that it was not likely that any would do so. She described dedicated arrangements that RBS has put in place for whistleblowers.

52. Ms Proudler also gave a very brief account of the personal circumstances of VBN. VBN stated that she is a private person, with a family, who has never spoken to the media about any private matters. She first met Sir Fred Goodwin in the company of large numbers of other people in the course of her work, but when she met him "personally" it was "in a social context". She did not say anything about her own marital status. She mentioned "a number of family members and associates", but refers specifically to only one member of her family. She identified that person in order to explain her concerns about the humiliation that person might suffer if her name were to be published by NGN. She made clear that at some point some people had come to know about her relationship with Sir Fred Goodwin, but she did not make clear when or how they came to know about it. Nor did VBN state in terms whether she told anyone at work about it. All that she said is that "there has already been disclosure identifying details" about her in a national newspaper and that "this has led to her being identified by a number of people with whom she works and with whom she has business relationships". I infer from this that she is saying that no one with whom she works knew about her relationship with Sir Fred Goodwin before the publication in the national newspaper, and the publication was in relation to these proceedings, and so in 2011.

53. VBN stated that publication of her name by NGN would be a very serious intrusion into her private and family life. She referred to occasions when her identity has been published, but states that in spite of that, it has not become generally known. She distinguishes such publications from publication in the press and broadcast media which would inevitably come to the attention of those she deals with on a daily basis, which she stated would be extremely intrusive. She referred to people known to her who have already been persistently approached by journalists, and she fears that such approaches would intensify if the injunction were varied to permit NGN and the press and broadcast media to identify her.

54. Ms Proudler stated that VBN asked her "not to go into details of these matters because she is concerned that material put before the court may find its way into the public domain".

55. The court has powers to prohibit the publication of information provided to the court, and all the orders made in this action have included provisions designed to achieve that. VBN is entitled to choose what evidence she puts before the court, whatever her

reasons for that choice may be. But if she does choose not to put evidence before the court, the court will be able to act only upon the evidence that is before the court.

56. While there is more evidence than I can set out in this judgment, the upshot nevertheless is that there is very little evidence indeed before the court about the personal circumstances of either Sir Fred Goodwin or VBN.

57. Mr Spearman did not ask me to doubt, and there is no reason to doubt, the truth of what VBN stated about the facts of her business and family position and the approaches she and others have received.

THE EVIDENCE OF SIR FRED GOODWIN

58. Sir Fred Goodwin did not adduce any evidence for the purpose of this application. But his witness statement of 2 March is before the court. In it he too gives very little detail about his personal circumstances.

59. Sir Fred Goodwin stated that:

> "the nature of any relationship between me and [VBN] is an entirely private matter. In so far as it is necessary to do so, I am content for the Court to proceed on the basis that there was a relationship as stated by The Sun to my representative. I have not disclosed any such relationship to the public and it has not been discussed or mentioned in the media. I am advised that, for the purposes of an application to restrain the misuse of private information, the truth or falsity of The Sun's claims is legally irrelevant and I will not say anything further about it…
>
> I am a private man. I have never discussed my personal life or relationships in public. …
>
> I believe that publication of the Confidential Information would also lead to considerable intrusive and disturbing speculation as to my private life and relationships, including on the Internet. If the Confidential Information were disclosed publicly, this would inevitably also reach friends, colleagues and other business contacts, not just in the United Kingdom but worldwide. This would have a very substantial impact on the way in which friends, colleagues and business contacts relate to me and therefore a serious negative impact on my personal life and career".

60. I infer from this that Sir Fred Goodwin is content that the court proceed on the basis that he did have a relationship with VBN, as alleged by The Sun, that he had not told any of his friends or colleagues at work about it, and that his friends and colleagues would view the relationship with serious disapproval, albeit for reasons which are not there set out.

THE APPLICABLE LAW

61. Mr Spearman for NGN and Mr Tomlinson for VBN each submit that the law requires the application of a two stage test. They cite the decisions of the Court of Appeal in *McKennitt v Ash* [2008] QB 73 at para [11], *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103 at para [37] and *ETK v News Group Newspapers Ltd.* [2011] EWCA Civ 439 at para [10].

62. Mr Spearman set out the position in his skeleton argument, in terms which I adopt (with some alterations), as follows:

a. The starting point is the Human Rights Act 1998. By s.6 the court (as a public authority) is required to act compatibly with Convention Rights. By s.1(1) the court is also required to take into account judgments of the European Court of Human Rights ("the Strasbourg court"). That is what Parliament, not the judges, has decided. The Convention rights in question in this case are the rights to freedom of expression of NGN and the right of the general public to receive information, which are protected by Article 10 and by the common law, and the right to respect for private life protected by Art 8. So far as material to the present case these provide:

> Article 8
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society … for the protection of the rights and freedoms of others.
>
> Article 10
> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
> (2) The exercise of these freedoms since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society … for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence ...

b. The exceptions in Article 10 relating to the protection of the reputation or rights of others and the disclosure of information received in confidence can apply only where three conditions are satisfied. The restrictions must (a) pursue a legitimate aim or aims, (b) be "prescribed by law" (i.e. be easily accessible and formulated with sufficient precision for the ordinary citizen to rely upon them to regulate his conduct) and (c) be necessary in a democratic society for the protection of the

legitimate aim or aims: the protection of the reputation or rights of others, or for preventing the disclosure of information received in confidence. They must also be proportionate to the end pursued, securing what is necessary for the protection of these aims and no more.

c. In accordance with the guidance given by the House of Lords in *Re S* [2005] 1 AC 593, Lord Steyn at [17], the correct approach to the balancing exercise where both Article 8 and Article 10 rights are involved is that: (i) neither Article as such has precedence over the other (ii) where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary (iii) the justifications for interfering with or restricting each right must be taken into account (iv) finally, the proportionality test – or "ultimate balancing test" - must be applied to each.

d. When deciding whether information is in principle protected by Article 8 and, if so, whether Article 8 must yield to some countervailing right or rights, the Court considers the matter in two stages:

(1) The first question is whether there is a reasonable expectation of privacy. This is the threshold question, and it is an objective test. See *Murray v Express Newspapers plc* [2009] Ch 481, where Sir Anthony Clarke MR said at [35]:

"In these circumstances, so far as the relevant principles to be derived from *Campbell v MGN Ltd* [2004] 2 AC 457 are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell v MGN Ltd*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee".

