Case No: HQ10X03121

Neutral Citation Number: [2010] EWHC 2818 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 November 2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

JIH	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LTD	**Defendant**

- -
- -

Mr Hugh Tomlinson QC (instructed by **Berwin Leighton Paisner LLP**) for the **Claimant**
Mr Richard Spearman QC (instructed by **Farrer & Co**) for the **Defendant**

Hearing date: 22 October 2010

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Judgment

Mr Justice Tugendhat :

1. In an action to restrain misuse of private information, in what circumstances should the court order that the claimant must not be named (an "anonymity order")? In what circumstances should the Court order that even the nature of the information which is protected by an injunction must not be identified?

2. This judgment requires consideration of these questions. I expressed views on them in the judgment I handed down on 21 October 2010 in *Gray v UVW* [2010] EWHC 2367 (QB) ("*Gray*") in the light of *In re Guardian News and Media Ltd* [2010] 2 WLR 325; [2010] UKSC 1 ("*Guardian*"). In *Gray* I had the benefit of argument from experienced counsel for the Claimant. But the Defendant was an individual who appeared in person. Nor did I receive representations in any form from any third party (although I was informed that newspaper publishers had been served). In this case both parties are represented by experienced counsel and the Defendant ("NGN") is a publisher of a national newspaper. In addition, as set out below, I have also had the benefit of submissions from Associated Newspapers Ltd, Express Newspapers Ltd, Guardian News and Media Ltd, MGN Ltd, Independent Print Ltd and Telegraph Group Ltd ("the Media Organsiations"). The views I express in this judgment therefore carry more weight.

3. It was also on 21 October 2010 that the parties in this action delivered to the Court a form of consent order, signed by both of them, which they asked the Court to make: see para 26 below. No other documents accompanied that form. It was clear (as has since been confirmed) that they expected the Court to make the order without consideration of any other documents. But the form of order contained derogations from the principle of open justice. The parties now accept that, as I stated in *Gray*, an order for anonymity and reporting restrictions cannot be made simply because the parties consent: parties cannot waive the rights of the public (*Gray* para [34]).

4. It may not always be necessary for there to be an oral hearing before the Court makes an order to which both parties have given their written consent, when that order includes provisions derogating from open justice. But the court must always be provided with sufficient material upon which to decide the questions which it is required to decide. In a case where the derogation is said to be necessary to protect a Convention right there are two questions: (1) is any, and if so which, Convention right of any party is engaged? and (2), if it is, then is there sufficient general, public interest in publishing a report of proceedings which identifies that party to justify any resulting curtailment of the rights of that party and his/her family to respect for their private and family life? (*Gray* para [4] citing *Guardian* para [52]).

5. Having read *Gray* the Claimant's solicitor Mr Shear made a witness statement, and Mr Tomlinson provided a Skeleton Argument.

6. It is important to record that the arguments of the parties before me were not adversarial. The parties have reached an agreement, and neither of them has resiled from it. Both parties were asking me to make the order in the form they had consented to. However, both counsel were able to give their assistance to the court, and they did so from the perspective of a claimant and a defendant respectively.

7. The feature of the form of order in this case on which I asked for particular assistance was that it contained two provisions, either of which, by itself, might not have caused me concern, but which, when appearing together, call for an explanation. The first of these two provisions was that the Claimant be not named. The second of these two provisions was the substantive part of the order: it contained no information as to the subject matter of the action. The essential part reads (subject to exceptions):

> "… the Respondent must not publish … (a) all or any part of the information … described in the Confidential Schedule …, or (b) anything which might identify the … claimant as the person who has obtained the order…"

8. However, as Mr Tomlinson, expressed it in his skeleton argument:

> " … [where] the court has … accepted that the publication of private information should be restrained, … if the court is to avoid disclosing the information in question it must proceed in one of two alternative ways:
> (1) If its public judgment or order directly or indirectly discloses the nature of the information in question then it should be anonymised;
> (2) If the claimant is named in the public judgment or order then the information should not be directly or indirectly identified" (emphasis added).

9. If it is right, as in my judgment it is, that anonymisation and withholding of information about the subject matter of the action are alternative forms of protection for a claimant, then in the present case the agreement reached between the parties contains a derogation from open justice which requires particularly close scrutiny. The fact that the claimant has agreed to this form of order is not surprising. It is more surprising that NGN should have agreed to it.

10. In response to questions from the bench, Mr Tomlinson submitted that the terms of this public judgment could cure any defect in the order. So it could. But the parties contemplated that this order would be made by consent, and without a public judgment. And the formulation in Mr Tomlinson's skeleton argument refers to both public judgment and order, and rightly so, in my view. Pursuant to CPR r.5.4C(1)(b) it is also the general rule that a person who is not a party to proceedings may obtain from the court records a copy of a judgment or order given or made in public (whether made at a hearing or without a hearing). That will apply to the order that I make in this case.

CHRONOLOGY OF PROCEEDINGS

11. NGN publishes a number of titles, including the News of the World and the Sun. Earlier this year NGN published articles in its newspapers concerning the Claimant. The first publication was without notice to the Claimant. Subsequently journalists approached the Claimant about other possible publications they might make concerning him.

12. On 13 August 2010 the Claimant applied to Nicol J sitting in the interim applications court, for an interim Order before issuing proceedings. The application was supported by a witness statement from the Claimant. In it he set out the facts, and gave reasons for his fear that, unless an injunction was granted, he and other individuals would suffer distress and humiliation, and he explained the serious effect upon him and them that he feared might result.

13. Notice was given to NGN (and to no other media organisation) pursuant to HRA s.12 (2). A hearing took place in the interim applications court. Counsel appeared for the Claimant and for NGN. They were counsel other than Mr Tomlinson and Mr Spearman who appeared at the hearing before me. Nicol J gave a judgment, a note of which is in the papers before me. The chronology of events is derived from that note, from the evidence before Nicol J, and from the recent witness statement of Mr Shear.

