



Neutral Citation Number: [2004] EWCA Civ 1462

Case No:2004/2194

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Mr Justice Fulford

Neutral Citation Number: [2004] EWHC 2322 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2004

Before :

LORD JUSTICE BROOKE
Vice-President of Court of Appeal (Civil Division)
LORD JUSTICE MAY
LORD JUSTICE DYSON

Between :

Martha Greene
- and -
Associated Newspapers Limited

Claimant/Appellant
Defendant/Respondent

Richard Spearman QC (instructed by Farrer & Co) for the Appellant
Andrew Caldecott QC and Catrin Evans (instructed by Reynolds Porter
Chamberlain) for the Respondent

Hearing date: 21st October 2004

Approved Judgment

.....

TABLE OF CONTENTS

PART I	Para No
1. Introduction	1
 PART II	
2. The Procedural Background	3
3. The Facts	5
4. The Judge's Conclusions on the Facts	20
5. Counsel's Arguments Before the Judge	24
6. The Judge's Conclusions on the Law	32
7. The Effect of the New Evidence	34
 PART III	
8. The Law of Prior Restraint in Defamation Actions: the Beginnings	42
9. The Law of Prior Restraint in Defamation Actions: the Modern Law	51
10. The Law of Prior Restraint in Defamation Actions: the Rationale of the Rule	57
 PART IV	
11. The Effect of the Human Rights Act 1998	58
12. Section 12(3) of the Human Rights Act 1998	59
13. Section 6 of the Human Rights Act	67

Approved Judgment

Lord Justice Brooke: This is the judgment of the court.

PART I**1. Introduction**

1. In this country we have a free press. Our press is free to get things right and it is free to get things wrong. It is free to write after the manner of Milton, and it is free to write in a manner that would make Milton turn in his grave. Blackstone wrote in 1769 that the liberty of the press is essential in a free state, and this liberty consists in laying no previous restraints on publication. “Every freeman”, he said, “has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press” (Commentaries, Book 4, pp 151-2). It is this freedom which is under challenge in this appeal. Mr Richard Spearman QC has argued before us that the enactment of the Human Rights Act 1998 has significantly weakened the inhibitions that judges should feel before imposing prior restraint on the press. This was a surprising proposition, but it deserves careful analysis.
2. In Part II of this judgment we describe what this case is all about. In Part III we describe why the courts have shrunk from restraining publication of a defamatory libel unless it is clear that there is no defence. And in Part IV we will explain the challenge that has been made to the approach the judges have adopted in this country and explain the reasons why we decided at the end of the hearing that the claimant was not entitled to the prior restraint of *The Mail on Sunday* which she sought.

Part II**2. The Procedural Background**

3. This is an appeal by the claimant Martha Greene from an order of Mr Justice Fulford on Saturday 16th October 2004 when he refused to grant her an injunction restraining an article which the defendants proposed to publish about her in *The Mail on Sunday*. Although the judge refused her the relief she sought, he granted her a temporary injunction so as to hold the position until the hearing of her appeal to this court. For that purpose he granted permission to appeal.
4. The judge announced his decision at about 6 pm that day, because that was the printing deadline for the following day’s *Mail on Sunday*, and the costs implications of a later decision prohibiting publication were very considerable. Counsel’s submissions had concluded shortly before that hour, and because there was insufficient time for him to deliver an extempore judgment, he simply informed the parties of his decision and the outline reasons for it. He made his written judgment available to them before 9 am the following Monday. In it he apologised for the fact that he had not had the time to research and prepare his judgment in the usual way, with the result that it was short and lacked the benefit of thoroughgoing analysis. In these circumstances it was a model of its kind, and the parties and this court have good reason to be grateful to him for making his judgment available so speedily.

3. The Facts

5. We can take the facts, as they stood on 16th October, from the judge’s admirably clear recitation of them.

Approved Judgment

6. The background to this application begins with an article published in *The Mail on Sunday* on Sunday 10th October 2004, which was written by Laura Collins and Sharon Churcher. The focus of the piece is revealed in the opening paragraph:

“The woman at the centre of the Blairs’ £3.6 million house deal is a former business contact of convicted fraudster Peter Foster, *The Mail on Sunday* can reveal. Martha Greene has become one of Cherie Blair’s closest friends and confidantes and was entrusted with the role of go-between when, earlier this summer, the Blairs bought the property in Connaught Square, central London.”

A little later the article continues:

“Martha Greene, the 48-year-old New Yorker who runs the Villandry Restaurant and Foodstore in London’s Great Portland Street, was, like Foster, introduced to Cherie by her lifestyle ‘guru’, Carole Caplin. The women have known each other for six years, during which time Greene has seemingly supplanted Caplin as Cherie’s ‘new best friend’.”

7. The authors then purported to quote from Peter Foster, who claimed that he had discussions with Martha Greene about Reneulle: “a slimming firm through which (Foster) planned to market Trimmit diet pills”. The article then contained this passage:

“Of course, any claims made by Foster must be treated with a degree of caution. But e-mail communications between Foster and Greene, seen by this newspaper, support his account. In one, dated November 6, 2002, Greene wrote to Foster: ‘As discussed, happy to assist you with the development of your Reneulle business in UK. I don’t need a fancy title, as you suggested, just a consultant would suit me fine.

I would require a set fee of US\$15,000, if possible paid to my account in the US Can we do this without the need to UK-based invoice through your overseas company? Would be helpful?’”