(2) If and only if that question is answered in the affirmative, the Court proceeds to the second part of the two-stage approach which is laid

down by the authorities. See *Murray v Express Newspapers plc* [2009] Ch 481, where Sir Anthony Clarke MR said at [27]:

> "[There are] two key questions which must be answered where the complaint is of the wrongful publication of private information. They are, first, whether the information is private in the sense that it is in principle protected by article 8 (ie such that article 8 is in principle engaged), and, secondly, if so, whether in all the circumstances the interest of the owner of the information must yield to the right of freedom of expression conferred on the publisher by article 10?"

e. It is also clear from the authorities that the correct application of this approach requires the Court to give separate consideration to different items or classes of information. See, for example, *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, Sir Anthony Clarke MR at [37]:

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

f. In addition, because the relief sought will affect the Convention right to freedom of expression of the Defendant(s) and of third parties who are served with the injunction, s12 HRA applies. This includes the following:

> "12. - (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression…
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-
>
> (a) the extent to which-
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code.

g. As to s12(3) HRA, the correct approach appears from decision of the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, [22]-[23]. As at the time of a hearing such as the present hearing, the threshold requirement that the applicant

for an injunction must satisfy is generally that it is "more likely than not" that s/he will be able to establish at trial that publication should not be allowed:

> "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."

h. Turning next to s12(4) HRA, so far as concerns journalistic material the Court is required to have regard to the extent to which such material has or is about to become available to the public, the public interest in publication, and "any relevant privacy code". The PCC Code of Practice is such a code, and relevant provisions of it include the following:

> 3.*Privacy
>
> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications.
>
> ii) Editors will be expected to justify intrusions into any individual's private life without consent. Account will be taken of the complainant's own public disclosures of information.
>
> The public interest
>
> There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.
>
> 1. The public interest includes, but is not confined to:
>
> i) Detecting or exposing crime or serious impropriety.
> ii) Protecting public health and safety.
> iii) Preventing the public from being misled by an action or statement of an individual or organisation.
>
> 2. There is a public interest in freedom of expression itself.
>
> 3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest."

63. On an application for an interim injunction the effect of s.12(3) is that it is for the applicant to satisfy the court that she is likely to succeed at trial. In the present case, the application is by NGN and it is for a variation of an injunction. But VBN is

opposing the application by contending that the injunction granted on the application of Sir Fred Goodwin (and subsequently varied) should be maintained. She is in the position of an applicant for an injunction. It follows that the burden is upon her to satisfy the court of the matters upon which it is required to be satisfied by HRA s.12.

64. In the law of privacy there has been some recognition in the authorities of the concept of a public figure, defined as those who exercise public or official functions (as appears from the words I have italicised in the following citations).

65. In *Campbell v MGN Ltd* [2004] AC 457 Baroness Hale said at [158-159]:

> "There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. *This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life.* Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made. But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life."

66. In the same case Lord Hoffmann said at [56] and [60]:

> "Take the example I have just given of the ordinary citizen whose attendance at NA is publicised in his local newspaper. The violation of the citizen's autonomy, dignity and self-esteem is plain and obvious. Do the civil and political values which underlie press freedom make it necessary to deny the citizen the right to protect such personal information? Not at all. While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the

> conflicting right. In the example I have given, there is no public interest whatever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information…The relatively anodyne nature of the additional details is in my opinion important and distinguishes this case from *cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office)* but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning."

67. The majority opinion in *Von Hannover v Germany* (2004) 16 BHRC 545; (2004) EMLR 21 stated (among other things) the following:

> "(1) a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to *politicians in the exercise of their functions*, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not *exercise official functions*. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'imparting information and ideas on matters of public interest' it does not do so in the latter case" [63];
>
> (2)… the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest" [76]".

68. This test of contribution to a debate of general interest was adopted by the Court of Appeal in *Ntuli v Donald* [2011] 1 WLR 294 at para [20].

THE SUBMISSIONS OF THE PARTIES

69. There is no dispute that the fact that parties are in a sexual relationship may, in principle, be a fact in respect of which they have a reasonable expectation of privacy. What I set out next was not in dispute between the parties, except where indicated.

70. Mr Spearman accepts that where there might otherwise be such an expectation, it will not necessarily be defeated by the fact that the two parties to the relationship work for the same employer.

71. In the case of RBS, the RBS Code expressly recognises that RBS "entirely respects the right of every one of us to form friendships and personal relationships at work". What the Code requires is that on occasions "it will be appropriate to tell your manager about a relationship that may impact on your work by creating a conflict of

interest". As Mr Tomlinson points out, the RBS Code does not require that anyone else be told, and in particular it does not require that the newspapers be told.

72. In *ETK* at para [11] Ward LJ held that the parties to the sexual relationship between two people who were working together had a reasonable expectation that their work colleagues who knew about the relationship would keep that information confidential. But in that case there was no argument to the effect that the parties to that relationship did not have such a reasonable expectation, save on the basis that the fact that it was known to some other people might itself defeat that expectation (in effect, that it might have been in the public domain). It does not appear to have been a case where one party was a very senior executive and the other an executive of some less senior rank.