14. The hearing on 13 August lasted 2 hours and 20 minutes, finishing at 9.18pm. The judgment is not public. It could not be public in the form in which Nicol J gave it, without defeating the purpose of the order that he made.

15. Nicol J asked himself the question that he was required to ask under HRA s.12(3): is the court satisfied that the applicant is likely to establish that publication should not be allowed?

16. Nicol J said "I have no doubt that the private life considerations of Art 8 are engaged here". He then carried out the balancing exercise pursuant to the guidance in *Re S (A child)* [2004] UKHL 47; [2005] 1 AC 593 ("*re S*"), focussing on the comparative importance of the rights engaged, in this case the rights under Art 8 and Art 10 of the Convention. He concluded that he ought to grant the order sought. He then turned to the terms of the order. He accepted submissions for NGN that the order sought was wider than was necessary, and granted it in the more limited terms which he considered were necessary. He made the substantive order, the essential terms of which are set out above in para 7.

17. Nicol J then turned to consider the anonymity order. He granted it saying:

> "if this was not included in the order it would undermine the purpose of the order itself. I note that it is common for such an order to be made, at least when the order is made to prohibit publication".

18. The Order of 13 August recites that Nicol J granted anonymity to the Claimant pursuant to CPR 39.2(4) and the inherent jurisdiction of the court because it appeared to him that:

> "(1) these proceedings were likely to attract publicity
>
> (2) that publicity revealing the identity of the Applicant is likely unfairly to damage the interests of the Applicant and/or frustrate the administration of justice in these intended proceedings".

19. Nicol J also accepted undertakings as required by CPR PD25A, and, as ancillary matters:

i) heard the application in private pursuant to CPR r 39.2(3)(a), (c) and (g)

ii) made an order under CPR r5.4C limiting the information that was to be available to the public from the court file

iii) made the right (under CPR PD 25A para 9.2) of third parties affected by the order to obtain the order and the supporting evidence subject to an undertaking to be given to the Court by such third party.

20. On 13 August the Order was served on the six Media Organisations. Associated Newspapers Ltd sought a copy of the hearing papers and provided the undertaking required by the Order. The papers were served on them later that day. MGN Ltd asked to be informed as to the return date and whether they could be present at the hearing. This was agreed on behalf of the Claimant.

21. On 16 August 2010 the Claimant gave Notice of an application for an Order continuing the Order of 13 August. On the same day he issued a claim form. The relief claimed was

> "an injunction restraining the publication or disclosure of private information concerning the Claimant identified in the Confidential Schedule to the Order of Mr Justice Nicol dated 13 August 2010".

22. On 20 August 2010, by agreement between the parties, Nicol J continued his Order of 13 August, subject to the correction of one omission, until a return date specified as 20 September, or so soon after as the Court could accommodate the parties. He gave directions for the service of evidence and skeleton arguments. The estimated time for the hearing was one day.

23. The Order of 20 August was served on the Media Organisations. The Guardian News and Media Ltd sought a copy of the hearing papers and offered the required undertaking. Papers were delivered on 25 August. MGN Ltd asked to be notified of the return date, which the Claimant agreed to do. None of the Media Organisations gave notice of any intention to apply for variation or discharge of the Orders of 13 or 20 August. Until I circulated the draft of this judgment (as described below) none of the Media Organisations, nor any third party, had made any representation to the Court, whether informally by letter (as is sometimes helpfully done) or by formal intervention. The point as to the scope of the Order on which I have sought the assistance of the parties was a point raised by the Court of its own motion. On receiving this judgment in draft MGN Ltd reminded the Court of *re S* para 35:

> "…, it is true that newspapers can always contest an application for an injunction. Even for national newspapers that is, however, a costly matter which may involve proceedings at different judicial levels. Moreover, time constraints of an impending trial may not always permit

> such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting."

24. In the event no further evidence was served pursuant to the Order for directions. The hearing before me was the return date. By that time the parties had reached an agreement. Parties to such a dispute are entitled to settle it by agreement, and thereby to give up such rights as they may claim to have, whether under Art 8 or Art 10. In this case it is NGN which has compromised its rights under Art 10. There is no reason for the Court to go behind that agreement, in so far as the parties have compromised their own rights. The Court is concerned only with the terms of the agreed form of order in so far as those terms affect the duties of the court and the rights of third parties.

25. There then followed the events described in para 3 above.

26. The form of consent order provides:

> "… BY CONSENT THAT the interim Order of Mr Justice Nicol dated 13 August 2010 (as varied by paragraph 1 of the Order of Mr Justice Nicol dated 20 August 2010) be continued until final judgment or further Order in the meantime"

27. I am informed that the Claimant has agreed that he will not enter judgment in default of defence without giving 21 days notice. I have not been told what further steps, if any, are expected to be taken in the proceedings. I make no comment upon that aspect of the matter in this judgment. But this may well be the last time this matter comes before the court. What I am being asked to make is not a Final Order in the technical sense of that term. But it may well be the last order the court makes in the action. As two of the Media Organisations have reminded the court in their submissions on receipt of this draft, in such circumstances Art 6 may apply: *Micallef v Malta* 17056/06 para 85. This order may be more effective to protect the Claimant's rights than a true Final Order would be. As Eady J said in *X & Y v Persons Unknown* [2006] EWHC 2783 (QB), [2007] EMLR 290 at para 72:

> "…the *Spycatcher* doctrine [*Attorney-General v Newspaper Publishing Plc* [1988] Ch 333 at 375, 380] would go on inhibiting third parties from publishing the relevant information notionally pending a trial which would never actually take place. The *Spycatcher* doctrine, as a matter of logic, has no application to a permanent injunction since, obviously, there is no longer any need to preserve the status quo pending a trial. This doctrine is directed at preventing a third party from frustrating the court's purpose of holding the ring: see e.g. the discussion in *Att.-Gen. v Punch Ltd* [2003] 1 AC 1046 at [87]-[88] in the Court of Appeal and at [95] in the House of Lords; and *Jockey Club v Buffham* [2003] QB 462 (Gray J)."

