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Case No: (None)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 April 2008

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

MAX MOSLEY **Claimant**

- and -

NEWS GROUP NEWSPAPERS LIMITED **Defendant**

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- -

James Price QC and **David Sherborne** (instructed by **Steeles Law**) for the **Claimant**
Gavin Millar QC and **Anthony Hudson** (instructed by **Farrer & Co**) for the **Defendant**

Hearing date: 4 April 2008

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. At 3.00 pm on Friday, 4 April, an application was made by Mr James Price QC on behalf of Mr Max Mosley for an injunction against News Group Newspapers Limited to restrain it from making available on its website a short extract ("the edited footage") from a much longer videotape. The Respondent had the opportunity to be represented (albeit at very short notice) and Mr Gavin Millar QC made submissions on its behalf.

2. Mr Mosley has been since 1993 the President of the Federation Internationale de l'Automobile ("the FIA"). It is the governing body of motor sport worldwide and it represents the interests of motoring organisations and also car users around the world. In his capacity as President, Mr Mosley has spoken publicly from time to time on a variety of issues, including driver safety, environmental matters, tobacco advertising and, quite recently, the question of racism in the Formula 1 sport.

3. The Respondent newspaper group is the publisher of, among other titles, the *News of the World*, which published an article on 30 March 2008 with the headline "F1 boss has sick Nazi orgy with 5 hookers". The story was published inside on pages 4 and 5 under the headline "The Pits". The article was accompanied by a number of still photographs taken from the videotape to which I have referred.

4. I was given a copy of the edited footage shortly before the application. It is very brief, containing shots of Mr Mosley taking part in sexual activities with five prostitutes, and it also covers the tea break. The events took place in the basement of a private flat near Mr Mosley's home and thus, undoubtedly, on private property. The session seems to have been devoted mainly to activities which were conveniently described as "S and M". They lasted for several hours. The very brief extracts which I was shown seemed to consist mainly of people spanking each other's bottoms. There is also a scene in which Mr Mosley was pretending to have his head examined for lice. This appears to have been part of acting out a prison fantasy, in which he is described as having come from another "facility". This is because notions of restraint and punishment are integral to this type of sexual activity. There were discreet blocks incorporated on the extracts I saw, so as to make sure that no private parts were on display (or, for that matter, the prostitutes' faces).

5. The subject-matter was extensively covered in the *News of the World* on 30 March on the basis of the video recording. It seems that it was made by one of the prostitutes, who was able to conceal a camera in such clothing as she was wearing. Mr Mosley has apparently known all of the prostitutes for a while, but the lady who made the recording was of the most recent acquaintance (only a few months).

6. Moreover, since the original publication, these events have received massive coverage throughout the world, both in newspapers and on various websites. The article, together with the edited footage, was made available on the *News of the World* website until complaint was made by Mr Mosley's solicitors on the day of publication. The next day, on 31 March, the edited footage was voluntarily removed from the website and an undertaking given that it would not be shown again without 24 hours notice. Such notice was given by letter dated 3 April and faxed at 1.19 pm that day.

7. The evidence before me indicates that between 30 and 31 March the on-line version of the article was visited approximately 435,000 times, whereas the edited footage itself was viewed about 1,424,959 times over the same period. The explanation for the difference in numbers is, as I understand it, that the footage could have been accessed via the Internet by users who were visiting other websites in which the footage had been "embedded". It was also made available on the Internet by other websites which had copied it while still available on the *News of the World* website.

8. It follows that there are a number of websites (not possible to quantify accurately) where the footage has been available continuously, notwithstanding its removal from the *News of the World* website.

9. Mr Mosley does not dispute that the events occurred, as portrayed in the edited footage, but he maintains that they were private and that the public display engages his rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms (as it undoubtedly does). The proceedings, and the application made before me, are thus based upon the alleged infringement of his privacy.

10. It has emerged, however, that Mr Mosley does challenge the accuracy of the *News of the World* presentation in at least one respect; that is to say, its characterisation of his activities as being Nazi role-play. This interpretation has been picked up and given widespread coverage by others. For example, in *The Times* on 31 March, an article appeared under the heading "Max Mosley faces call to quit as Formula One chief after 'Nazi orgy'". This quoted Karen Pollack, chief executive of the Holocaust Educational Trust, as saying, "This is sick and depraved. For anyone to be in such a position of influence and power beggars belief. I am absolutely appalled".

