Case No: HQ02X00289
[2002] EWHC 137(QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th February 2002

Before:

THE HONOURABLE MR JUSTICE OUSELEY

Between:

THEAKSTON

Claimant

-and-

MGN LIMITED

Defendant

Michel Tugendhat QC with **Anna Coppola** (instructed by Schilling & Lom and Partners Solicitors for the Claimant)
Richard Spearman QC (instructed by Marcus Partington Solicitor) for the Defendant

Hearing dates: 26th January 2002

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

Mr Justice OUSELEY:

1. On Saturday 26th January 2002, I granted an injunction to the Claimant, on notice to the Defendant preventing it publishing photographs of the Claimant inside a Mayfair brothel. I refused to grant an injunction preventing it publishing an article in the Sunday People the next day which stated that the Claimant had visited a Mayfair brothel on the night of 18th to 19th December 2001(the preceding night on the Claimant's evidence), and there had engaged in a variety of sexual activities with three prostitutes (with one on the Claimant's evidence). At the conclusion of the hearing, close to the publication deadline, I gave a brief judgment as I was asked, to be followed by a fuller judgment which I now provide.

2. The Claimant is a 31 year old man who earns his living as a presenter for the BBC's "Top of the Pops", a programme, on the evidence, directed at teenagers and youngsters. He also has a weekly radio show on BBC Radio 1. He is unmarried, was not then and is not now in any regular partnership and has no children.

3. His evidence was that he was out for an evening drinking with three male friends in the West End of London and in Soho; the bar in which they were drinking had closed and, in pursuit of further refreshment, they had taken the advice of a mini-cab driver as to where they could continue drinking. He had taken them to a place which he had said also had strippers.

4. There they were offered drinks and a strip routine in a private room but left. The Claimant says that having left this establishment, he later returned with a friend for another drink. He was then "ushered" into a room on his own by a girl who "performed a sex act on me". He described how "three girls then entered"; he became aware that someone, without his consent, was taking photographs of him. By now, very drunk and partially undressed by the girls, he "realised the sort of establishment this clearly was" and left.

5. He then related how he had been harassed for money by people who made innumerable telephone calls to his mobile telephone and left a text message demanding money for services rendered, and referring to photographs which would be taken to the press if money were not forthcoming.

6. He resisted these demands which, despite Mr Spearman QC's arguments for the Defendant, have the appearance of blackmail rather than of a naïve, crude but understandable attempt at the collection of unpaid fees. Consequently, this material and the prostitute's tale were taken to the Sunday People, an editor of which contacted the Claimant and sought his reaction to the article "of a personal nature", as this editor called it, which it proposed to publish. His reaction was to seek an injunction on the grounds of breach of confidentiality and breach of his right to privacy as reflected in the Press Complaints Commission Code, and as contained in Article 8 of the European Convention on Human Rights.

7. The Claimant in his Witness Statement reflected upon his lack of judgment but asserted that he was in a private place with friends, that the events were "private and confidential". He said "I have never discussed the details of my private life or sex life in public and I do not consider that there is any public interest in the information and photographs."

8. He referred to his distress, shame, embarrassment, that of his family and friends and the harm to his career prospects were the material published.

9. The Defendant's evidence was that the place was obviously a brothel, entered off the street. The Claimant had indeed left at one stage having inquired as to the price of sex but had later returned.

10. There were factual issues on the Defendant's evidence as to the number of prostitutes with whom the Claimant had engaged in various sexual activities; these were described in some detail. He was said to have instigated them. It was said that it was other customers not prostitutes who had taken the photographs. These other customers, recognising the Claimant in "the lounge", had followed him into the "dungeon", a basement equipped with a rack and other trappings, where some of the activities took place. The prostitutes had also recognised him on arrival. He had stayed for sex even after the photographs had been taken. He had not paid because he said he had insufficient money. He was only called on his mobile phone to get him to pay what he owed.

11. The Defendant also contested the Claimant's claim to value his privacy and his private sex life. A number of newspaper interviews were produced in which the Claimant discussed his private and sexual life, how on one occasion he had settled down and abandoned one night stands, how important sex was, or how much he would like a girlfriend, or liked a particular girlfriend. Other articles about his actual or alleged personal relationships with well known personalities, or about one night stands, although not seemingly the product of any interview by him, had nonetheless not attracted any complaint from him about an intrusion into his private life. Indeed, one article had involved a girl he met in a club describing their night together in some flattering detail and another described his relationship with a girl who had referred to him less flatteringly. Other tender moments had also been reported. None of these had attracted complaint from the Claimant either.