28. The witness statement of the Claimant made on 13 August was directed primarily to the substantive relief claimed in the proceedings. It dealt only indirectly with the ancillary provisions of the order, such as the application for anonymity and other derogations from the principle of open justice.

29. Accordingly, in his statement of 22 October Mr Shear addressed specifically the derogations from open justice.

30. The evidence of Mr Shear brings the court up to date with the information which is in the public domain. It is not suggested that there has been any breach of the Orders of Nicol J. The point made is that what is in the public domain is evidence of what is likely to occur if the anonymity and other derogations from open justice are not continued. Much of the publicity about this case has been in the form of guesses, or invitations to the public to guess, the identity of the Claimant. There have also been similar publications and speculations on the internet. Such publications and speculations are not uncommon after the court grants an injunction on the application of an unnamed claimant.

31. Mr Shear's evidence is relevant to my conclusion as to the amount of information that could be given in this judgment, or my order, relating to the subject matter of the action. But I cannot set out what that evidence is without incurring the risk of identifying the Claimant.

THE LAW ON OPEN JUSTICE

32. I repeat what I wrote in my judgment on *Gray*. The principle of open justice in English law long preceded the ECHR and the HRA. For recent cases on its importance see *R v Legal Aid Board ex p Kaim Todner* [1999] 1 Q.B. 966 per Lord Woolf MR at 977 and *R (Binyam Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [38]-[42]. So far as material to this case the relevant parts of Art 6 are:

> " … Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial …where the protection of the private life of the parties so require[s], or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

33. In so far as Art 6 contains the words "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice", it is similar in substance to the common law as summarised in *Guardian.* In *Scott v Scott* [1913] A.C. 417 at 438, 463 and 477 Lords Haldane, Atkinson and Shaw said:

> "(438) . . .unless it be strictly necessary for the attainment of justice, there can be no power in the Court to hear in camera either a matrimonial cause or any other where there is a contest between the parties. He who maintains that by no other means than by such a hearing can justice be done may apply for an unusual procedure. But he must make out

his case strictly, and bring it up to the standard which the underlying principle requires. He may be able to show that the evidence can be effectively brought before the Court in no other fashion. He may even be able to establish that subsequent publication must be prohibited for a time or altogether. But this further conclusion he will find more difficult in a matrimonial case than in the case of the secret process, where the objection to publication is not confined to the mere difficulty of giving testimony in open Court. In either case he must satisfy the Court that by nothing short of the exclusion of the public can justice be done. The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors… If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the exception to the principle that in these proceedings, … a public hearing must be insisted on in accordance with the rules which govern the general procedure in English Courts of justice. A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

(463) … in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

(477) … Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair construction of evidence; and the right of Parliament, without let or interruption, to enquire into, and obtain redress of, public grievances. Of these, the first is by far the most

> indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise ".

34. The last clause of Art 6 also qualifies the word "necessary" with the word "strictly". It requires that an order be "strictly necessary" where the reason for making the order is that "publicity would prejudice the interests of justice". Lord Rodger did not mention Art 6 in *Guardian* and for the purposes of the present case it appears to add nothing to the principle of open justice as prescribed by *Scott v Scott.*

35. The relevant parts of Arts 8 and 10 are:

> "Article 8 Right to respect for private and family life
>
> 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 prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> Article 10 Freedom of Expression
>
> 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 …
> 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 prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

COMMON GROUND BETWEEN THE SUBMISSIONS

36. The parties accept that, as most recently stated in *Gray,* the following principles apply when the issue of anonymity is being considered (this being the formulation in Mr Tomlinson's skeleton argument):

> (1) As a general rule, the names of the parties to an action should be included in orders and judgments of the court *(ibid,* para 1).

> (2) There is no general exception for cases where private matters are in issue *(loc. cit.).*
>
> (3) An order for anonymity is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Where the court is asked to restrain the publication of the names of the parties and the subject matter of the claim [on the ground that restraint is necessary under Art 8] the question is whether the there is sufficient general, public interest in publishing a report of the proceedings which identifies a party to justify any resulting curtailment of his right and his family's right to respect for their private and family life *(ibid,* para 4).
>
> (5) An order for anonymity and reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public *(ibid,* para 33)
>
> (6) An anonymity order made by a Judge, on the first hearing of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date *(ibid,* para 34)

37. For the purposes of proposition (4) the Court must first find that Art 8 is engaged before proceeding to the question of public interest, as Nicol J did. Nicol J asked the question (in para 15 above) in the form approved by the Court of Appeal for without notice applications in *ASG v GSA* [2009] EWCA Civ 1574 para [5] (see also *Micallef v Malta* 17056/06 para 86). That is a different basis from that which applies at the return date. Waller LJ said in that case that the test is:

> "Is there a sufficient degree of likelihood that the claimant will win at trial to justify an ex parte injunction for a short period before a full *inter partes* hearing?" (emphasis added)

It follows from this (point (6)) that the ancillary provisions of the Orders of 13 and 20 August were, like the substantive provisions, to last only until the return date. The Judge hearing the case at the return date must come to his own view as to the necessity for such derogations in the light of the facts as they are known to him at that time. An anonymity order made on a without notice application such as the one on 13 August is not to be understood as applying indefinitely. The parties before me both accepted that was so.