11. The director of the Holocaust Centre, Stephen Smith, was also quoted:

> "As Mr Mosley has condemned the racism in motor sport he should live up to the standards he sets. This is an insult to millions of victims, survivors and their families. He should apologise. He should resign from the sport".

12. There have been many similar comments, some of which are specifically related to the allegation of Nazi role-play, and others more general. There have been statements, for example, from BMW and Mercedes, and from Honda and Toyota. There is no need to set these out in full, but Toyota drew particular attention to the overtones of anti-Semitism:

> "Toyota Motorsport does not approve of any behaviour which could be seen to damage Formula One's image, in particular any behaviour which could be understood to be racist or anti-Semitic".

13. Lewis Hamilton expressed agreement with the statements of the car manufacturers, stating that it was important to set an example and that "we all, especially the young people, we're always looking up to at least someone to show us the way. Setting a good example is the best way of saying it".

14. Mr Mosley has chosen to respond to the widespread publicity in various ways, including in one statement containing the following:

> "Given the history of BMW and Mercedes-Benz, particularly before and during the Second World War, I fully understand why they would wish to strongly distance themselves from what they rightly describe as the disgraceful content of these publications.
>
> Unfortunately they did not contact me before putting out their statement to ask whether the content was in fact true."

15. It is thus clear that Mr Mosley's complaint has at least two distinct elements. First, he objects to the visual portrayal of the edited footage showing his sexual activities. Secondly, he says that the episode had nothing to do with Nazism. The suggestion was made in the newspaper that he was playing "Nazi sex games"; that he was playing a concentration camp commandant; and that the women wore "uniforms reminiscent of Auschwitz guards". All this has an extra resonance because Mr Mosley is the son of Sir Oswald Mosley. This is linked to allegations by the newspaper of hypocrisy ("In public he rejects his father's evil past, but secretly he plays Nazi sex games").

16. The allegation of hypocrisy is obviously defamatory. It is also strongly arguable that to say, of anyone, that he or she is taking part in Nazi games or role-play, involving re-enactment of scenes from concentration camps, or insulting the memory of victims, will reflect adversely upon that person's reputation. It is important to emphasise, therefore, that the application before me was based solely on infringement of privacy and not on the tort of defamation.

17. In the light of the well-known principle associated with *Bonnard v. Perryman* [1891] 2 Ch 269, recently endorsed after the enactment of the Human Rights Act 1998 by the Court of Appeal in *Greene v. Associated Newspapers* [2005] 1 All ER 30, it would not be possible to restrain publication of the allegations linking the "orgy" to Nazism. That is because the Respondent wishes to maintain that it is a true reflection of what the video recording, as a whole, actually portrays. This is challenged as "absurd" by Mr Price and, if the edited footage is the best evidence in support of this contention, it certainly appears very weak. Obviously, however, I cannot come to a conclusion on that at this stage. It remains a matter of dispute between the parties.

18. Mr Mosley, it appears, speaks German very well. He claims that he was only speaking German on this occasion because one of the participants was herself from Germany. Mr Millar does not accept this and suggested that there is a section of the recording in which "cod German" is used in a way that is reminiscent of the bogus German accents used in the television series "'Allo 'Allo". Also, although one of the women is wearing for part of the time a German uniform jacket, it is said to be a modern German Air Force jacket (nothing to do with the Nazi era).

19. It is also accepted that some of the women wear suits with broad horizontal stripes, but these are said to be quite unlike anything in the concentration camps. They are readily available in joke shops as representing United States prison uniforms.

20. Another matter to which the *News of the World* appeared to attach significance was the use of a clipboard or notepad described as an "SS-style inspection sheet". It would appear, so far as one can see, to have nothing to do with the SS. All one can make out is the name "Tim Barnes" at the top. (I hasten to add that this has nothing to do with any real person of that name – it is merely a *nom de guerre* used by Mr Mosley. By giving a false name, he provided a pretext for punishment.)

21. Again, this is not a matter on which it would be appropriate for me to come to a conclusion at this stage. It is accepted that a quasi-prison environment is part of the "S and M" scenario, but it is said not to be representative of Nazism in particular. Mr Mosley may well be right about all this, but obviously I could not restrain the allegations or verbal descriptions of what took place. If the matter were to come to trial, it may be that the Court will in due course hold that there is nothing in the allegations of Nazi role-play – as opposed merely to examples of dominance, submission and punishment in an "S and M" context.