12. The articles also included references to concern by the BBC at the behaviour and profile of its TV presenters including the Claimant, but at a time when he was presenting programmes more clearly directed at children. He had also, three years ago, been involved in a safe sex campaign.

13. The editor of the Sunday People in his statement produced some examples of Press Complaints Commission adjudications which he thought were helpful. I did not regard his assessment of how that body would react to any complaint by the Claimant to the proposed article as persuasive. As the editor in question, and a member of the Commission, his views were not wholly disinterested.

14. The framework for my decision is set by section 12(1), (3) and (4) of the Human Rights Act 1998. These provide:

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

15. The Press Complaints Commission Code of Practice, so far as material, provides:

> "Editors and publishers must ensure that the code is observed rigorously not only by their staff but also by anyone who contributes to their publications.
>
> It is essential to the workings of an agreed code that it be honoured not only to the letter but in the full spirit. The code should not be interpreted so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it prevents publication in the public interest.
>
> Privacy
>
> (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent.

(ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.

Note - Private places are public or private property where there is a reasonable expectation of privacy.

Harassment

They must not photograph individuals in private places (as defined by the note to clause 3) without their consent; must not persist in telephoning, questioning, pursuing or photographing individuals after having been asked to desist; must not remain on their property after having been asked to leave and must not follow them.

The public interest

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes:

(i) Detecting or exposing crime or a serious misdemeanour.

(ii) Protecting public health and safety.

(iii) Preventing the public from being misled by some statement or action of an individual or organisation.

2. In any case where the public interest is invoked, the Press Complaints Commission will require a full explanation by the editor demonstrating how the public interest was served.

3. In cases involving children, editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of the child."

16. The asterisked clauses include "Privacy" and "Harassment".

17. Article 10 of the European Convention on Human Rights provides:

"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 and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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, in the interests of national security, territorial integrity or public safety, 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."
>
> Article 8 of the Convention provides:
>
> "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 in the interests of national security, public safety or the economic well-being of the country, 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."

18. The application of these provisions was considered by the Court of Appeal in *Douglas v. Hello! Ltd.* 2001 QB 967. Keene LJ, in a passage with which Brooke and Sedley LJJ concurred, said:

> "150. For my part, I do not accept that there is any need for conflict between the normal meaning to be attached to the words in section 12(3) and the Convention. The subsection does not seek to give a priority to one Convention right over another. It is simply dealing with the interlocutory stage of proceedings and with how the court is to approach matters at that stage in advance of any ultimate balance being struck between rights which may be in potential conflict. It requires the court to look at the merits of the case and not merely to apply the American Cyanamid test. Thus the court has to look ahead to the ultimate stage and to be satisfied that the scales are likely to come down in the applicant's favour. That does not conflict with the Convention, since it is merely requiring the court to apply its mind to how one right is to be balanced, on the merits against another right, without building in additional weight on one side. In a situation such as the one postulated by Mr Tugendhat, where the non-article 10 right is of fundamental importance to the individual, such as the article 2 right to life, the merits will include not merely the evidence about how great is the risk of consequences for an application if the risk materialises. The nature of the risk is part of the merits, just as it would be at trial when the balance had to be struck. That is as relevant at the interlocutory stage as it would be at trial. But that does not require any strained interpretation of section 12(3)."
>
> "153. It is impossible to accept that a statutory provision requiring a court to consider the merits of the case and to be satisfied that the balance is likely to be struck in favour of the applicant before prior restraint is to be granted is incompatible with the Convention. It follows that no strained reading of the language of section 12(3) is needed to render it compatible with Convention

> rights. The wording can be given its normal meaning. Consequently the test to be applied at this stage is whether this court is satisfied that the applicant is likely to establish at trial that publication should not be allowed. Even then, there remains a discretion in the court."

19. Mr Tugendhat QC for the Claimant submitted that section 12(3) should be applied as if the test were not discernibly different from the familiar interlocutory test of whether the case had a real prospect of success. He referred me to the later judgment of Sir Andrew Morritt V-C in *Imutran Ltd v Uncaged Campaigns Act* 11th January 2001 in which he had said of section 12 of the Human Rights Act:

> "17. Counsel for the defendants submitted that the requirement of likelihood imposed a higher standard than that formulated in American Cyanamid. I did not understand this to be disputed by counsel for Imutran. He submitted that whatever the standard was his case satisfied it. Theoretically and as a matter of language likelihood is slightly higher in the scale of probability than a real prospect of success. But the difference between the two is so small that I cannot believe that there will be many (if any) cases which would have succeeded under the American Cyanamid test but will now fail because of the terms of s.12(3). Accordingly I propose to apply the test of likelihood without any further consideration of how much more probable that now has to be."