8. On 15 October 2004, the claimant’s solicitors, Messrs Farrer & Co, wrote to Mr John Wellington, who is the Managing Editor of *The Mail on Sunday*. Their letter contained, among other things, the following objections to the article:

“The piece is littered with inaccuracies, some material, some less so. It is unnecessarily intrusive, for instance into her personal relationships and misuses what is clearly confidential medical information about her membership of and attendance at Alcoholics Anonymous, as well as her treatment for breast cancer. There can be no conceivable justification for putting this information into the public domain.

The sting of the article is, however, to be found in your attempts to link our client to Peter Foster..... Our client has

Approved Judgment

met Peter Foster on no more than six occasions between October 2002 and January 2003 and not otherwise. They were predominantly social events. She did not send Foster the e-mails you attribute to her. She did not have any form of business with him.”

9. On the same day Sian James, the Features Editor of *The Mail on Sunday*, wrote to the claimant’s solicitors in a letter which crossed with their letter and did not purport to respond to it. Her letter contained the following passage:

“Thank you for your help with last week’s article. A further email has come into our possession which raises a number of points. We would be grateful for your response by 12 noon tomorrow so that we can include it in the article we are preparing for this Sunday’s *Mail on Sunday*.

In an email you sent on Friday January 31, 2003 to Peter Foster, you say:

‘I would like you to give some thought to our suggestion of selling your diet aids over the internet. As you know, we are both very excited about the potential of the internet and its global reach. Ivan has the expe(r)ience with the structuring of a web site that is interactive and also how to advertise on the net.’

Can you confirm that you are planning to enter into business with Peter Foster selling his slimming aids on the internet?”

10. She then proceeded to ask a number of questions about the contents of the alleged e-mail, which appeared to evidence Miss Greene’s willingness to get herself involved with Mr Foster on his proposed business venture in a way which evaded British advertising standards, associated the Prime Minister’s family with the venture, and minimised its tax liabilities. She did not respond to the claimant’s solicitors’ letter after she received it.
11. The claimant’s solicitors replied the same day. The writer maintained and repeated the firm’s earlier representations about what was said to be the misuse of private information and referred to a “wholly erroneous and defamatory link between our client and Peter Foster”, before going on to emphasise the suggested falsity of the claim that there had ever been a business relationship between Mr Foster and Miss Greene. The firm’s representations are unequivocal: “Foster’s claims, as published by the *Mail on Sunday* are a fabrication”. The letter continues:

“The simple answer to the questions raised in your letter is that Foster is lying to you in suggesting that our client sent him an email on 31 January 2003. If Foster has provided you with what he claims to be an email from our client to him dated 31 January 2003, then it is a forgery and your paper is about to be duped and to dupe its readership in the event that you publish his claims. Newspapers are frequently the subject of scams and there is a need for considerable caution.

Approved Judgment

Please provide us with details as to: at what time this email is said to have been sent; from what email address it is said it was sent, and to which email address it is said to have been sent, and ideally supply us with a copy of the alleged email. Without this information our client is obviously hampered in her ability to meet any case you may persist in maintaining that the email is genuine, and in demonstrating that the email is a forgery by independent or other forensic evidence.

The suggestion that our client emailed Foster on 31 January is undermined by the sequence of events leading to Foster's deportation at the end of January. On Monday 27 January 2003, Foster was detained at Dublin Airport by the Irish Garda having, it seems, spent most of the period leading up to 27 January in the Irish Republic. On Tuesday 28 January 2003 Foster was deported from Ireland. On 30 January 2003, Foster appears to have arrived back in Australia, landing at Sydney Airport before flying to the Gold Coast, south of Brisbane.

All of this information is in the public domain and information that you could readily obtain. If you were to read the coverage given to Foster during January 2003, including that given over to his deportation from Ireland and his arrival back in Australia, the likelihood of our client emailing him on Friday 31 January to discuss a business proposition is highly unlikely."

12. Thereafter, the writer rehearses his views as to the identity of the possible authors of this email, suggesting that it is Mr Foster himself, someone unknown who has perpetrated a criminal interception, one of Miss Greene's own employees acting in breach of confidence, or an anonymous source. In relation to the latter, the writer suggests that such a source should be treated with great caution, adding

"... [T]here can be no public interest in simply regurgitating claims of a conman or information obtained from one of the other sources we have identified without having properly taken steps to verify the information that has been provided and, at the very least, demonstrated that the email he claims to have been sent is authentic."

13. The judge also had before him a witness statement from Miss Greene (which she undertook to sign and verify) and a witness statement from Mr Wellington (see para 8 above), together with a separate letter dated 16th October from Mr Wellington.
14. In her statement Miss Greene said that Mr Peter Foster was a convicted fraudster. She maintained she never sent the emails referred to in paragraph 7 above. She said that between 18th October and 24th December 2002 she was undergoing treatment for breast cancer, having undergone a surgical operation on 17th /18th October. As to their suggested business relationship, proposed or otherwise, she said:

"I confirm that I did have about two conversations with Foster in which he tried to persuade me to assist him in his business proposals. However, this was the extent of my involvement and

Approved Judgment

I confirm I did not enter into a business relationship with him, take any steps to assist him, or receive any money from him.”