73. There are various categories of information which may be the subject of a reasonable expectation of privacy, and some of these were considered by the courts in *Browne*. Two that are material to the present case were "(b) the alleged misuse of BP's resources and manpower to support and assist JC" and "(c) the bare fact of the past relationship between JC and Lord Browne". At that time Lord Browne was the group chief executive of BP.

74. At para [53] the Court of Appeal held that "it was open to the judge to hold that the claimant had no reasonable expectation of privacy with regard to the use of BP equipment and resources". The court was approving the reasoning of Eady J at para [50] of his judgment. He had held that the claimant had failed at the first stage of the enquiry. He had asked himself at para [43]:

> "43 … One may ask whether there can be a reasonable expectation that the law will protect the privacy of a senior executive, in relation to the use of corporate information and resources, when the effect would be to keep such allegations from those who might ordinarily be expected to make the relevant judgments, or exercise supervision; that is to say, shareholders and colleagues on the board of directors. For example, they might wish to know that a company was set up (to enable JC to deal in ring-tones for mobile phones) with the assistance of [BP] personnel. It is at least accepted by the claimant that his personal assistant helped with "secretarial tasks". The company no longer trades.
>
> 44. Mr Spearman [who then appeared for Lord Browne] 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."

75. Having upheld the judge's decision on that point, the Court of Appeal went on to consider whether publication of the bare fact of the relationship between the claimant and JC should be permitted. At para [59] the Court held that there was

> "a sufficient reason to permit publication of the bare fact of the relationship. Publication of the information in categories b) and d) would make no sense without publication of the nature of the relationship between the claimant and JC" (the information in category (d) was an alleged breach of a duty of confidence owed by the claimant to BP in discussing BP's affairs with JC).

76. In the present case Mr Spearman did not clearly distinguish in his submissions between the first and the second stages of the court's approach as laid down in cases such as *McKennitt*. As he summarised his written submissions:

> "Any confidentiality or reasonable expectation of privacy that the lady (and [Sir Fred Goodwin]) may succeed in establishing at trial with regard to the revelation of the identity of the lady (or at least the role she had at RBS) would be outweighed by the Article 10 rights of the freedom of expression of NGN to impart and of the general public to receive information and ideas".

77. Mr Tomlinson submits that the real and only question in the present case is the one that arises at the second stage, and that Mr Spearman had effectively conceded the first stage, namely that Sir Fred Goodwin and VBN did have a reasonable expectation of privacy.

78. It is true that the main weight of Mr Spearman's submissions did appear to be directed mainly to the second stage, but I did not understand him to concede that the first stage was satisfied in this case. It seems to me that Mr Spearman's submissions are better considered at the first stage of the enquiry. That is how the Court of Appeal approached a similar issue in *Browne* as I note in para 74 above.

79. I have sympathy with Mr Tomlinson in that the case for NGN has changed at each hearing of these proceedings (as described above), and the case advanced before me on this application is a case that could have been, but was not, advanced at an earlier hearing.

80. Moreover, although the case now advanced on public interest is one that is open to NGN on the basis of the evidence adduced before me, it is remarkable that that is all the evidence that NGN has chosen to advance. As Mr Tomlinson points out, NGN has not given evidence as the investigation it has made into this matter, it has not asked any questions of VBN, and the only evidence of investigation is the approach to RBS referred to by VBN herself, and the initial and very limited approach to Sir Fred Goodwin on 1 March which caused him to set these proceedings in motion. Thus it has had to rely on the article in the Financial Times as the only source of information that it has disclosed. There must, of course, also have been a report by a source to NGN about the relationship, but journalists do not normally disclose their sources, and it is not surprising that NGN gives no evidence about that.

81. NGN submits that in this case there was no reasonable expectation of privacy in respect of this particular relationship between Sir Fred Goodwin and VBN, because he was Chief Executive of RBS at the time and she was an employee holding a senior position. In the alternative, Mr Spearman submits that, if the second stage is reached, it is in the public interest that the fact of the relationship be disclosed. He stresses that all that is in question is the fact of the relationship, not any intimate or salacious details, or even photographs.

82. Mr Tomlinson submits that a reasonable expectation of privacy is a concept which must be applied with some flexibility in the light of the circumstances of the case. There may be a reasonable expectation of privacy confined to a very small class of other persons, or one that extends to a larger class, or no such expectation at all.

83. As I understand the submission, it can be illustrated by the examples given in the RBS Code. So, if two employees of RBS working under a dual control procedure have a close personal relationship with one another, they cannot have a reasonable expectation that their relationship will be kept so private that no one else working for RBS may know about it. If such a couple were to attempt to keep the fact of their relationship unknown to anyone at RBS, then a third employee of RBS who came to know about it would be entitled, and may be bound, to notify a manager at an appropriate level of seniority – in other words to blow the whistle.

84. Mr Tomlinson refers to the distinction drawn by the Court in *Browne* at para 61:

> "It appears to us that there is potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper".