20. I am not sure that this fully supports Mr Tugendhat's submission. In any event, I have some difficulty in seeing how the approach required by section 12(3) can be other than that the Claimant must show that it is more probable than not that he will succeed in obtaining an injunction at trial. I cannot envisage, as a matter of ordinary English, an injunction which is likely to be granted but more probably than not will be refused. If Parliament had intended the relevant test to be whether the Claimant had a real prospect of success, it would have used that familiar legal phrase. I consider that it intended to impose the discernibly more rigorous requirement which it did in this particular contest of freedom of expression.

21. Nonetheless, in view of the submission by Mr Tugendhat that the requirements of section 12(3) were to be treated as not discernibly different from the real prospect test and in view of the potential for any injunction granted on that basis to be discharged soon on fuller consideration, I applied the real prospect test to the question of whether the Claimant would obtain an injunction at trial. In the event, it made no difference to my conclusions. I do consider it likely, or more probable than not, that the Claimant would succeed at trial in obtaining an injunction to prevent the publication of photographs of him inside the brothel. Plainly I did not consider it likely or more probable than not that he would obtain injunctive relief in respect of the written material.

22. I now turn to the factual basis upon which I considered matters. Mr Tugendhat submitted that, in view of the evidential conflict, I should and indeed had to approach matters on the basis that what the claimant stated was correct. I do not agree. The existence and nature of any factual disputes are all part of the factors which are material

to my judgment as to the prospects of injunctive relief being granted. There is no obligation to assume that what a Claimant says is true. However, as Mr. Spearman pointed out, the areas of factual agreement included the fact that the Claimant had visited the brothel, had left only to return later, had engaged in sexual activity there and that he had been in a room with at least three prostitutes. He did not claim to have paid. The text message was admittedly sent by one of the prostitutes, who had made frequent phone calls to him. The Claimant was silent as to the nature of the rooms inside the premises, but that could be consistent with a very drunken state. However, the hearsay evidence of Mr Bays, a partner in Davenport Lyons, Solicitors for the Defendant, detailed what he had been told by the prostitute Isabella Savage, as to the layout of the premises and the furnishings of the rooms in the basement flat, all of which would be readily verifiable; I consider that therefore likely to be true. It is surprising that it was not apparent to the Claimant on his first arrival that he was in a brothel and that that only became apparent, on his later return and after he had engaged in sexual activities beyond the strip routine offered on his first visit.

23. Mr Spearman also submitted that the truthfulness of what the Claimant said about not discussing "the details" of his private or sex life in public rather depended on what he meant by "the details". Certainly, to those unaware of the Claimant and unfamiliar with the printed media interest in him, what he said could easily have been taken as suggesting a publicly more reticent persona than in fact appeared to be the case from the material placed before me by the Defendant. I approached the Claimant's evidence with some scepticism.

24. As the submissions progressed, I reached the conclusion that different considerations, or a different balancing of the same considerations might apply to differing aspects of what the Defendant wished to publish. The Claimant had not seen and was not shown the proposed article, and it was not produced to me either. However it seemed to me that there were three aspects to be considered; first, the very fact that the Claimant had visited a brothel, returned to it and had engaged in sexual activity there. It would be inevitable that even if no mention were permitted of any sexual activity, the inference would be drawn that it had taken place rather than that the brothel was being used as a venue for late night drinking; second, the details of the sexual activity in the brothel and third, the photographs of the Claimant inside the brothel, which may or may not have shown sexual activity.