15. Miss Greene set out in an exhibit to her statement various supposed quotes from Mr Foster (particularly that which appeared in *The Scotsman* on 14th December 2002), in which he is alleged to have said that he could make money from a story about his predicament.
16. Miss Greene maintained, against the background of Mr Foster’s convictions and deportation, that an article based on the “email” of 31st January 2003 (see para 9 above) would be highly defamatory of her, particularly because of the suggestions that she was continuing to advise Mr Foster on business ventures, and that she was advising him on how to avoid the Advertising Standards Authority’s Code of Practice and tax obligations. She added that it was defamatory to suggest that she had disloyally disavowed Mrs Blair to Mr Foster.
17. Her statement ended in these terms:

“I am arranging for a forensic computer expert to examine my computers during the course of the next few days to demonstrate that the alleged email was not sent by me to Foster. In this regard, even if the Court is not minded to injunct the Defendants permanently until further order, I respectfully request that it orders an interim injunction to prevent the publication of the allegations the Defendants propose to publish based on the email until such time as it is possible for proper evidence to be put before the Court on the authenticity of the alleged email. If so, I also ask that the defendants disclose the email said to have been sent by me to Foster in order that this may be given to the computer forensic expert to assist in his examination of my computers. I confirm I have a PC in my office and my home.”

18. In his statement, Mr Wellington stated quite briefly:

“I do not know whether or not the editor will decide to publish an article about the business relationship between Martha Greene and Peter Foster, but if he does decide to do so I believe we will be able to stand up the story and, if *The Mail on Sunday* is sued, I confirm we will justify the sting of the article.”

19. In the accompanying letter, which was not annexed to his witness statement, Mr Wellington suggested that *The Mail* had no evidence that the email of 31st January 2003 was a forgery. He said that previous emails supplied by Mr Foster in relation to Mrs Blair’s purchase of flats in Bristol “have been proved to be entirely genuine”. He added that *The Mail on Sunday* would defend any libel action on the basis that “our information is true and accurate”.

4. The Judge’s Conclusions on the Facts

20. After setting out these facts, the judge commented that the conclusions he reached were perforce based on the material before him, with its self-evident limitations and

Approved Judgment

lack of completeness. Given the approach of the courts following the decision of this court in *Bonnard v Perryman* [1891] 2 Ch 269, he said that it was unsurprising that Mr Wellington had opted to put only a short statement before the court. If a defendant to a libel action makes a statement verified as true in which he maintains that he can and will justify the alleged libel, the rule has always been that claimants will be unable to obtain an interim injunction to restrain the publication of an allegedly defamatory statement unless it is plain that the plea of justification is bound to fail.

21. The judge said that his conclusions on the material before him were entirely test-dependent. If the test to be applied was that the claimant must demonstrate that “it is clear that (the) alleged libel is untrue” (per Lord Coleridge CJ in *Bonnard* at p 284), he had no hesitation in finding that the claimant had failed to make out her case to that high standard. He said that although he had a substantial degree of scepticism about the email of 31st January 2003, the evidence did not reveal to a sufficiently high degree – certainly not so as to make it “clear” - that Miss Greene did not send it (or, for that matter, the earlier emails). He said that there was simply no unassailable “knock-out” evidence, or combination of pieces of evidence, that demonstrated plainly that forgery had occurred.
22. However, if the test were to be the lesser one, namely that it was more likely than not that Miss Greene could establish at the trial that publication should not be allowed, he would find for her. In this context he quoted a passage from the speech of Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44 at [22]:

“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.”

23. The judge said that Miss Evans, who appeared for the defendant, had not suggested that Mr Foster was anything other than a convicted criminal. The judge bore in mind that the email was alleged to have been sent on the day after Mr Foster arrived back in Australia, following his deportation from Ireland, and that there was currently no supporting material to indicate that the source of this information – whether that person was Mr Foster or someone else - was telling the truth about Miss Greene having dispatched the email of 31st January 2003. He concluded, on the basis of the documents then before the court, that it was more likely than not that the claimant would be able to establish at trial that it was a forgery and should therefore not be published. He said that the improbable timing of the email, coupled with both the lack of any other evidence from the defendant and the claimant’s credible denials of authorship, led him to this conclusion. He said that he had reached his decision with considerable reluctance, given the fact that only meagre evidence, untested by cross-examination, had been made available to him, and that he had had to assess it in haste, due to the pressures of time to which we have referred.

5. Counsel’s Arguments before the Judge

24. He then summarised the gist of the submissions that had been made to him.

Approved Judgment

25. Mr Spearman QC had argued that following the decision of the House of Lords in *Cream Holdings Limited v Banerjee* [2004] UKHL 44, in which the speeches of the Appellate Committee had been handed down two days before the hearing, the relevant test to be applied under section 12(3) of the Human Rights Act 1998 was whether the claimant was able to demonstrate at this stage that she was more likely than not at trial to be able to establish that publication should not be allowed. The judge commented that that argument inevitably conflicted with the rule in *Bonnard v Perryman*, and would create a wholly new test for a judge to apply on an application for an interim injunction in defamation cases.
26. Anticipating that objection, Mr Spearman submitted that the rule in *Bonnard v Perryman* was not compliant with the European Convention of Human Rights, which required a careful balance to be struck between competing rights on the facts of each particular case. He submitted that it was a hard and inflexible rule which precluded the fair and just performance of that exercise. He was willing to concede that whereas the defendant could invoke Article 10 of the Convention, the claimant was relying on what he described as the high societal value of the right to her reputation. Even though this was not a case involving competing Convention rights, nonetheless, given the importance of her reputation to Miss Greene, he argued that the rule in *Bonnard v Perryman* accorded inappropriate weight to the right to freedom of expression, particularly given the qualifications set out in Article 10(2), and particularly as regards the reputation of others.
27. Following the decision of the House of Lords in *Campbell v MGN Limited* [2004] UKHL 22, [2004] 2 WLR 1292, he submitted that there should be no automatic priority, or presumption of one right in favour of the other, and that the court should evaluate whether it was necessary in any given case to qualify the one right in order to protect the other (see Lord Hoffmann at [55] and Baroness Hale of Richmond at [141]).
28. The judge said that, as he understood the position, the key question was whether the approach advocated by Mr Spearman applied in the present case, or whether that approach was limited to cases involving an alleged breach of confidence, or cases in which the courts had to weigh competing Convention rights.
29. Miss Evans argued that the judge was bound by *Bonnard v Perryman*. She added that the House of Lords in *Cream Holdings* did not deal with the rule in *Bonnard v Perryman* because breach of confidence, and not defamation, was under consideration in that case. In this context she drew attention to the observations of two of the members of this court in *Cream Holdings* which showed that they considered that this rule was unaffected by their decision in that case.
30. First, Simon Brown LJ said at p 43 :