38. In *Gray* at para [1] I cited *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103, [2007] EWCA Civ 295, [2007] EMLR 538 ("*Browne"*) as authority for the proposition that claims for injunctions to restrain publication of private information enjoy no general exception from the principles of open justice. It is authority for that proposition, but, as Mr Tomlinson rightly submitted, it is not a clear example of that principle being applied. There is a distinction between cases where the applicant for such an injunction is successful, and cases where he

is not. In *Browne* the proceedings were initially anonymised and heard in private, both at first instance and on appeal. The claimant was asking for an injunction in relation to five categories of information (*Browne* para [12]). He was successful in relation to two categories, but was unsuccessful in relation to three (paras [46] and [62]).

39. The Court of Appeal did not directly address the basis on which it made its decision to name the claimant. It said at para [3]:

> "granted that the judgment relates to some matters concerning the parties, there is no good reason why they should continue to be referred to anonymously".

THE LEVELS OF INFORMATION AN ORDER MAY SPECIFY

40. So far as the identity of a party is concerned, there is only one level of disclosure: the party will be named or not named. Further, as submitted on behalf of Guardian News and Media Ltd, and supported by Mr Spearman, if it is to be necessary to protect it pursuant to Arts 8 and 10(2), private information has to cross "a certain level of seriousness": *R (Wood) v. Commissioner of Police of the Metropolis* [2009] EWCA Civ 414; [2010] 1 WLR 123 paras [22]-[23]. This principle applies both to the identity of the Claimant, and to any information about the subject matter of the action. To publish that a person has obtained an injunction restraining the publication of private information will not normally, of itself, cross that threshold, but will depend on all the circumstances. Whether the information is sufficiently serious may depend upon the identity of a claimant. Resolution No 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy includes:

> "6 ...public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.
>
> 7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."

41. So far as the subject matter of the action is concerned the position is more complicated. In *Browne* the Court differentiated between information at various levels of generality. At para [5] the Court distinguished between "referring in broad terms to the kind of information" and "detail". Amongst the categories of information for which the claimant was seeking an injunction were "the details of the relationship between himself and JC" (para [7]) and "the bare fact" of that relationship (para [12] category (c)).

42. The claimant succeeded in obtaining an injunction restraining publication of the details. He failed in respect of the bare fact of the relationship. But his failure on that category was only on account of the other categories of information (referred to as (b) and (d)) on which the claimant was unsuccessful. See para [61].

Categories (b) and (d) on which the claimant was unsuccessful related to information about misuse of the resources and confidential information of BP plc, of which the claimant was at that time the group chief executive. The Court accepted that category (c), the fact of the relationship, concerned the claimant's private life (para [60]) in that case.

43. Of course, in other cases, the fact of a relationship may not be private at all. A personal relationship between two individuals will be a matter of public record if there is a marriage or civil partnership. And there are many less formal personal relationships or partnerships which the parties are proud to publicise to all the world. So, too, business or official relationships may be either private or public, depending upon the circumstances of the case.

44. In *Browne* there were three levels of information concerning the relationship between the claimant and the individual referred to as JC. The Court was considering whether or not to enjoin (or permit to be disclosed) in its order information as follows:

    i) no information about the subject matter of the action

    ii) "the kind of information" the subject matter of the action

    iii) "the bare fact of the relationship"

    iv) "details of the relationship".

45. If the court is not minded to enjoin disclosure of details of the relationship, then it will obviously not enjoin disclosure of the other alternatives. But if it is minded to enjoin disclosure of the details of the relationship, then it will have to decide whether in its judgment or order it discloses:

    i) no information at all about the subject matter of the action, or

    ii) the kind of information to which the action relates, and,

    iii) in some cases, the fact of any relationship to which the action relates.

46. Another example is *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] 1 QB 73. It does not appear that the claimant in that case ever asked for anonymity. What she did ask for were orders to prevent disclosure of the information which was the subject matter of the action. Eady J made such an order, as did the Court of Appeal. The Order of the Court of Appeal is to be found at [2008] 1 QB at p77. The Court of Appeal strongly endorsed the way that Eady J had dealt with the matter, and gave its own brief reasons for the Order it made at paras [1]-[2] and [81] of the judgment of Buxton LJ. Eady J and the Court of Appeal described the information which was the subject matter of the action at paras [19]-[25]: some items are not explained at all (eg para [19] and [25]), others are generically described (eg para [23] "the state of the first claimant's health"). In the present case the interim order of Nicol J, and the form of consent order, disclose no information at all about the subject matter of the action. All that information is in the Confidential Schedule. I must consider whether in my Order and in this

judgment I can disclose more information about the subject matter of the action, and thereby make a less serious derogation from open justice.

SUBMISSIONS OF MR TOMLINSON

47. Mr Tomlinson submits that in most cases it is the first of the two alternatives he mentioned in paragraph 8 above will be the appropriate one, namely that the court should disclose the kind or nature of the information in question in the action, without naming the claimant. But in some cases even that is not possible: the information about a claimant which is in the public domain, whether before or after an interim injunction is granted, may be such that the publication of any information at all about the subject matter of the action will in practice reveal to the public the facts of any relationship in question. In those cases the court should, as in the draft consent order, disclose no information at all about the subject matter of the action.