25. I approached these aspects on the basis that, by virtue of section 12(4), I had to have particular regard to the Article 10(1) right to freedom of expression not just of the Sunday People, but also of the prostitute who too had information of a journalistic nature which she wished to impart. In examining the effect on their freedom of expression, the scope of the permitted restrictions in Article 10(2) are very relevant. These restrictions must be "prescribed by law" i.e. easily accessible and formulated with sufficient precision for the ordinary citizen to rely upon them to regulate his conduct: *Sunday Times v United Kingdom (No.)* [1979] 2 EHRR 245 and *Rantzen v Mirror Group Newspapers Ltd* [1994] QB 670 at p 693. They must also be necessary in a democratic society for the protection of the legitimate aim or aims of the law of confidence (i.e. they must be proportionate to the end pursued, securing what is necessary e.g. for the protection of confidence and no more). The relevant restrictions

relied on here by the Claimant were the protection of the rights of others, which included the right to privacy as set out in Article 8 of the ECHR, and the prevention of the disclosure of information received in confidence. Thus the application of Article 10 itself brings in the application of Article 8. This is the approach of Sedley LJ in paragraph 133 of his judgment in *Douglas v Hello! Ltd.*

> "Two initial points need to be made about section 12 of the Act. First, by subsection (4) it puts beyond question the direct applicability of at least one article of the Convention as between one private party to litigation and another - in the jargon, its horizontal effect. Whether this is an illustration of the intended mechanism of the entire act, or whether it is a special case (and if so, why), need not detain us here. The other point, well made by Mr Tugendhat, is that it is "the Convention right" to freedom of expression which both triggers the section see section 12(1) and to which particular regard is to be had. That Convention right, when one turns to it, is qualified in favour of the reputation and rights of others and the protection of information received in confidence. In other words, you cannot have particular regard to article 10 without having equally particular regard at the very least to article 8."

26. The availability of the right to privacy as a basis for a degree of restriction on the right of freedom of expression can be derived also from section 12(4)(b) of the 1998 Act and the Code of Practice which in the section headed "Privacy" sets out the language of Article 8(1), and a little more. I see this as the approach of Brooke LJ in paragraphs 94 and 95 of his judgment in *Douglas v Hello! Ltd.*

> "It appears to me that the existence of these statutory provisions, coupled with the current wording of the relevant privacy code, mean that in any case where the court is concerned with issues of freedom of expression in a journalistic, literary or artistic context, it is bound to pay particular regard to any breach of the rules set out in clause 3 of the code, especially where none of the public interest claims set out in the preamble to the code is asserted. A newspaper which flouts clause 3 of the code is likely in those circumstances to have its claim to an entitlement to freedom of expression trumped by article 10(2) considerations of privacy. Unlike the court in *Kaye v Robertson* [1991] FSR 62, Parliament recognised that it had to acknowledge the importance of the article 8(1) respect for private life, and it was able to do so untrammelled by any concerns that the law of confidence might not stretch to protect every aspect of private life.
>
> It follows that on the present occasion it is not necessary to go beyond section 12 of the 1998 Act and clause 3 of the Press Complaints Commission's code to find the ground rules by which we should weigh the competing considerations of freedom of expression on the one hand and privacy on the other."

27. It does not seem to me to be necessary to find that the tort of breach of privacy does or does not exist in order for the effect of section 12(1), (3) and (4) to be that the Convention right of privacy must be taken into account. In view of the uncertainty, to put it no higher, as to the existence of a tort of breach of privacy, Parliament cannot have assumed that it existed or have intended to create it by implication with all its shape and content so ill-defined.

28. It may very well be that Parliament intended section 12(4) to be given effect, not through the creation of direct "horizontal effects" in the form of a limited new privacy related cause of action applicable only in section 12 cases, but through the approach which the Courts would adopt to the scope of existing causes of action, in particular breach of confidence. This is the approach of Keene LJ in *Douglas v Hello! Ltd.* at paragraph 166.

> "Since the coming into force of the Human Rights Act 1998, the courts as a public authority cannot act in a way which is incompatible with a Convention right: section 6(1). That arguably includes their activity in interpreting and developing the common law, even where no public authority is a party to the litigation. Whether this extends to creating a new cause of action between private persons and bodies is more controversial, since to do so would appear to circumvent the restrictions on proceedings contained in section 7(1) of the Act and on remedies in section 8(1). But it is unnecessary to determine that issue in these proceedings, where reliance is placed on breach of confidence, an established cause of action, the scope of which may now need to be approached in the light of the obligation on this court arising under section 6(1) of the Act. Already before the coming into force of the Act there have been persuasive dicta in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804, 807 and *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 281 cited by Sedley LJ in his judgment in these proceedings, to the effect that a pre-existing confidential relationship between the parties is not required for a breach of confidence suit. The nature of the subject matter or the circumstances of the defendant's activities may suffice in some instances to give rise to liability for breach of confidence. That approach must now be informed by the jurisprudence of the Convention in respect of article 8. Whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more than deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned."