DISCUSSION

Reasonable expectation of privacy

85. The right to respect for private life embraces more than one concept. Dr Moreham summarises what she calls the two core components of the rights to privacy: "unwanted access to private information and unwanted access to [or intrusion into] one's … personal space" (see Law of Privacy and the Media (2nd edn, 2011, Warby, Moreham and Christie eds) paras 2.07, 2.08, 2.16 and 12.71). I shall refer to the two components of the right as "confidentiality" and "intrusion". In 1988 Lord Goff spelt out the distinction between private facts and official secrets, and between the publication of a private fact and the harm that might be caused by a later repetition of the same fact to a different readership: *Att.-Gen. v Guardian Newspapers (No. 2)* [1990] 1 AC 109 at p260E-H. The distinction is well known to media lawyers, as illustrated by the following cases. In *Blair v Associated Newspapers Ltd* (QBD, 10 March 2000) Morland J issued an injunction to stop further publication of The Mail on Sunday, despite widespread publication of the first edition and the fact that the story had been picked up by other Sunday papers. See also *West v BBC* (QBD, 10 June 2002, Ouseley J), *McMennitt v Ash* [2005] EWHC 3003 (QB), [2006] EMLR 10 para [81]; *X & Y v Persons Unknown* [2006] EWHC 2783 (QB), [2007] EMLR 290 para [64]; *JIH v News Group Newspapers Ltd* [2010] EWHC 2818 (QB); [2011] EMLR 9 paras [58]-[59], *TSE v News Group Newspapers Ltd* [2011] EWHC 1308

paras [29]-[30] and *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) para [23].

86. The scope of the rights referred to in Art 8 and Art 10(2) is one important respect in which the law of privacy differs from the earlier English law of confidentiality, under which matters such as these came before the courts before about 2000. The first significant change in English law came in 1997 when the Protection from Harassment Act gave a right to protection from intrusion. It was soon recognised that this applied to newspapers: *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233; [2002] EMLR 4 (Law of Privacy and the Media para 10.59). Parliament developed English law further to give protection against intrusion by enacting the Human Rights Act 1998. These developments made legally enforceable the principles already accepted voluntarily by the press in the PCC Code.

87. The court does not address questions of privacy in terms of generalities. According to the authorities set out above, the question must be whether this particular person (usually a claimant, but here also VBN) has a reasonable expectation of privacy in respect of the particular information at issue. So anyone commenting upon this case without reference to the specific evidence before the court will be approaching the issues in a way in which Parliament has not permitted judges to approach them.

Confidentiality

88. The particular information at issue in the present case is the bare fact of the relationship between the two individuals concerned, or, if she is not named, then the bare fact of the relationship between Sir Fred Goodwin and the lady anonymised as VBN, together with a description of her position at work with RBS.

89. In this case the parties both accept that the details of a sexual relationship is information of a kind which will very commonly give rise to a reasonable expectation of privacy on the part of the individuals concerned, but details are not what this case is about.

90. However, the fact that details of a sexual relationship are confidential or private does not necessarily mean that the bare fact of a sexual relationship is private (Law of Privacy and the Media para 5.42). *Ntuli* is a clear example of this. In *Ntuli* the judge at first instance had granted an anonymised claimant an injunction restraining an anonymised defendant from publishing, amongst other information "the fact that the Claimant had a relationship with the Defendant" (paras [1] and [7] of the judgment of Maurice Kay LJ). The Court of Appeal varied the injunction, and named the parties. Maurice Kay LJ said at para [55] "The material in respect of which Mr Donald has been found to have a reasonable expectation of privacy is not detailed in the judgment. The material in the judgment does not attract a reasonable expectation of privacy." The material in the judgment which did not attract a reasonable expectation of privacy included the following at para [3]:

> "The respondent/claimant is Howard Donald, one of the hugely successful "boy band" Take That. He has never married but he has had a number of relationships and he is the father of two children. The appellant/defendant is Adakini Ntuli. She is also a musician but is now a full-time single parent of two children.

> Mr Donald is not their father. During some of the time since 2000, Mr Donald and Ms Ntuli had a relationship. Its duration and intensity are matters of dispute. They did not cohabit"

91. The legal test requires consideration of all the circumstances: *Murray* para [27]. One difficulty with privacy cases is that the court is often unable to set out all the relevant circumstances in the judgment. The information not detailed in the judgment in *Ntuli* may have cast light on why the information that was detailed was held not to attract a reasonable expectation of privacy and why other information was held to attract that. *Ntuli* is not authority for the proposition that the bare fact of a relationship never attracts a reasonable expectation of privacy.

92. As I have noted above, both Sir Fred Goodwin and VBN have been reticent as to the circumstances of this case: paras 54 and 58 above. It is correct (as noted by Sir Fred Goodwin) that information need not be true in order for it to attract a reasonable expectation of privacy. But that does not mean that the circumstances of the parties are irrelevant. As I have already remarked, if the parties choose not to give to the court details of the circumstances of their case, the court cannot take them into account.

93. There are a number of reasons why the bare fact of a relationship may, or may not, attract a reasonable expectation of privacy. The question depends on the particular circumstances of each case.

94. One reason why, in particular cases, the parties to a relationship will have a reasonable expectation that they can keep the bare fact of it confidential was mentioned in argument. It is when an abusive family will not allow the couple to be together. This is a situation well known in the Family Division and the criminal courts, but not yet, to my knowledge, in the context of a privacy injunction. There are literary examples to be found in *Romeo and Juliet*, and the gangster society portrayed in *West Side Story*. Juliet needed to keep confidential the bare fact of her relationship with Romeo in order to avoid being forced into marriage with a man imposed upon her by her father. Shakespeare invites the audience to sympathise with Juliet. The audience will consider that she had a reasonable expectation of privacy, at least for the period until she had exchanged her marriage vows with Romeo and they were out of danger from revenge attacks from their violent friends and families.

95. But there is a more mundane reason why the courts commonly prohibit the disclosure of the bare fact of a relationship. It is explained by the court of Appeal in *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324, [2011] EMLR 15, [2011] EWCA Civ 42 at para [35] as follows:

> "there is much in the point that the media will be generally better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, a sexual liaison between an unidentified well known sportsman, in an apparently monogamous relationship, and a third party) rather than (b) the name of the individual who is seeking to protect an unspecified aspect of his or her alleged private life by means of an injunction. As Mr Tomlinson puts it, the former information would normally enable the public to have a much better idea of why the court acted as it did than the latter information."