22. When it comes to privacy, however, Mr Price emphasises that, when balancing his client's Article 8 rights against the Respondent's Article 10 rights, the visual display of the edited footage serves no legitimate purpose and that its grossly intrusive nature is unnecessary and disproportionate.

23. I was reminded of a passage in the speech of Lord Hoffmann in *Campbell v. MGN Limited* [2004] 2 AC 457, 475 at [60], where he referred to a hypothetical case in which there would be a public interest in the disclosure of the existence of a sexual relationship (e.g. because of corrupt favours), but where the addition of salacious details or intimate photographs would be disproportionate to any legitimate purpose and unacceptable. He observed that these would be likely to be intrusive and demeaning – even if accompanying a legitimate disclosure. Mr Price submitted that this would also be true in the present case.

24. I was also invited to have in mind similar observations made by Waller LJ in *D v. L* [2004] EMLR 1 at [23]:

> "A court may restrain the publication of an improperly obtained photograph even if the taker is free to describe the information which the photographer provides or even if the information revealed by the photograph is in the public domain. It is no answer to the claim to restrain the publication of an improperly obtained photograph that the information portrayed by the photograph is already available in the public domain."

25. There was comment in the same vein in the decision of the Court of Appeal in *Douglas v. Hello! Ltd (No 3)* [2006] QB 125, 162 at [105]:

> "In general, however, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, though this may not always be true: see *Gilbert v. Star Newspaper Co Ltd* [1894] 11 TLR 4 and *Creation Records Ltd v. News Group Newspapers Ltd* [1997] EMLR 444, 456. The same may generally be true of private information of a personal nature. Once intimate personal

> information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it. To take an example, if a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of the photograph by a popular newspaper would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain. There is thus a further important potential distinction between the law relating to private information and that relating to other types of confidential information."

It has been recognised for some time that personal and private information is not always to be treated in exactly the same way as commercial secrets, which can generally be assessed according to a bright line boundary between what is in the public domain and what is not: see e.g. the remarks of Lord Keith in *Attorney-General v. Guardian Newspapers (No 2)* [1990] 1 AC 109, 260E-H; *R v. Broadcasting Complaints Commission, ex parte Granada TV* [1995] EMLR 163; *WB v. H Bauer Publishing* [2002] EMLR 145.

26. The extent to which material is truly "in the public domain" will ultimately depend upon the particular facts before the Court. In *Attorney-General v. Greater Manchester Newspapers Ltd* [2001] All ER (D) 32 (Dec) the test was applied as to whether certain information was "realistically" accessible to members of the public or only "in theory".

27. I need to bear in mind, on an application of this kind, the provisions of s.12(3) of the Human Rights Act 1998 and, in particular, that before granting relief of an interim nature I must be satisfied that the claimant would be likely to obtain similar relief on a permanent basis at trial. It follows that I have to try to form a view of the overall merits of the privacy claim on incomplete evidence.

28. The methodology to be applied has become very well established over the last few years, and especially in the light of *Campbell* (cited above) and *Re S (A Child)* [2005] 1 AC 593. The following principles need to be borne in mind in any case where it is sought to restrain publication on the basis of an alleged infringement of rights guaranteed by Article 8, and where they come into conflict with those of other persons, and in particular the rights of the media to freedom of expression and, correspondingly, the right of the public to be informed about maters of public interest:

    i) No Convention right has, as such, precedence over another;

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

iii) The Court must take into account the justification for interfering with or restricting each right;

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

In *Douglas v. Hello! Limited* [2001] QB 867 at [137], Sedley LJ indicated that in situations of this kind "the outcome … is determined principally by considerations of proportionality".

29. Here there is no doubt that the rights of Mr Mosley under Article 8 come into conflict with those of the Respondent company under Article 10. One question which has to be answered is whether, in respect of the information contained in the edited footage, Mr Mosley any longer has a reasonable expectation of privacy, having regard to everything which has happened since the original publication.

30. It is also appropriate to ask whether any of what Lord Goff described, in *Attorney-General v. Guardian Newspapers Limited (No 2)* [1990] 1 AC 109, at 282C-F, as the "limiting factors" come into play. A relevant consideration here is whether there is a public interest in revealing the material which is powerful enough to override Mr Mosley's *prima facie* right to be protected in respect of the intrusive and demeaning nature of the photographs. I have little difficulty in answering that question in the negative. The only reason why these pictures are of interest is because they are mildly salacious and provide an opportunity to have a snigger at the expense of the participants. Insofar as the public was ever entitled to know about Mr Mosley's sexual tastes at all, the matter has already been done to death since the original coverage in the *News of the World*. There is no legitimate element of public interest which would be served by the *additional* disclosure of the edited footage, at this stage, on the Respondent's website.