48. Mr Tomlinson submits that where the court is considering whether to disclose the name of the claimant or, in the alternative, some information about the subject matter of the action, there are reasons why the court should in general prefer to disclose the subject matter rather than the name are. Those reasons are as follows:

> (1) In general, the public interest in open justice will be best served by knowing the subject matter of the proceedings rather than the "bare identity" of the claimant.
>
> (2) It will often be the case that public domain information concerning the claimant will mean that the nature of the information in issue is obvious so that if the proceedings are not anonymised it will be clear that the identified claimant is seeking to prevent disclosure of information of a particular kind.
>
> (3) If a claimant is named there will, almost inevitably, be speculation and rumour about the likely nature of the information covered by the injunction. Of course, unless the nature of the information is obvious, much of this speculation and rumour will be false and unfounded. Nevertheless it is established in *Standard Verlags GmbH* v *Austria (No.2)* Judgment of 4 June 2009, ECtHR, para 53 that
>
> > "even public figures may legitimately expect to be protected against the propagation of unfounded rumours relating to intimate aspects of their private life".

49. Mr Tomlinson relies on the following further points:

(a) The general public interest served by identifying this Claimant as a person who has obtained a privacy injunction is very limited. He contrasts the obvious public interest in identifying the individuals in the *Guardian News and Media* case. They had entered into public debates about matters of high public interest

arising out of the proceedings, namely the appropriateness of Government counter-terrorism measures. The Claimant has not entered into any such debate.
(b) It is likely that the publication of the Claimant's name would lead to the public becoming aware of the nature of the information covered by the injunction in the particular circumstances of this case. This is not just a matter of "general speculation" as to the nature of the kind of information likely to be covered by an injunction of this type (as discussed in *Gray* [55]) but focussed and accurate inference in the light of the circumstances. In any event, "speculation" can itself be intrusive' (see *Standard Verlags GmbH* v *Austria (No.2)*). This is not a matter of the press "abusing their freedom to report" but of interference with the Claimant's Art 8 rights as a direct result of the publication of his name.
(c) In any event, the publication of the Claimant's name would lead to large scale media intrusion. He would be photographed and questioned, and other people would be subject to unwanted media attention. This coverage and attention would, in itself, constitute a very substantial intrusion into the private and family life of himself and of any other individual concerned, and would be very distressing for all of them. Of course, such attention may be a necessary incident of a person invoking the Court's process, but it is a matter which the Court can properly take into account when balancing the relevant interests and performing its duty to ensure that the protections given to the Claimant's Art 8 rights are "practical and effective". There is a public interest in ensuring that individuals are not deterred from seeking legal redress through the courts by the consequences of court orders being made public.
(e) The defendant in this case is NGN, a major media organisation, and it has accepted that anonymity is appropriate.

SUBMISSIONS OF MR SPEARMAN

50. Mr Spearman submits that Mr Tomlinson overstates the importance of the public knowing the subject matter of the action, and understates the public interest in disclosure of a name. This is not a case where the claimant could say he would be deterred from coming to court. As illustrated by cases cited in *Guardian* and *Gray*, there are many types of litigation where individuals are not deterred from coming to court by the fact that even intimate details of their health and other private matters will be aired in public.

51. Mr Spearman refers to para [62] of *Guardian* where Lord Rodger explained the importance of identifying parties to litigation in the light of other recent decisions of the House of Lords, including *re S* para 34 and in *In re British Broadcasting Corpn* [2009] 3 WLR 142, 152, para 25. He said:

> "What's in a name? 'A lot' the press would answer…"

52. Mr Spearman submits that it is always important for the public to know who has obtained an injunction from the court. There are examples from the past of rich and powerful individuals who have repeatedly applied for orders from the court, and who, with hindsight, are now known to have been doing so abusively. The naming of claimants may also be important, not because their identity is important, but because if they are named it can be seen that others are not the subject of suspicion as being the persons about whom rumours or true information is circulating. The number of individuals whom the public might suspect of being

the claimant is in many cases quite small, and it is unfair on those who are not the claimant (and their families) for there to be speculation that they might be the claimant.

53. Further he submits that if the claimant is not identified, there will in any event be speculation and rumours about the identity of the claimant. An anonymity order will not stop speculation and rumours. Even if the court can give some information about the subject matter of the action, the amount of information the court can give will be limited, because the more detail the court gives in its order or judgment the greater the likelihood of so called jigsaw identification. So in truth it is impossible to give to the public at the same time both no information about the identity of the claimant and full information about the subject matter of the action. If the claimant is not named, the amount of information that can be given about the subject matter of the action will inevitably be small. So if the public is given the name of the claimant, there will be little lost in terms of information that will be given about the subject matter of the action. Whereas if the claimant is not named, the public will get very little information at all, whether as to the claimant's identity or as to the subject matter of the action.

54. On the facts of this case, and of many such cases, a claimant could not say that the prospect of being named will deter him from coming to court. In those cases where there is before the application is made for an interim injunction already substantial information in the public domain about the claimant (or a threat to put substantial material in the public domain), the choices open to a prospective claimant are likely to be limited. The choices are likely to be between submitting to continuing intrusive publicity without a court injunction, or obtaining an injunction which at least limits the scope of such publicity. In most cases an application for an injunction in which the claimant is named is unlikely to make the publicity worse from the claimant's point of view than it would be if he obtained an injunction anonymously.

55. If a claimant is named in circumstances where there is already information about him in the public domain, it does not follow that the subject matter of the injunction must be the information which has most recently been put in the public domain. Reasonable members of the public can be expected to understand that no such inference can be drawn. So the fact that a named person has obtained an injunction restraining misuse of private information will not of itself lead a reasonable person to conclude that the subject matter of the injunction is the information most recently put into the public domain. On the other hand, disclosure of some information about the subject matter increases the likelihood of the public correctly inferring the identity of the claimant. So an order that is to be effective in protecting the identity of the claimant will have to tell the public little or nothing. Such is the form of consent order in this case.

DISCUSSION

56. The evidence of the Claimant and Mr Shear does not include a statement that the Claimant would have been deterred from commencing this action if he had expected that his name would be identified in the court documents. It is difficult to see how a person in the Claimant's position could credibly make such a statement.