96. In other cases the details of the relationship have been disclosed in the media in an anonymised form before an injunction is sought, with the result that if a name is published it will be linked in readers' minds to the details already known. So if the court is to give the applicant any protection in such a case, the only means of doing it is to prohibit the publication of the bare fact of a relationship.

97. Reasons why the bare fact of a relationship may not attract a reasonable expectation of privacy include the following. In general, parties to a relationship are proud, or at least content, to disclose the relationship. Not all relationships are sexual: relationships include other family relationships, as well as membership of communities of many different kinds, business relationships and the like (as recognised in the RBS Code). The first thing that people generally want to know about one another is the relationships of each other with one another and with other people. Each person wants to know whether there is any common relationship, or any relationship which might preclude, or limit, the development or continuation of the relationship between the two of them. The most important information about an acquaintance or colleague is: are they friend or foe, trustworthy or untrustworthy, and what relationship each can form or develop with the other (in the broadest sense of those terms).

98. In the case of sexual relationships, this is one reason why in the tradition of England women have generally worn engagement and wedding rings, and married men increasingly wear rings too. It is one reason why marriages and civil partnerships are public institutions. It is one reason why spouses and partners often like to take each other with them when they go to meet their friends.

99. If a person does not wish to disclose an existing relationship, for whatever reason, there is a real risk that that will lead to misunderstanding or deception. Recent examples in public life abound. In the parliamentary expenses scandal a prominent MP made a claim for accommodation expenses which he should not have made. The claim would have been a proper one, if the person to whom he claimed the money was payable had not been in a sexual relationship with the MP. But it was not proper, because there was a sexual relationship. The problem was not the relationship, but the deception perpetrated in an attempt to keep it confidential.

100. Returning to the facts of the present case, the evidence about the relationship of the parties and their personal circumstances which they have put before the court is so sparse that I cannot be satisfied that Sir Fred Goodwin and VBN are likely to establish that they have a reasonable expectation of privacy in respect of the bare fact of their relationship.

101. But I do find that there is one fact in the case which in any event presents an obstacle to them establishing that they have such an expectation. That fact is that Sir Fred Goodwin was the Chief Executive of RBS, the company for which VBN worked. As Mr Spearman submitted: "The role of both parties, but perhaps more particularly that of the Claimant, is a matter of legitimate public interest and concern, and (it may be) censure, and these issues can only be ventilated if the lady (or at least her role) can be identified".

102. First, it is obvious that if an employee has a sexual relationship with a more senior person in the company there are any number of possible misunderstandings and

grievances (whether well found or unfounded) that can arise if the fact of the relationship is not known, at least to the work colleagues of the more junior of the two partners to the relationship. Colleagues of the junior partner who speak candidly in her presence (whether as whistle blowers or not) about the senior partner without knowing of the relationship could reasonably feel that they had been trapped or misled, if and when the relationship comes to light. And sooner or later the relationship is likely to come to light, as has the relationship in the present case. There are few things that people are more sensitive to than signs that two other people are in a relationship. It is rarely realistic for partners in a relationship to expect that the bare fact of their relationship will remain confidential between the two of them for a long or indefinite period.

103. Second, the extent to which men in positions of power benefit from that power in forming relationships with sexual partners who are less senior within the same organisation is also a matter which is of concern to an audience much wider than the work colleagues of either partner in the relationship. In the present case Sir Fred Goodwin had a reputation as an exceptionally forceful businessman. And he was Chief Executive of one the largest publicly quoted companies in the United Kingdom, doing business on a global scale. Whatever limits there may be to the legal concept of a public figure, or of a person carrying out official functions, in my judgment Sir Fred Goodwin came within the definition. This distinguishes him from sportsmen and celebrities in the world of entertainment, who do not come within that definition. But even in the case of sportsmen, there may be a public interest if the sexual relationship gives rise to conflicts with professional interest or duties, for example to his team.

104. For these reasons I am not satisfied that VBN will establish that she ever had a reasonable expectation of privacy in respect of the bare fact of her relationship with Sir Fred Goodwin.

105. One circumstance which has not influenced me in reaching this decision is the fact that, after Sir Fred Goodwin had ceased to be Chief Executive Officer, RBS came to be under the effective control of the state. That does not seem to me to affect this point materially. But if it does, then it can only strengthen the point.

106. But that is not the end of the matter. I accept the submission of Mr Tomlinson that there are degrees of privacy. What matters in this application is whether, notwithstanding the conclusion I have reached so far, nevertheless there remained a reasonable expectation of privacy held by Sir Fred Goodwin and VBN in the circumstances of this case such that the court should prohibit the disclosure *in the press* of the name or the work position of VBN.

107. In the case of Sir Fred Goodwin the question of whether he should be named no longer arises. On 19 May he accepted that he should be named. It will be clear from what I have said above that, on the evidence before the court, I take the view that he was well advised to accept this (albeit that the reasons I have given are in addition to the reasons why he made the concession he did make on 19 May: his reasons related to the publicity that had already occurred that day).

108. But the fact that his identity as the claimant has now been published in the media has enabled Mr Tomlinson to submit that the name of Sir Fred Goodwin and the fact that

VBN is a work colleague is the only information that should be published, and that no further variation of the injunction should be made.