31. I have well in mind, naturally, that one aspect of the public interest is the need to protect the public from being misled by a statement made by or on behalf of the relevant claimant. That is recognised expressly in the terms of the Code of Practice promulgated by the Press Complaints Commission (a factor to which it is appropriate to have regard, on an application of this kind, in the light of s.12(4) of the 1998 Act): see also e.g. the observations in *Campbell v. MGN Limited* (cited above) at [24], [57], [80]-[83], [129] and [163]. This is of some relevance here because one argument advanced by Mr Millar is that, since 31 March, when the material was voluntarily taken off the website, Mr Mosley has gone on record as denying the allegations; to that extent, he submits that his client should be entitled to refute his statements and vindicate the accuracy of its original account.

32. I am quite satisfied that Mr Mosley, even though he may have been misunderstood by some commentators, has accepted that he took part in the "S and M" session with the prostitutes. What he is denying is the link to Nazism. I do not consider that the edited footage shows, convincingly, that his denial is false. But, even if it is capable of being so construed, there is nothing to prevent the *News of the World* reasserting, with whatever prominence it thinks appropriate, that there was Nazi role-play.

Accordingly, if there is any case for saying that Mr Mosley's denials have, in any way, misled the public, and that the record should therefore be put straight for that reason, the objective can be achieved effectively without displaying the edited footage of bottoms being spanked.

33. The other "limiting factor" to be considered is whether the information contained in the edited footage has lost its privacy to the extent that there is nothing left for the law to protect. I have found this more difficult. I am prepared to accept that the material has been seen by thousands of people around the world and that it continues to be available. Mr Millar asks rhetorically, therefore, what can be achieved by an injunction in these circumstances? The Court must always be conscious of the practical realities and limitations as to what can be achieved. I have in mind, of course, what was said in *Douglas v. Hello!* at [105] (cited above). Nevertheless, a point *may* be reached where the information sought to be restricted, by an order of the Court, is so widely and generally accessible "in the public domain" that such an injunction would make no practical difference.

34. As Mr Millar has pointed out, if someone wishes to search on the Internet for the content of the edited footage, there are various ways to access it notwithstanding any order the Court may choose to make imposing limits on the content of the *News of the World* website. The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised, in the traditional terminology, as a *brutum fulmen*. It is inappropriate for the Court to make vain gestures.

35. There is a closely related argument which needs also to be considered. It was addressed in *Attorney-General v. Times Newspapers Ltd* [2001] 1 WLR 885, 895-6, at [29]-[35]. The Court will sometimes recognise that it is inappropriate to restrain one media organisation from publishing material, for the vindication of the right of another person or pursuant to an obligation owed to that person, at a time when it is open to other media outlets, including competitors, to publish the selfsame information. That was an argument which carried weight in *Attorney-General v. Times Newspapers*. It is, however, a less convincing argument where the information was put into the public domain in the first place by the respondent sought to be restrained. In such circumstances, the argument would have about it what Mr Price calls a "bootstraps" quality; that is to say, because the respondent would be seeking to take advantage of its own "wrong" in having made the (hypothetically tortious) publication in the first place.

36. In the circumstances now prevailing, as disclosed in the evidence before me, I have come to the conclusion that the material is so widely accessible that an order in the terms sought would make very little practical difference. One may express this conclusion either by saying that Mr Mosley no longer has any reasonable expectation of privacy in respect of this now widely familiar material or that, even if he has, it has entered the public domain to the extent that there is, in practical terms, no longer anything which the law can protect. The dam has effectively burst. I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate public interest in its further publication, the granting of an order against this Respondent at the present juncture

would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the *News of the World* from showing what is already available.

37. In the result, I feel bound to decline the Claimant's application.

Addendum

38. After the judgment was written, I received on the morning of Monday, 7 April, a copy of the *News of the World* coverage of the story from the previous day. It makes no difference and I have taken no account of it. I believe it was merely sent to me "for information". All I need say is that the newspaper has taken full advantage of the opportunity to criticise Mr Mosley yet again, including by reasserting its case that the sexual activities represented Nazi role-play. There are also extensive quotations from one of the prostitutes.