57. I accept Mr Spearman's submission that, in those cases where there is, or there is a threat to put, substantial information in the public domain about the claimant before the application is made for an interim injunction, the choices open to a person considering whether or not to make a claim are limited. The present case is not one where naming the claimant would put him in a worse position than he would have been if he had not applied for an injunction. If he had expected to be named, that would have been unlikely to deter him from applying for the injunction on 13 August.

58. It is important to bear in mind what privacy injunctions are intended to achieve. In some privacy cases the information sought to be protected will be truly secret. One example may be the paternity of a child where the mother has successfully withheld that information (as happened in the case of a French Minister of Justice: "Minister's Mystery Baby" *The Observer*, Sunday 4 January 2009). Another example may be that the applicant is suffering from a particular condition or disease (eg the case of the late President Mitterand *Plon (Societe) v. France* 58148/00 [2004] ECHR 200; 42 EHRR 36). Such cases bear some comparison to cases about trade or official secrets: if the secret is revealed there is nothing the court can do to undo what has been done. In cases of trade or official secrets an injunction may thereafter be futile.

59. But in many privacy cases the information sought to be protected is not secret in that sense, or, even if it is, once the secret is revealed, there is still something to be achieved by an injunction. Art 8 is about interference with a persons' private and family life. There may be such interference by the repetition in the press of information even when that information is not secret or unknown. As *Plon v France* (paras [14], [34] and [47]) illustrates, this is be because the repetition of known facts about an individual may amount to unjustified interference with the private lives not only of that person and but also of those who are involved with him (in that case his widow and children) in the matters which are the subject of the action. It may also lead to harassment: *von Hannover v. Germany* (59320/00); (2005) 40 EHRR 1 para [68]. The widow and children were parties in the *Plon* case in the national courts. But the obligation of the Court under s.6 of the HRA (not to act incompatibly with Convention rights) obliges the Court to have regard to the Art 8 rights of persons who are not parties to the action, as well as to the rights of the claimant.

60. It is to be noted that in the *Standard Verlags* case in the first instance proceedings in Austria, as in *McKennitt*, there is no suggestion that the names of the individuals concerned were anonymised. The two men concerned were Mr Klestil, the Federal President of Austria and Mr Scheibner, the head of a parliamentary group. Mrs Klestil-Loefler was a public figure in her own right, as well as being first lady. The complainants to whom Standard Verlags Gmbh had been ordered to pay compensation were Mr Scheibner and Mrs Klestil-Loefler. The names of all three are given in the judgment of the ECHR. As a matter of practice, the ECHR does give anonymity to those whose private lives are said to be the subject of unnecessary or disproportionate interference, and could have done so in that case if it had thought it necessary to do so. See *A v United Kingdom* 35373/97 (2003) 36 EHRR 51 paras [13] and [17], where the applicant and her family had been

named in Parliament as “neighbours from hell”, as a result of which she was harassed and had to move home.

61. The agreement by NGN to anonymity is relied on by Mr Tomlinson. I attach little weight to it. The court has not been given (and would not expect to be given) any information as to any agreement or arrangement that may have been made between NGN and the Claimant. It is open to the parties to settle litigation such this in consideration of an agreement for the publication of other information, or of other matters entirely unrelated to the subject matter of the action. There may be an incentive upon a news publisher to agree that a claimant should enjoy anonymity in consideration of some other benefit the claimant may be able to give to the news publisher. It is not to be assumed that news publishers are always concerned to protect the Art 10 rights of the public and their competitors. I do not suggest that in this case there has been such a bargain at the expense of the public. I simply decline to attach weight to NGN’s agreement to the form of consent order, in circumstances where there is no evidence as to why it has been agreed in that form.

62. Having considered the evidence, I too have no doubt that the private life considerations of Art 8 are engaged here, both as to the subject matter of the action, and, to a much lesser extent, as to the identification of the Claimant. The proceedings are likely to attract publicity, and if the Claimant is identified that will result in some interference with the private life of himself and his family. There is no suggestion of any public interest or other possible justification in disclosure of the information which is the subject matter of the action.

63. It is implicit in the form of the consent order, and I accept, that in the present case it would not be possible to make an order or give a judgment which disclosed any information about the subject matter of the action which did not thereby make it likely that the Claimant would be identified. To identify both the subject matter and the Claimant would defeat the purpose of the proceedings. Accordingly, the only practical question open to the Court is whether to withhold the identity of the Claimant, in addition to withholding all information about the subject matter of the action. In this case the alternatives canvassed by Mr Tomlinson (para 8 above) are theoretical not real. The only real choice is to allow the public to know the Claimant’s identity or to allow them to know nothing at all about the action.

64. I remind myself that where the proposed justification for anonymity is that identification would prevent the attainment of justice, the test that the Claimant has to satisfy is that of strict necessity (paras 33 and 34 above). The Claimant has not shown to that high standard that the object of achieving justice in this case would be rendered doubtful if the anonymity order were not made. It is not possible to do perfect justice to all parties and to the public at the same time. In my judgment the proposed order will be effective to achieve justice, and will give all necessary protection the private lives of the Claimant and any others concerned, if it identifies the Claimant, but gives information about the subject matter only in the Confidential Schedule. It will be served on newspaper publishers (as the earlier Orders have been). They will know what they can publish in the future and what they cannot publish. Nothing will stop people from speculating in private. And the court cannot stop much of the speculation that takes place on the internet. But an Order will limit the extent to which the private

lives of the Claimant and others are interfered with notwithstanding that it identifies the Claimant. So the general principle of open justice provides, in this case, sufficient general, public interest in publishing a report of proceedings which identifies the Claimant to justify any resulting curtailment of the rights of the Claimant and his family to respect for their private and family life

CONCLUSION ON ANONYMITY

65. Accordingly, I will not make an Order requiring that the identity of the Claimant be not disclosed. His identity will therefore be disclosed in any order I make. However, this must be subject to what is to happen during the period pending any appeal. Otherwise, by naming the Claimant, I would render the right of appeal nugatory.