109. I repeat that in this part of my judgment I am considering privacy in the sense of confidentiality, and will consider intrusion or harassment separately. Given the position in public life that Sir Fred Goodwin held at the time when the relationship was formed, I take the same view in the present case as Maurice Kay LJ expressed in *Ntuli* at para [55] as follows:

> "Provided that publicity is limited to what is contained in this judgment, there is no justification for continued anonymity. I have in mind the judgment of Lord Rodger in *Guardian News and Media Ltd* [2010] 2 WLR 325, [2010] UKSC 1, at paragraphs 63-64."

110. And since this case has attracted so much publicity, readers of this judgment should be able know what Lord Rodger said without having to follow that link. Lord Rodgers was talking about freezing orders in the context of anti-terrorism legislation. He said:

> "63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European Court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* (2000) 31 EHRR 246, 256, para 39, quoted at para 35 above. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors." See also Lord Hope of Craighead in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
>
> 64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that
>
> > "from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the

> trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."
>
> Mutatis mutandis, the same applies in the present cases. A report of the proceedings challenging the freezing orders which did not reveal the identities of the appellants would be disembodied. Certainly, readers would be less interested and, realising that, editors would tend to give the report a lower priority. In that way informed debate about freezing orders would suffer."

111. The reasons that VBN has given in her brief evidence in support of maintaining the injunction all relate to intrusion. I shall consider them under that heading. So far as confidentiality is concerned, in my judgment VBN does not have a right to keep the fact of the relationship confidential, or, to the extent that she does, then it would not be necessary or proportionate to restrict NGN's freedom of expression to prevent disclosure of that information. Her position at work, and to a lesser extent her name, are each important parts of the story, for the reasons given by Lord Rodger.

112. If VBN's position in RBS were at a level at which there are many other women, it might be possible to identify her position in the company without identifying herself. But in the present case that is not likely to be possible. Her position is sufficiently senior that identification of her status or the department in which she works is likely to identify her name. It was on this basis that VBN asked me to refer to the Attorney-General the information published in the Daily Mail.

Intrusion

113. NGN has been criticised in the courts for intrusion and harassment on more than one occasion in relation to The Sun. But other readers of this judgment may be less familiar than NGN with the distinction in privacy law between confidentiality and intrusion.

114. In *Thomas* The Sun had published a number of articles referring to the claimant. In two of these she was described as a 'black clerk', and the paper criticised her involvement in a dispute over a racist comment made by police officers at her place of work (paras [5] and [9]). The Sun disclosed her name and work address. The court recognised that there are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment (para [29]). The court stated that "In general, press criticism, even if robust, does not constitute unreasonable conduct and does not fall within the natural meaning of harassment" (para [34]). The court held that it was at least arguable that it was foreseeable that the publication of the articles complained of by Ms Thomas would lead Sun readers to address hostile letters to her, causing her additional distress (para [46]). The court stated that the test for whether the articles amount to harassment

> requires the publisher to consider whether a proposed series of articles, which is likely to cause distress to an individual, will constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed".

115. The fact that Ms Thomas was black was obviously not something which was claimed to be confidential. Nor did she claim that her name or place of work were confidential. What she complained of was harassment. She complained that the cause of her distress and fear was the repetition in the articles of these personal facts concerning her. Of course that judgment was on an application to strike out the claim, and so in refusing to strike out the claim the Court was not reaching any conclusion other than that the case was arguable.

116. In that case Ms Thomas's claim was under the 1997 Act, and under that Act the definition of harassment includes a requirement that there be a course of conduct which is unreasonable. Intrusion which the court could prohibit under the Human Rights Act does not necessarily have to amount to harassment within the meaning of the 1997 Act. But the test will otherwise be substantially the same.

117. More recent occasions on which NGN has been criticised for intrusion are *Mosley v News Group Newspapers Ltd*. [2008] EWHC 1777 (Eady J at first instance) and *Mosley v. The United Kingdom* - 48009/08 [2011] ECHR 774 (10 May 2011, by the Strasbourg court). The Court endorsed the criticisms made by Eady J of NGN, saying that case:

> "the newspaper was required to pay GBP 60,000 damages, approximately GBP 420,000 in respect of the applicant's costs and an unspecified sum in respect of its own legal costs in defending the claim. The Court is of the view that such awards can reasonably be expected to have a salutary effect on journalistic practices."

118. I accept that on the facts of the present case the fears of intrusion expressed by VBN are well founded to the extent relevant in this application. Thus I am satisfied that she would be likely to establish that publication by NGN of any information in addition to her name and job description (and the information contained in this judgment) would be likely to cause distress to her which would constitute an abuse of the freedom of press which the pressing social needs of a democratic society require should be curbed. So in my view NGN is well advised in not seeking a variation of the injunction which would permit it to publish more information than that.

119. The issue between the parties is limited to VBN's name and job description: see para 33 above. But even that issue is a narrow one. Mr Spearman expressly submitted that VBN's name was not significant. He said it was her role that was significant, but that as soon as her role is published it will tend to identify her name.

120. I consider first whether VBN's name should be published. In my judgment publication in The Sun (or any other print or broadcast medium) of VBN's name would be a significant intrusion into her private and family life from which she is entitled to be protected (as she is likely to establish at trial). And I am satisfied that she is likely to establish that the interference with NGN's Art 10 right which would be involved in prohibiting publication of her name is necessary and proportionate for the protection of that right of hers.

121. I consider next whether the role or job description of VBN should be published. While publication of her job description would lead many people to identify her, and

would also be an intrusion into her private and family life, in my judgment the information about her job description is an important feature of the story. I am not satisfied that she is likely to establish that the interference with NGN's Art 10 right, which would be involved in prohibiting publication of her job description, is necessary and proportionate for the protection of her rights.

122. There is a further reason. As VBN's evidence makes clear, her name has already become known to some of her acquaintances, in some cases by reason of publications outside the press and broadcast media. The additional publication of her name that is likely to follow from publication of her role in the press and broadcast media is not, in my judgment, likely to be so great a further intrusion into her private life as to make it necessary and proportionate to interfere with the Art 10 rights of NGN.