“[Counsel] further relies upon the long-established principle in the closely related field of defamation law that where the defendant contends that the words complained of are true and swears that he will plead and seek to prove the defence of justification, the court will not grant an interlocutory injunction unless, exceptionally, it is satisfied that the defence is one which cannot succeed. This is often called the rule in *Bonnard v Perryman* ([1891] 2 Ch 269) and it appears to extend also to

Approved Judgment

the defences of privilege and fair comment. In defamation, therefore, it is even harder to obtain interlocutory relief than were the claimant facing the suggested balance of probability test in section 12(3) [of the Human Rights Act 1998]. So much the more likely, submits [Counsel], that Parliament was intending by section 12(3) to introduce a test at least as stringent as that rather than the lower and less precise threshold test of a real prospect of success, a test so low, indeed, that a failure to meet it would in any event render the claim vulnerable to strike out by summary judgment under CPR 24.2 and amounts to little more than was previously required by the *American Cyanamid* approach - see *American Cyanamid v Ethicon Limited* [1975] AC 396, 407:

“The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words that there is a serious question to be tried.”

For her part, Arden LJ said at p 96:

“The present case is an action for breach of confidence. If a breach of confidence occurred, the second appellant (“*The Echo*”) was aware of all the relevant circumstances. This is not a case where defamation is alleged and where *The Echo* has indicated its intention to prove justification at trial. In such a case, the court will not grant an interim injunction to restrain publication unless it is clear that the plea of justification is bound to fail: *Bonnard v Perryman* [1891] 2 Ch 269, *Holley v Smith* [1998] QB 726. Nor is this a case where there is a strong case for publication in the public interest of the alleged confidential material of the nature that was held to exist in *Lion Laboratories Ltd v Evans* [1985] QB 526.”

31. Miss Evans also quoted a passage from the current edition of *Gatley on Libel and Slander* (10th Edition 2004) at p 797:

“The rule in *Bonnard v Perryman* is long established, straightforward to apply and in harmony with the importance attached by the Convention and the European Court of Human Rights to the right of freedom of expression. Moreover, the rule releases the court from the usually impossible task of investigating summarily the merits of the defence of justification which is so often dependent on the credibility of witnesses and detailed consideration of documents. It is surely improbable that it will be adjudged that the burden on a claimant seeking an interim injunction in defamation has been relaxed by section 12(3) so that he merely has to show a reasonable prospect of success in the face of a defendant’s contention that he has a viable defence.”

6. The Judge's Conclusions on the Law

32. After reciting counsel's arguments, the judge concluded that he was bound by the clear rule in *Bonnard v Perryman*. He said that it was unequivocal in its terms, and remained undisturbed by later authority (including *Cream Holdings*). For this reason he dismissed the claimant's application. As we have said, he went on to grant her a temporary injunction pending her appeal to this court.
33. As a postscript to his judgment, the judge added that he considered that this was a paradigm case for the purposes of demonstrating, from a practical viewpoint, that it would be difficult for the court on an application for an interim injunction to investigate whether, at the trial, the plea of justification was more likely than not to fail. A judge would have to decide whether the proposed material was, on a balance of probabilities, likely to be found to be libellous in advance of publication, in circumstances in which it would often be impossible to make that decision satisfactorily. The judge said that it was evident that the rule in *Bonnard v Perryman* had survived for so long not least because it provided a test for the grant of interim injunctions in libel cases that was wholly workable.

7. The Effect of the New Evidence

34. When the appeal was opened in this court we permitted Mr Spearman to adduce new evidence which was not and could not have been placed before the judge on the basis that the defendants would have the opportunity of replying to this evidence, however informally.
35. The claimant's new evidence consisted primarily of an interim report by Mr Ian Henderson, a computer expert she had instructed, supported by a supplementary message he sent to the claimant's solicitors just before the hearing. Mr Henderson had been supplied with the e-mail address of origin and receipt which related to the disputed message of 31st January 2003 (for which see para 9 above). He had been instructed to examine the desktop and laptop computers used by Miss Greene in order to establish whether that e-mail (and two other e-mails dated 6th November 2002 and 23rd January 2003) was genuine. He explained that he had not been provided with electronic or paper copies of these e-mails and he did not have access to the detailed routing information contained in the header section of the e-mails which can be viewed using specialist software. Subject to these limitations he had examined all the e-mail records relating to both Microsoft Outlook and Outlook Express on Miss Greene's two computers and found no trace of the alleged e-mails. A study of the AOL e-mail records retained by AOL online as well as the PFC (Personal Filing Cabinet) records saved on the desktop computer also revealed no trace of the alleged e-mails. In the time available AOL had not itself been able to provide transaction listing records prior to November 2003 which related to Miss Greene's e-mail account.
36. He had also been unable to find any trace on either of Miss Greene's computers of the e-mail address Mr Foster was said to have been using. He said that this was perhaps not too surprising because he had found no trace of internet or e-mail activity on 31st January 2003.
37. In reply to this evidence we were told that a computer expert had inspected three e-mails (including those dated 6th November 2002 and 31st January 2003) on a laptop

Approved Judgment

owned by Mr Foster at his home in Australia. He had had the advantage of being able to complete a “trace route” on the “IP address headers”, and this indicated that all these e-mails had originated from a server in the Greater London Area. The mail servers reported in the header of the e-mail were actual servers, and the times reported by the header which indicated when the e-mails were received were accurate. The e-mail address header from the sender could not be changed, although the sender of the e-mail could be another person who had access to the owner’s computer. An inspection of the e-mail header and text showed that the e-mails had not been interfered with from the point of departure to the addressee’s mailbox.