OTHER PROVISIONS OF THE ORDER

66. Since I made clear that I would deliver an open judgment, the parties asked that I should add a new provision to the Order. It is that the Defendant must not disclose (or cause anyone else to disclose) any information which identifies, or any information which is liable to lead to the identification of, the subject matter of this action (that is the information which is in the Confidential Schedule), save for that contained in any public judgment and Order of the court.

67. This is a form of order adapted from that made by Sharp J, and explained by her in her judgment in *DFT v TFD* [2010] EWHC 2335 (QB), in particular in para [29]. Subject to the further matters mentioned below, I would be willing to include that provision in the order I make.

68. Mr Spearman made submissions about other provisions of this Order. However, in the light of the conclusion that I had reached on anonymity when I circulated this judgment in draft, I invited the parties to submit to me a revised form of order. As I requested, the draft is a freestanding order which does not require the reader to read any earlier order. I consider that below.

69. The parties, and the other publishers to whom this judgment was circulated in draft, welcomed the giving of an open judgment in this case and cases like it. The giving of such judgment is clearly desirable in principle. That is the primary means by which judges satisfy the public that they have given consideration to the matters they are required to consider before they make orders affecting the rights of the public. But the holding of oral hearings and giving of detailed reasoned judgments require time and other resources. Before such a judgment can be handed down, it must be circulated not only for the usual editorial corrections. The parties must have the right to make submissions as to matters which should be included and excluded. That too is an exercise that can be costly in time and other resources. That may not always be necessary or proportionate: in some cases the reasons for giving anonymity will be obvious. In *Guardian* at para 2 Lord Rodger said:

> “the present appeals show that an order ("anonymity order") may be made, often by consent of both parties, without the

court considering in any detail what is the basis or justification for it".

Those words, and the detailed consideration the Supreme Court gave to the anonymity orders both in that case and the case of *Secretary of State for the Home Department v AP (No. 2)* [2010] UKSC 26, [2010] 1 WLR 1652, may be taken as guidance that judges should give detailed reasons for making anonymity orders. There are further models in the detailed judgments on anonymity given by the judges in Northern Ireland in *A (A minor) & Others v A health & Social Services Trust* [2010] NIQB 108 and *R A, Re Judicial Review* [2010] NIQB 27. On the other hand, the ECHR did not explain in its judgment in *A v United Kingdom* why it did not identify the applicant in its judgment dismissing her application. It may be inferred that the reason was obvious: in order not to give an occasion for further harassment of her.

70. As stated in para 4 above, where the Court is required to decide whether to grant (or continue) derogations from open justice, the information necessary for the Court to carry out its obligations under HRA s.6 must be provided to the Court by the party asking for the order. In most cases the information the Court requires should be in the form of a witness statement from the party concerned and in a section of the statement clearly addressing the derogations that are asked for. There should also be a short skeleton argument directing the judge's attention to the applicable law, to the relevant parts of the evidence and the grounds of the application. It cannot be assumed that all judges will have at the forefront of their minds the applicable law, as Nicol J did in this case, particularly when asked to make such orders in urgent applications made out of hours. Advocates must have in mind their obligations to the court to see that correct legal procedures and forms are used (*Memory Corpn v Sidhu (No 2)* [2000] 1 WLR 1442, 1460). I make clear that I cast no blame on the parties in this case, or their legal representatives, given that the first judgment stating that anonymity orders could not be given by consent in privacy injunctions was *Gray*.

SUBMISSIONS FROM OTHER PUBLISHERS

71. When I circulated this judgment in draft I asked the Claimant's solicitors to give me the names of those publishers who they had served with the orders of Nicol J. They were the Media Organisations. All these publishers publish a number of different titles and web sites. I circulated the draft of the judgment to each of these. In doing so I invited them to make representations (if so advised) as to any matter which should, or should not, be included in the judgment, in addition to editorial corrections.

72. I received written responses, and have taken some of the representations into account in revising the preceding part of this judgment. Mr Tomlinson and Mr Spearman have made further submissions in writing in response. Other complaints, representations and submissions from third parties included the following:

i) That they had not been given, but should have been given, notice of the application to Nicol J: Associated Newspapers Ltd, Express Newspapers Ltd, MGN Ltd, Guardian News and Media Ltd

ii) Complaints that they had not been given copies of the witness statement of Mr Shear and the skeleton argument of Mr Tomlinson submitted to me on 22 October, and other documents: MGN Ltd

iii) Complaints that the provisions of CPR PD 25A para 9.2 (persons served with the order to be provided on request with materials read by the judge and a note of the hearing) had not been complied with: MGN Ltd

iv) Complaints that the Claimant had not notified them of the return date: MGN Ltd (the Claimant has apologised to MGN Ltd for this omission), Guardian News and Media Ltd

v) That applicants should be required to undertake to the Court to keep third parties who have been served with an order, and who are bound by it under the *Spycatcher* principle, informed as to what is going to happen in the action, including prior notice of any hearings: MGN Ltd, Guardian News and Media Ltd

vi) That the information relied on in support of any application for a derogation from open justice (see para 70 above) should be served on third parties: MGN Ltd

vii) The provisions of CPR PD 25A para 9.2 should not be dispensed with, or made subject to any condition (such as are in paras 5 and 6 of the draft Order set out below), alternatively any condition other than an undertaking to protect private information: all six Media Organisations.