123. Accordingly, I shall vary the injunction to remove the prohibition upon publication of VBN's job description, while leaving in place the prohibition upon publication of her name.

124. In reaching this decision I am aware that many individuals with access to blogs and other internet means of communication may publish the name of VBN. If my purpose was to keep her name confidential, that would render the injunction futile, and I would not adopt the course I have decided upon. Courts do not grant injunctions that would be futile

125. But the degree of intrusion into a person's private life which is caused by internet publications is different from the degree of intrusion caused by print and broadcast media. Important though this story is, there are very many people who will not take the trouble to find out from VBN's job description what her name is. And there are many people who would not be sufficiently interested in the story to learn VBN's name unless it were exposed in The Sun. They include people who would not normally read a story about Sir Fred Goodwin or RBS, but would read a story about VBN, because they already know VBN. As everybody knows, there is a big difference between making a criticism without naming names and making a criticism of named individuals. This is so even if, in the former case, most readers or listeners in fact known the names of the individuals at whom the criticism is addressed. Once a person's name appears on a newspaper or other media archive, it may well remain there indefinitely. Names mentioned on social networking sites are less likely to be permanent.

126. Some people who have commented on this litigation have made comparisons between English law and the law of the USA. They should know that of the three examples produced by NGN of other cases of chief executives in sexual relations with work colleagues (para 43 above), two are reported in English newspapers and one in an American newspaper. The name of the lady concerned is given in each of the English newspapers. In the American newspaper, The New York Times, neither her name nor her role is given. She is referred to there as "a female Boeing executive".

127. There is another case which also illustrates why it can be appropriate for the court to anonymise a party whose name can be readily discovered by a reader of a judgment, if that reader is sufficiently motivated to follow up the references. It is *A v United Kingdom* 35373/97 [2002] ECHR 811; (2003) 36 EHRR 51. In that case the applicant had been named by an MP in Parliament as the "neighbour from hell" about whom

the MP's constituents were complaining. As a result she was named in the newspapers. Before the Strasbourg court the applicant sought to challenge the doctrine of Parliamentary privilege in so far as it provides an absolute defence to a claim for defamation. She failed.

128. But the Strasbourg Court recorded that there is no means by which a person may obtain redress for any injustice or harm a person may suffer by reason of being named in Parliament, and in the consequential press reports of the Parliamentary debate. Before the Strasbourg court the applicant denied the truth of the majority of the allegations. The MP never tried to communicate with her regarding the complaints made about her by her neighbours, and never attempted to verify the accuracy of his comments made in his speech either before or after the debate.

129. The result of her being named in Parliament in this way was catastrophic for her and her family. The court described the consequences as follows:

> "15. The applicant was approached by journalists and television reporters asking for her response to the MP's allegations and her comments were summarised in each newspaper the same day, although they were not given as much prominence.
>
> 16. The applicant subsequently received hate mail addressed to her at 50 Concorde Drive. One letter stated that she should "be in houses with your own kind, not in amongst decent owners". Another letter [contained a tirade of abuse]
>
> 17. The applicant was also stopped in the street, spat at and abused by strangers as "the neighbour from hell".
>
> 18. On 7 August 1996 a report was prepared for the SHA by a group which monitors racial harassment and attacks. The report found that "it has now come to the point where [the applicant] has been put in considerable danger as a result of her name being released to the public". The report recommended that the applicant be re-housed as a matter of urgency. She was re-housed in October 1996 and her children were obliged to change schools."

130. Notwithstanding the extensive publicity given to her name in Parliament and in the consequential press reports, the Strasbourg court anonymised the title of the judgment and did not repeat the applicant's name. No doubt the court was concerned not to precipitate further intrusion and harassment. That is my concern in this case, albeit that I would not expect that the intrusion into the life of VBN and her family to be as grossly offensive as the intrusion that happened in that case.

Public interest

131. In the light of the conclusion that I have reached on reasonable expectation of privacy, the question of public interest at the second stage of the enquiry does not arise.

However, I shall state may findings on the arguments in case I am held to be wrong on the conclusions that I have reached.

132. If I had held that in respect of the relationship between Sir Fred Goodwin and VBN either of them was likely to establish that they had a reasonable expectation of keeping the matter private (in the sense of confidential), I would have held that they were not likely to establish that publication of the job description of VBN should be prohibited. In my judgment the position of Sir Fred Goodwin as Chief Executive of RBS is a matter which NGN would be likely to establish in light of the position that it is in the public interest for it to publish.

133. I do not reach this conclusion on the ground that NGN would thereby expose serious impropriety, still less crime. I reach it because in my judgment it is in the public interest that there should be public discussion of the circumstances in which it is proper for a chief executive (or other person holding public office or exercising official functions) should be able to carry on a sexual relationship with an employee in the same organisation. It is in the public interest that newspapers should be able to report upon cases which raise a question as to what should or should not be a standard in public life. The law, and standards in public life, must develop to meet changing needs. The public interest cannot be confined to exposing matters which are improper only by existing standards and laws, and not by standards as they ought to be, or which people can reasonably contend that they ought to be.

134. On the evidence before me I am satisfied that Sir Fred Goodwin or VBN would be likely to establish that the trial judge should make no finding of any breach of the RBS Code. There is no evidence in this court of such a breach, (assuming, in any event, that the question whether there is a breach or not is a matter for this court to decide).

135. On the evidence before me I am also satisfied that Sir Fred Goodwin or VBN would be likely to defeat any case NGN might make to the effect that the relationship between them had an impact on the financial difficulties of RBS. I regard the suggestion as most implausible, and there is no evidence before me to support it.