29. I regard those three approaches as compatible with the final decision of Dame Butler-Sloss, President, in *Venables v News Group Newspapers Ltd.* [2001] Fam 430.

30. These jurisprudential bases still leave the essential question as being how to balance what are competing rights, or at the interlocutory stage, what is the likely outcome of such a balancing exercise at trial.

31. The Article 10(1) rights, as I have said, are not just those of the Sunday People but also those of the prostitute who plainly takes a different view from the Claimant as to whether what she did and with whom was a private or confidential matter so far as she was concerned. Mr Spearman submitted that in balancing the competing rights I should follow the approach set out in *Sunday Times v United Kingdom* (1) [1979] 2

EHRR 245 paragraph 65 in which the European Court of Human Rights said that the Court in deciding whether a given interference with free expression was necessary in a democratic society "is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted." He submitted that as Hoffmann LJ said in *R v Central Independent Television Plc* [1994] Fam 192, 201-204:

> "publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what Judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which Government and Judges, however well motivated, think should not be published. It means the right to say things which "right thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute ... the principle that the press is free from both Government and judicial control is more important than the particular case."

32. Mr Spearman also referred to *Reynolds v Times Newspapers Ltd.* [2001] 2 AC 127 in which Lord Nicholls said:

> "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration and the means employed must be proportionate to the end sought to be achieved ... The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

33. In the same case Lord Steyn said:

> "Exceptions to freedom of expression must be justified as being necessary in a democracy. In other words, freedom of expression is the rule and regulation of speech is the exception requiring justification."

34. I accept Mr Spearman's submission that it requires a strong case to restrain the media from publication of information and that although the right to confidence and indeed the right to privacy are recognised exceptions within Article 10(2), the onus of proving that freedom of expression must be restricted is firmly upon the Claimant who seeks such a restriction. The restriction sought must be shown to be in accordance with the law and justifiable as necessary to satisfy a need which has been convincingly demonstrated within the exceptions and which must be proportionate to the legitimate aim pursued.

35. Mr Tugendhat submitted that, by whatever route, the claimant's confidential relationship would be breached and his privacy disrespected and intruded upon in all three aspects of the proposed article.

36. Mr Tugendhat referred me to a number of authorities in support of his general proposition that sexual relations should be regarded as confidential and that confidentiality could arise from the nature of the circumstances, and did not require any express or implied agreement to that effect.

37. He referred me to *Stephens v Avery* [1988] Ch 449 and *Barrymore v News Group Newspapers Ltd.* [1997] FSR 600. He referred me to what Keene LJ said at paragraph 168 in *Douglas v Hello! Ltd.:*

> "But any consideration of article 8 Rights must reflect the Convention jurisprudence which acknowledges different degrees of privacy. The European Court of Human Rights ruled in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 that the more intimate the aspect of private life which is being interfered with, the more serious must be the reasons for interference before the latter can be legitimate: see p 165, para 52. Personal sexuality, as in that case, is an extremely intimate aspect of a person's private life."

38. He also prayed in aid the judgment of the European Court of Human Rights in *PG and JH v UK* dated 25th September 2001 in which, dealing with a complaint in that covert listening devices had been used by the police at a flat and at a police station to record the voices of the applicant and that the police had also used video surveillance to obtain images in a way which interfered with the applicants' rights under article 8, the Court said:

> "1. Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by article 8 ... .
>
> 2. There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures affected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in public a person's reasonable expectations to privacy may be significant, though not necessarily a conclusive factor. The person who walks down the street will inevitably be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (e.g. a security guard viewing through close circuit television) is a similar character. Private life considerations may arise however once any systematical permanent record comes into existence of such material from the public domain. ..."

39. Mr Tugendhat also relied upon the judgment of Jack J in *A v B & C (No. 2)* [2001] 1 WLR 234 in which the Judge declined to discharge an injunction he had previously granted restraining the publication of details of the sexual relations between a footballer and two women while the footballer was married. The Judge had held that in the

context of modern sexual relations the protection of the confidentiality concerning sexual relations within marriage should be extended to relationships outside marriage. The confidentiality attached not just to the fact of the relationships but also to the detail of the sexual conduct which had occurred.

40. Mr Tugendhat also referred me to a number of cases dealing with the use of photographs taken of people without their consent and the extent to which that is an interference with their private lives. In *R v Loveridge* (2001) EWCA Crim 973 Lord Woolf CJ said:

> "... in any event secret filming in a place to which the public has free access can amount to an infringement even where there is no private element to the events filmed. Secret filming is considered objectionable because it is not open to those who are the subject of the filming to take any action to prevent it: *R v Broadcasting Standards Commission ex parte British Broadcasting Corporation (Liberty intervening)* [2000] 3 All ER 989, [2000] 3 WLR 1327 CA 6th April 2000."