38. The defendant’s expert added that although the text of an e-mail may be altered by forwarding or sending the e-mail back to oneself or to a third party, the original header would reflect this change, and there was no sign of such a change in the header information on any of these e-mails.
39. We were also told that the editor of *The Mail on Sunday* had not yet had the opportunity to consider the claimant’s evidence. If he decided to publish a new article, then on the assumption that this evidence differed from his own evidence, he would include the claimant’s account of the matter and would not adopt the allegations as true as the evidence at present stood. He would also highlight Mr Foster’s potential unreliability.
40. However, he regarded the matter as a matter of public interest, not only because of the subject matter but because he had already told his readers that the e-mails were genuine (having put this to the claimant the previous week, who did not challenge them at that time). The question of the authenticity of the e-mails was therefore in the public domain, and it was in the public interest, he said, for this further information to be put before the public.
41. In the light of the head-on conflict between the evidence of the two computer experts, which cannot be resolved at this early stage of these proceedings, we do not consider that this evidence is strong enough to shift the conclusions the judge made. We find it impossible to hold that it is clear that Miss Greene will succeed in showing that the emails are forgeries. There is still no unassailable “knock-out” evidence, or any combination of pieces of evidence, that demonstrates plainly that forgery has occurred (compare para 21 above). On the other hand, Mr Henderson’s new evidence tends to strengthen the judge’s conclusion that it is more likely than not on the totality of the present evidence that Miss Greene can establish at trial that the emails are forgeries.

PART III**8. The Law of Prior Restraint in Defamation Actions: the Beginnings**

42. Blackstone (see para 1 above) made a clear distinction between the press’s freedom to publish without prior restraint and the post-publication penalties it might incur if it published “what is improper, mischievous or illegal.” After publication the publisher must “take the consequences of his own temerity”.
43. In 1792 Fox’s Libel Act established that the question “libel or no libel” was one for the jury to determine, and although the rule was made in a criminal law context it was rapidly adopted in civil litigation as well. In those days the danger to press freedom came from the executive and the licensing systems it might introduce, which Blackstone castigated in these terms:

Approved Judgment

“To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.”

44. In those days the judges did not have the power of prior restraint. Until the enactment of the Common Law Procedure Act 1854 the judges of the common law courts had no power to grant an injunction, and even after 1854 they never used it in a libel case. The judges of the Court of Chancery, who did possess such a power, had no jurisdiction to try a libel action.
45. It was only when the Judicature Acts fused equity with the law, sweeping away the old jurisdictional boundaries, that the courts had to grapple seriously with two new questions. The first was whether they possessed jurisdiction to grant an injunction in a libel case where the defendant averred that he had a defence. The second related to the principles on which they should exercise any jurisdiction they might be found to possess. The story has recently been told by Auld LJ in *Holley v Smyth* [1998] QB 726 at pp 737-743, and we derived much benefit from that judgment.
46. The rule in *Bonnard v Perryman* [1891] 2 Ch 269 was laid down by five judges, including the Lord Chief Justice and the Master of the Rolls, who constituted the majority of the full Court of Appeal in that case. The libel in issue was a very damaging one. North J at first instance said (at p 274) that unless it could be justified at the trial it was one in which a jury would give the plaintiff “very serious damages”. He went on to say (at pp 277-8):

“I have this to bear in mind, that, if in such a case as this an interlocutory injunction is not granted, I cannot imagine any case in which an interlocutory injunction to restrain a libel could be granted, whereas it is clear on the authorities that there are cases in which it would be proper to grant it.

Then there is this further matter to be considered with reference to the point made, that the matter ought to be tried before a jury. I am satisfied of this, that if the matter was before a jury now, upon the evidence which is before me - that is to say, the evidence of the Plaintiffs uncontradicted, not cross-examined to, and merely resting on the Defendant's evidence in answer to it - I am perfectly satisfied there is not any jury in *England* who would say there should be a verdict for the Defendant in such a case, and, what is more, if they did, I am quite satisfied it is a case in which a new trial would be directed. This, of course, does not touch what may be the case when the action comes to be tried. There may be evidence before the Court then which would satisfy a jury who tries it that the Defendant has made out a justification. I am merely referring to the materials before me, which are all I can look to now in considering what I am to do in the matter. In these circumstances I have come to the conclusion that an injunction must be granted in the terms which I have mentioned.”

Approved Judgment

47. In overruling that decision Lord Coleridge CJ quoted with approval what Lord Esher MR had said four years earlier in *William Coulson and Sons v James Coulson and Co* (1887) 3 TLR 846:

"... the question of libel or no libel was for the jury. It was for the jury and not for the Court to construe the document and to say whether it was a libel or not. To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel before the jury decided whether it was a libel or not. Therefore, the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable. The Court must also be satisfied that in all probability the alleged libel was untrue, and if written on a privileged occasion that there was malice on the part of the defendant. It followed from those three rules that the Court could only on the rarest occasions exercise the jurisdiction."