136. But there is a further reason. Everyone has difficulties in life which might distract them from doing whatever job they hold. A senior executive will commonly have a family. Families give rise to any number of serious concerns that can be distracting. Family members suffer illness and bereavement. Children encounter difficulties at school or university, and difficulties with their friends. These can be very worrying for parents. As a matter of principle, the right to respect for private life of persons holding responsible positions cannot be overridden in the interests of freedom of expression simply because a newspaper alleges that they might have a worry that might distract them from doing their jobs. If there really is distraction, and the newspaper can put the evidence for it before the court, then it may be that the fact of the distraction can be reported. Such evidence might that the person falls asleep at meetings, or misses them altogether It may be possible to report that without interfering with the person's private life.

137. It cannot be right that the press should be free to interfere with a person's private and family life by exposing confidential information, and then seek to justify that by speculating that the information might have distracted him from doing his job. In the

present case there is no evidence that Sir Fred Goodwin was distracted from doing his job by his relationship with VBN. It is speculation by NGN.

138. As Mr Spearman submitted the law is as follows:

> "In order to establish a public interest defence at trial the defendant does not necessarily have to establish that the allegation which it proposes to make (or may already have made) by way of use of the (ex hypothesi) private or confidential information is true. See Lord Goff in *A-G v Guardian Newspapers Ltd (No 2) [Spycatcher]* [1990] 1 AC 109, 283:
>
> > 'In any event, a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source. (emphasis added by Mr Spearman)'"

139. On the evidence before me, NGN has failed to show that it has conducted such investigations as are reasonably open to it to support the allegations it makes that there has been any breach of the RBS Code, or that Sir Fred Goodwin was distracted from his job as Chief Executive by the relationship with VBN.

THE JUDGMENTS OF HENRIQUES AND SHARP JJ

140. Nothing in this judgment should be taken as expressing or implying any disagreement on my part with anything said or done by Henriques J or Sharp J.

141. On the contrary, I can say with confidence that if I had been the judge at the hearings on 1 and 4 March, and if the same submissions had been made to me as NGN made to those judges, I would not have said or done anything different. I repeat that neither NGN nor any third party had put any evidence before either of those two judges. The case advanced to me by NGN on this application is a case which NGN expressly disavowed at the hearing on 1 March, and on 4 March NGN did not oppose the grant of an injunction.

142. The case advanced on this application is an entirely new case. The hearing before me is the fourth occasion the case has come before a judge, but is the first occasion on which the court has had from NGN's side the benefit of evidence in the form of written witness statements and written submissions from counsel. There was no time for those to be prepared before the hearing on 1 March. And on 1 March Mr Spearman had to respond to the application made by Sir Fred Goodwin with virtually no time to reflect on the submissions that could best be made for NGN. It is no criticism of him that he did not advance on 1 March the arguments that he advanced before me.

143. It might have been expected that on 4 March there would have been the full argument that was advanced before me. But that did not happen. The continuation of the injunction was not opposed. That was a decision by NGN made for reasons which have not been explained in evidence.

144. On many occasions since 1 March people have commented publicly on the case, criticising the injunction in the pages of newspapers and elsewhere. Much of this reporting contained many factual errors about the case, as I have noted above. Judges read newspapers, but judges cannot vary court orders on the basis of what the public are told by the media. If persons affected by a court order want it to be varied, they must make an application to the court. As appears from the events of 19 May, they can do this quickly and informally, if it is urgent.

145. English law develops in two ways. First, it is made by Parliament. The Prevention from Harassment Act 1998 and the Human Rights Act 1997 are two privacy statutes referred to in this judgment. Second it is developed by case law, as judges apply the statute to particular cases. At the second stage it is essential that the parties to litigation put their evidence and submissions before the court. It is by weighing up arguments and counter arguments that judges are best able to interpret the law. The circumstances of injunctions applied for out of hours on the telephone are not favourable to a considered development of the law. That is one reason why judges order cases to come back before the court for full consideration on the evidence. That happened on 4 March. But there was no argument then because NGN chose not to argue its case. And other media organisation notified of the injunction chose not to argue the case in court. To the extent that media defendants choose not to submit evidence and argument to the courts, judges will find it difficult to develop the law of privacy to meet the needs of society.

CONCLUSION

146. For the reasons given above, this application succeeds in part and fails in part. The injunction will be varied to permit disclosure by NGN of the job description of VBN, but not disclosure of her name.

147. This judgment in draft to enable the parties to correct errors and omissions. The suggestions of the parties have been incorporated into the final version. At the same time I invited the parties to submit a form of order to be agreed if possible, or settled at the time the judgment is handed down.

148. Notwithstanding the decision I have reached, I have not identified in this judgment the job description of VBN. The reason is that my decision may be the subject of an appeal. By drafting it in the form I have, my intention is that it can be published and reported in full immediately, whether or not there is an appeal. Nor have I given details of all the evidence submitted to the court. That is not possible, since it would disclose private information. As with many judgments in privacy cases, the fact that some of the evidence cannot be revealed, and the complicated provisions of the law, each requires the judge to write the judgment in ways that make it difficult to read.

149. On 8 June solicitors to NGN sent to me copies of an exchange of letters between themselves and RBS dated 2, 7 and 8 June. On 2 June the solicitors had asked RBS to provide information about the internal enquiry regarding this matter. On 7 June RBS

declined to do so. It stated that it could confirm that RBS had been contacted by the FSA in connection with this matter and is co-operating fully. On 8 June the solicitors wrote to RBS objecting it taking this stance. I have added this paragraph to the judgment in the light of para 29, which is in the form of the draft that was circulated.