73. There has been no application by any third party to vary or discharge the Orders of Nicol J. These points are raised as matters of general principle. They were not canvassed at the hearing on 22 October, and the parties have not responded to them for that reason. They are points that merit consideration, but not in this already long judgment. Some of these points are already the subject of other judgments (eg *TUV v Persons Unknown* [2010] EWHC 853 (QB) paras [10-[16]).

THE REVISED FORM OF ORDER

74. The revised form of draft order submitted by the parties includes the following as its substantive provisions, to run until the trial of this action or further order in the meantime:

> "**The prohibited acts**
>
> 1. The Defendant must not publish, republish, syndicate, use, communicate or disclose to any person:
>
> (a) Any information concerning the subject matter of these proceedings save for that contained in the public judgment of the Court handed down on 5 November 2010 and/or

(b) Any of the information set out in the Confidential Schedule to this Order (together "the Information").

PROVIDED THAT nothing in this Order shall prevent the publication, disclosure or communication of any of the Information:

(i) by the Defendant (1) to legal advisers instructed in relation to these proceedings for the purpose of obtaining legal advice in relation to these proceedings or (2) for the purposes of carrying this Order into effect or (3) for the purpose of these proceedings (including for the purpose of gathering evidence in relation to these proceedings) provided that any person to whom such information is disclosed must first be either given a copy of this Order or notified of its substance and effect;

(ii) by the Defendant of any part of the Information that is in the public domain as the result of national media publication (otherwise than as a result of breach of this Order).

[(iii) by or to any person named in the Confidential Schedule for purely private and personal purposes and in confidence, (that is, on the express understanding that there will be no further disclosure of the Information), with their closest friends, their immediate family and professional advisers.]

Confidential Information in Statements of Case

2. Anything which may reveal any information or purported information described in the Confidential Schedule to this Order shall be excluded from the statements of case served in this action, and included in a separate schedule served with the statement of case.

3. Pursuant to CPR 5.4C(4) any person who is not a party to this action may not obtain from the court records any copy of any confidential schedule served with any statement of case. Any non party seeking access to or copies of any confidential schedule from the court file must make an application to the Court, having previously given at least 3 days' notice of the application to the solicitors for the parties.

4. If any non-party at any time makes an application to the Court under CPR 5.4C(2) for permission to obtain from the Court records a copy of any other document, other than a statement of case, or of any communication, such non-party

must give at least 3 days' notice of the application to the solicitors for all parties.

Provision of Documents and Information to Third Parties

5. The Claimant shall not be required pursuant to CPR 25 PD 9.2 or otherwise to provide any third party served with a copy of this order with:

(a) a copy of any materials read to or by the Judge, including material prepared after the hearing at the direction of the Judge or in compliance with the order; and/or

(b) a note of the hearing

save where the third party (1) specifically requests the same and (2) provides written undertakings to the court (i) that these documents will not be copied or reproduced except for the purposes of any application to vary or discharge this Order (ii) that they will be kept securely and (iii) that these documents and the information contained therein shall only be used (save to the extent that such information is already in the public domain) for the said purposes.

6. Any person who has made any such request may apply to the Court to vary these provisions or for directions.

Hearing in Private

7. Pursuant to CPR 39.2(3)(a)(c) and (g), the hearing of the application to which this order relates be heard in private and pursuant to section 6 of the Human Rights Act 1998, there be no reporting of the same. For the avoidance of doubt, nothing in this provision shall prevent the reporting of the Court's public judgment dated 5 November 2010.

Variation or Discharge of this Order

8. The Defendant or anyone served with or notified of this Order may apply to the Court to vary or discharge this Order (or so much of it as affects that person), but they must first give not less than 48 hours written notice to the Claimant's solicitors. If any evidence is to be relied upon in support of the application, the substance of it must be communicated in writing to the Claimant's solicitors at the time of giving notice or as soon as possible thereafter".

75. In addition, the undertakings given to the Court by the Claimant are:

"Schedule 1

Undertakings given to the Court by the Claimant:

(1) If the Court later finds that this Order has caused loss to the Defendant and decides that the Defendant should be compensated for that loss, the Claimant will comply with any Order the Court may make.

(2) If the Court later finds that this Order has caused loss to any person or company (other than the Defendant) to whom the Claimant has given notice of this Order, and decides that such person should be compensated for that loss, the Claimant will comply with any Order the Court may make.

(3) If for any reason this Order ceases to have effect the Claimant will forthwith take all reasonable steps to inform, in writing, any person or company to whom he has given notice of this Order, or who he has reasonable grounds for supposing may act upon this Order, that this Order has ceased to be of effect.

(4) The Claimant will as soon as reasonably practicable give notice of this Order to the Defendant and will take all practicable steps to serve the Defendant with this Order and all supporting documents.

Schedule 2

Undertaking given to the Court by the Claimant's solicitors:

The Claimant's solicitors will prepare and retain until the conclusion of this intended action a full note of the hearing at which this Order was made."

76. The only provision not agreed between the parties is para 2(iii), which appears above underlined. This is referred to as a "friends and family clause".

77. Mr Spearman accepts that "NGN" is not entitled to seek the addition of this proviso in the light of the agreement between the parties.

78. Mr Tomlinson accepts that in principle such a clause may be appropriate in cases where the defendant is an individual, or where the claimant proposes to serve the order on a third party who is an individual, at least where the information the subject matter of the action is of a personal nature that such an individual may reasonably expect to discuss with friends and family. But he says that in this case there is no intention of serving the order on any third party who is an individual.

79. In the absence of full argument, I prefer to say nothing on this point, and to omit the proviso from my order.

CONCLUSION

80. This judgment is a public judgment. My conclusion is that the Claimant should not be granted anonymity. I will make the Order in the revised form agreed between the parties. But pending any order that may be made on any application for permission to appeal, the Claimant's name must remain anonymised.