48. In *Coulson* Lindley LJ (concurring, as he was later to concur in *Bonnard v Perryman*)

"agreed with the rules laid down by the Master of the Rolls, and he was not prepared to say that the jury might not find that this was no libel, or that the alleged libel was true. The injunction, therefore, ought not to have been granted. Both the Judge at Chambers and the Divisional Court had suggested a form of circular; but it was no part of a Judge's duty to do so, except for the purposes of putting an end to litigation, and the Court ought not to settle a draft form of what might turn out to be a libel."

49. This dictum illustrates an unusual feature of this particular jurisdiction, which is that the judge does not know in advance exactly what the publisher is going to say. Since he cannot determine the question "libel or no libel" at the trial, still less at the pre-trial stage, he must not get himself involved in the process of drafting what the defendant may or may not be permitted to say.

50. In *Bonnard v Perryman* Lord Coleridge CJ resolved North J's dilemma by saying (at p 285) that although the courts undoubtedly possessed the requisite jurisdiction, "in all but exceptional cases" they should not issue an interlocutory injunction to restrain the publication of a libel which the defence sought to justify except where it was clear that that defence would fail. He based his approach on the particular need not to restrict the right of free speech in libel cases by interfering before the final determination of the matter by a jury otherwise than in a clear case of an untrue libel. At p 284 he said:

"...[T]he subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without

Approved Judgment

impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions... In the particular case before us, indeed, the libellous character of the publication is beyond dispute, but the effect of it upon the Defendant can be finally disposed of only by a jury, and we cannot feel sure that the defence of justification is one which, on the facts which may be before them, the jury may find to be wholly unfounded; nor can we tell what may be the damages recoverable.”

9. The Law of Prior Restraint in Defamation Actions: the Modern Law

51. It is necessary to refer only to five modern cases in which the rule in *Bonnard v Perryman* was authoritatively restated. In *Fraser v Evans* [1969] 1 QB 349 Lord Denning MR said at pp 360-1:

“The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since *Bonnard v Perryman*. The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge. But a better reason is the importance in the public interest that the truth should out. ... There is no wrong done if it is true, or if [the alleged libel] is fair comment on a matter of public interest. The court will not prejudice the issue by granting an injunction in advance of publication.”

52. In *Herbage v Pressdram Ltd* [1984] 1 WLR 1160 Griffiths LJ restated the effect of the rule and then said (at p 1162H):

“These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages.”

53. He refused to water the principles down. After summarising an argument by counsel which suggested that the combined effect of the Rehabilitation of Offenders Act 1974 and the decision of the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 justified a radical departure from the rule, he went on to say (at p 1163B):

“If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would

Approved Judgment

obtain an injunction, for on the *American Cyanamid* principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.”

54. In *Khashoggi v IPC Magazines Ltd* [1986] 1 WLR 1412 Sir John Donaldson MR applied the rule in a new context, where the defendants had asserted that they would justify what they said at trial by reference to a *Polly Peck* defence (see *Polly Peck Holdings Plc v Trelford* [1986] QB 1000). He said (at p 1417G-H):

“I cannot see why the *Bonnard v Perryman* principle should not be applied. Quite apart from any question of public interest in the freedom of the press, there is a much wider principle which covers it, and that is this. The injunctive powers of the court can only be invoked in support of a right or in defence of an interest. If the *Polly Peck* defence were to succeed the plaintiff would have no right. She therefore cannot expect to have it defended. That does not of course answer the question which arises as to how likely she is to succeed. That is a problem which always arises in libel and elsewhere. The point is that *Bonnard v Perryman*, apart from its reference to freedom of speech, is based on the fact that courts should not step in to defend a cause of action in defamation if they think that this is a case in which the plea of justification might, not would, succeed.”

55. By now it was firmly established by this court that the principles underlying the grant of interlocutory injunctions which Lord Diplock laid down in *American Cyanamid* did not apply to cases covered by the rule in *Bonnard v Perryman*. This was reaffirmed by Lord Denning MR in *Herbage v Times Newspapers Ltd*, *The Times*, 30th April 1981. In that case Sir Denys Buckley, who had a great understanding of practice and procedure in relation to equitable remedies, observed that:

“... the question what meaning the words complained of bore was primarily one for the jury.

Suppose the words bore the second meaning alleged and an injunction were granted restraining further publication, if application were made to commit the defendants for contempt of court for breach of that injunction, the judge hearing the application would have to form a view as to whether there had been a breach of the injunction and decide whether the words used implied that Mr Herbage had been made bankrupt and discharged without paying his debts in full. It could not be right in a defamation action to grant an action of that kind. *There were special circumstances in defamation actions*”.
(Emphasis added)

Approved Judgment

56. In *Holley v Smyth* [1998] QB 726, where the potency of the rule was reaffirmed, Sir Christopher Slade, another experienced Chancery judge, said at p 749:

“I accept that the court may be left with a residual discretion to decline to apply the rule in *Bonnard v. Perryman* in exceptional circumstances. One exception, recognised in that decision itself, is the case where the court is satisfied that the defamatory statement is clearly untrue. In my judgment, however, that is a discretion which must be exercised in accordance with established principles.”

10. **The Law of Prior Restraint in Defamation Actions: the Rationale of the Rule**

57. This survey of the caselaw shows that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial. This is partly due to the importance the court attaches to freedom of speech. It is partly because a judge must not usurp the constitutional function of the jury unless he is satisfied that there is no case to go to a jury. The rule is also partly founded on the pragmatic grounds that until there has been disclosure of documents and cross-examination at the trial a court cannot safely proceed on the basis that what the defendants wish to say is not true. And if it is or might be true the court has no business to stop them saying it. This is another way of putting the point made by Sir John Donaldson MR in *Khashoggi*, to the effect that a court cannot know whether the plaintiff has a right to his/her reputation until the trial process has shown where the truth lies. And if the defence fails, the defendants will have to pay damages (which in an appropriate case may include aggravated and/or exemplary damages as well).

Part IV

11. **The Effect of the Human Rights Act 1998**

58. But Mr Spearman says that the Human Rights Act 1998 has changed all this. He relies in part on the express effect of section 12(3) of the Act. And if he is wrong about that, he relies on section 6 of the Act which inhibits a court from acting in a way which is incompatible with a Convention right. He says that his client has a right to a reputation which is protected by Article 8 of the European Convention on Human Rights, and that the rigidity of the rule in *Bonnard v Perryman* runs roughshod over that right, giving a court no power to weigh competing rights in the balance and give a proportionate response.

12. **Section 12(3) of the Human Rights Act 1998**

59. We can deal with the first of these points quite quickly. Section 12 of the Act is entitled “Freedom of Expression” and sub-section (1) makes it clear that it 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.” This language does not suggest that Parliament intended within this very section to whittle down a defendant’s right to freedom of expression in a case like this, but Mr Spearman told us that this was the effect of section 12(3) which provides that:

“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.”

Approved Judgment

60. As Fulford J observed (see paras 28-29 above), in *Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, [2003] Ch 650, the majority of this court took it for granted that the rule in *Bonnard v Perryman* was still good law notwithstanding the enactment of section 12 of the Human Rights Act, and although the House of Lords differed from their approach to the meaning of section 12, it did not avert to this aspect of the matter at all. That case was concerned with an entirely different subject-matter (the protection of confidential information). As Lord Nicholls observed (see [2004] UKHL 44 at [18]), “Confidentiality, once breached, is lost for ever, so that the granting or withholding of a pre-trial injunction is of critical importance to a claimant.” But before explaining what the word “likely” meant in the context of section 12(3) he said (at para 15):

“When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a ‘serious question to be tried’ or a ‘real prospect’ of success at the trial.”

61. This has got nothing at all to do with practice in defamation cases, where as we have observed (see para 55 above) the *American Cyanamid* guidelines are not applied. There are “special circumstances in defamation actions”, as Sir Denys Buckley put it in *Herbage v Times Newspapers Ltd* (*ibid*). In a section of an Act of Parliament which is expressly concerned with the protection of freedom of expression and not with undermining it, Parliament cannot be interpreted as having abrogated the rule in *Bonnard v Perryman* by a sidewind. In any event the very language of section 12(3) does not require such an interpretation. Nor do we consider that section 12(4) has any bearing on questions relating to prior restraint in the context of the case with which we are concerned.
62. First principles in statutory interpretation would also rule out the dismantling of judge-made law by stealth (in the absence of necessary implication). In *Black-Clawson International Ltd v Papierwerke-Aschaffenburg AG* [1975] AC 591, Lord Reid said at p 614:

“There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary Parliament can be presumed not to have altered the common law further than was necessary to remedy the ‘mischief.’ Of course it may and quite often does go further. But the principle is that if the enactment is ambiguous, that meaning which

Approved Judgment

relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary situation did not call for.”

63. In *In re F* [1977] Fam 58, a case concerned with the interpretation of section 12(1) of the Administration of Justice Act 1960, Scarman LJ said (at p 99E):

“The words, in their context, need mean no more than that there is a contempt in the absence of a defence recognised by law. If Parliament had intended to treat publication of information relating to proceedings before a court sitting in private as a contempt irrespective of circumstances, I would have expected express provision to that effect. Circumstances can and do arise in which Parliament must have intended the old law to continue, for example, where the court authorises publication or where by the passage of time ‘the rule of publicity [is] resumed’ (Lord Shaw of Dunfermline, *Scott v Scott* [1913] AC 417 at 483). Similarly, if, as I believe, the pre-existing law recognised a defence that the publisher neither knew nor ought to have known that the information published related to proceedings before a court in private, one would have expected express provision if such a defence was to be taken away.”

64. More recently, in *R (Rottman) v Commissioner of Police for the Metropolis* [2002] UKHL 20, [2002] 2 AC 692, a case concerned with the question whether any part of the police’s common law powers of search and seizure had survived the enactment of the Police and Criminal Evidence Act 1984 (“PACE”) Lord Hutton said (at para 75):

“It is a well established principle that a rule of the common law is not extinguished by a statute unless the statute makes this clear by express provision or by clear implication.”

65. Mr Spearman submitted that this well established principle did not apply to constitutional enactments like the Human Rights Act, but the House of Lords had no compunction about applying it in order to preserve the state’s power to search a citizen against his will, overruling a Divisional Court, of which Brooke LJ was a member, which had believed that the purpose of PACE was to clarify and codify what the police might or might not lawfully do in this very sensitive area.
66. We therefore have no hesitation in holding that there is nothing in section 12(3) of the Human Rights Act 1998 that can properly be interpreted as weakening in any way the force of the rule in *Bonnard v Perryman*.

13. Section 6 of the Human Rights Act

67. Section 6(1) of the Human Rights Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. It is well known that by section 6(3)(a) the expression “public authority” is defined so as to include a court within the scope of its meaning.
68. For the purposes of this judgment we are content to assume that a person’s right to protect his/her reputation is among the rights guaranteed by ECHR Article 8 (see *Affaire Radio France et autres v France* (No 53984/00) at para 31). In its judgment

Approved Judgment

in that case the court at Strasbourg recognised this right as an element of the right to respect for private life. (Compare Lord Hoffmann’s observations to similar effect in *Wainwright v Home Office* [2003] UKHL 23 at [16] – [18]).

69. Against this background Mr Spearman showed us a number of recent cases which demonstrate the techniques to be adopted where two Convention rights are in apparent conflict. That this is the case in the field of defamation was made very clear by Cooke P in *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148, in which he said:

“The common law rules, and their statutory modifications, regarding defamation and injurious falsehood represent compromises gradually worked out by the Courts over the years, with some legislative adjustments, between competing values. Personal reputation and freedom to trade on the one hand have to be balanced against freedom to speak or criticise on the other.”

70. More recently, in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 Lord Nicholls said at p 190:

“My Lords, this appeal concerns the interaction between two fundamental rights: freedom of expression and protection of reputation.”

71. Mr Spearman argued that a rights-based approach requires a careful balancing at every stage of every case between the competing rights. He relied in this context on passages in the speeches in the House of Lords in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 WLR 1292 (see Lord Nicholls at paras 19-20; Lord Hoffmann at paras 55-56; Lord Hope of Craighead at paras 105-111; and Baroness Hale of Richmond at paras 139-142).

72. Mr Caldecott QC, who appeared for the defendants, submitted that it is at the trial of a defamation action that English law shows itself appropriately solicitous of the claimant’s right to a fair reputation. At the trial the burden lies on defendants to prove that their defamatory statement was true, or that it represented fair comment on a matter of public interest, or that it was made on an occasion that attracted privilege. If they fail to do so, they have to pay the penalty for infringing the claimant’s right, and the claimant thereby sees his/her reputation vindicated in a very public way. Even if the case is settled before trial, rules of court uniquely allow a statement to be made in open court by way of vindication.

73. At the pre-trial stage, he argued, the position is different. As Stuart-Smith LJ said in *Lonrho v Fayed* [1993] 1 WLR 1489 at p 1502:

“... [N]o one has a right to a reputation which is unmerited. Accordingly one can only suffer an injury to reputation if what is said is false. In defamation the falsity of the libel or slander is presumed; but justification is a complete defence.”

74. If a claimant were able to stop a defendant from exercising its ECHR Article 10 right merely by arguing on paper-based evidence that it was more likely than not that the defendant could not show that what it wished to say about the claimant was true, it

Approved Judgment

would seriously weaken the effect of Article 10. In *The Observer and The Guardian v UK* (1992) 14 EHRR 153 the court at Strasbourg said (at para 60);

“... [T]he dangers inherent in prior restraint are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”

75. Scoops, as Mr Caldecott observed, are the lifeblood of the newspaper industry. He might have added that stale news is no news at all. If Mr Spearman was correct, people with a fair reputation they do not deserve could stifle public criticism by obtaining injunctions simply because on necessarily incomplete information a court thought it more likely than not that they would defeat a defence of justification at the trial.
76. In our judgment Mr Caldecott’s submissions are well-founded. As Sir John Donaldson MR observed in the *Khashoggi* case, once a claimant’s right to a fair reputation is put in issue it is the function of the trial, and the duty of the jury, to determine whether he/she does have a right to be vindicated. One cannot speak sensibly of the violation of the right until it is established at the trial, and at the trial the rules of evidence will favour the claimant.
77. In the passage quoted at para 31 above the editors of the current edition of *Gatley* correctly refer to “the usually impossible task of investigating summarily the merits of the defence of justification which is so often dependent on the credibility of witnesses and detailed consideration of documents”. The judicial authors of the rule in *Bonnard v Perryman* recognised this phenomenon when they created the rule in the first place. This court recognised it a generation ago when it refused to apply *American Cyanamid* principles in a defamation action. And in our judgment there is nothing in the European Convention of Human Rights that requires the rule to be done away with.
78. In cases involving confidential documents, the confidentiality of the documents will be lost completely if an injunction against disclosure is not granted when appropriate. In cases involving national security, great damage may similarly be done if an injunction is not granted when appropriate. In a defamation action, on the other hand, while some damage may be done by permitting the publication of what may later turn out to be false, everyone knows that it is at the trial that truth or falsehood will be tested and the claimant vindicated if the defendant cannot prove that the sting of the libel is justified or that he has some other defence the law will recognise. The damage that may on occasion be done by refusing an injunction where a less strict rule would facilitate its grant pales into insignificance compared with the damage which would be done to freedom of expression and the freedom of the press if the rule in *Bonnard v Perryman* was relaxed.
79. Since argument in this case was completed, the members of the appellate committee of the House of Lords have delivered their opinions in the case of *In re S (FC)* [2004] UKHL 47. That appeal was concerned with the appropriateness of an injunction which restrained the publication of the name of a defendant and her deceased child in the context of the reporting of a pending criminal trial in which a mother is charged

Approved Judgment

with murdering her child. The purpose of the injunction was to protect the welfare of the mother's younger child.

80. In paragraphs 17 and 18 of his speech, with which the other members of the House of Lords agreed, Lord Steyn said:

“17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v MGN Ltd* [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell* and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.

VI. *The general rule*

18. In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8.”

81. On the facts of that case Lord Steyn said, in effect, that the Article 8 rights of the younger child paled into insignificance when compared with the importance to be attached to the freedom of the press to report a criminal trial. Similarly, the relevant Article 8 rights of the claimant in the present case cannot be accorded great weight (before the trial of this action takes place) when compared with the importance to be attached to the freedom of the press to report matters of public interest, for the reasons already set out in this judgment. Once again we need to stress the distinction between a defamation case (where the claimant's right to a reputation has been put in issue and the issue cannot be effectively resolved before the trial) and a case which raises direct issues of privacy or confidentiality.
82. For these reasons we decided to dismiss this appeal.