41. In *A v B & C (No 1)* McKay J on 2nd March 2001 granted an injunction to restrain publication without her consent of photographs taken of the Claimant with her consent. These photographs had been taken before the Claimant achieved some subsequent fame. In *Amanda Holden v Express Newspapers* on 7th June 2001 Eady J granted an injunction restraining topless photographs taken of the actress while she was in a hotel garden. Mr Tugendhat submitted that so far as the publication of photographs was concerned the Courts had been very careful to protect the confidentiality or privacy of those who were photographed without their consent or where a permanent record was to be made of a photograph taken in a public place. This applied with particular force to photographs which were taken without the Claimant's consent in a private place, perhaps engaged in sexual activity, and whatever might be said about a lack of confidentiality attaching to sexual activity in a brothel, there could be no justification for publishing photographs of what went on, even if those were photographs taken by a security CCTV camera.

42. Mr Tugendhat also submitted that the approach of the Press Complaints Commission showed that it was willing to regard as a breach of privacy and intrusive the publication of the salacious and intimate details of sexual activity engaged in by people who had not sought to make the intimate details of their sex life public in any way. The details themselves were matters in respect of which there was no public interest.

43. He also submitted that the behaviour of the Sunday People involved breaches of the Code of Practice in that the source of its information had harassed the Claimant in order to obtain money from him, that the source had stolen the mobile phone which the Claimant left behind by mistake at the brothel and most importantly that the newspaper in paying money, as it was to be inferred it had done, to the prostitute for her story was enabling the aim of the prostitute in apparently blackmailing the Claimant to be

realised. Such breaches should weigh heavily in favour of the grant of the injunction sought.

44. Mr Spearman submitted that there was no free standing cause of action for breach of privacy and that so far as English law was concerned, the effect of the judgments in *Douglas v Hello! Ltd.* was not to create one. He submitted, in reliance upon the judgment of Brooke LJ and of Keene LJ that the trappings of privacy were identical to confidence or a breach of the right to privacy little more was involved than deciding what label should be attached to the course of action. That case did not provide for any more extensive restriction on the right to freedom of expression than was created already by the developing law on confidentiality. He referred me to the decision of the *Court of Appeal in Secretary of State for the Home Department v Wainwright and Another Court of Appeal Times Law Report 4.1.02*. He submitted that the Court of Appeal had held that no tort of privacy had been developed, that that decision was binding on me and meant that any contrary dicta, particularly of Sedley LJ, in *Douglas v. Hello! Ltd.* should not be relied on.

45. Mr Spearman submitted that the cases to which Mr Tugendhat referred did not support the proposition that between unmarried transitory sexual partners there was any duty of confidentiality such that either of them was not free to discuss with the whole world the sexual conduct which they have experienced with the other. He submitted that the information in the present case had no quality of confidence about it of the sort necessary to attract the protection of confidentiality. Indeed he submitted that what the Claimant sought to protect was not confidential information in any ordinary sense but simply the knowledge that was acquitted by the prostitute from her own experiences with the Claimant. Whilst Mr Spearman recognised that in certain circumstances the law would impose an obligation of confidentiality as it did in *Venables*, that was a very strong case in which the life of *Venables* was potentially at risk were the information as to his whereabouts disclosed.

46. Mr Spearman submitted that *Argyll v Argyll* [1967] Ch 302 was only concerned with the question of whether the Duke owed to the Duchess a duty of confidence with regard to information relating to her private life communicated by her during the marriage. The case was seen as a case which related to marital confidences in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109. In *Stephens v Avery* [1988] Ch 449 it appeared to be assumed by the Vice-Chancellor that whilst the details of people's sexual lives would be high on the list of those matters which they regarded as confidential, the Vice-Chancellor appeared to accept as correct, the premise for the argument that one party to a lesbian relationship could restrain publication by a third party of information concerning the relationship which she had communicated to the third party in confidence, that as between unmarried sexual partners there was no duty of confidentiality so the both parties were free to discuss the matter with the whole world. Likewise *Barrymore v News Group Newspapers Ltd.* drew a distinction between the disclosure of the existence of a sexual relationship which might not amount to a breach of confidence and the publication of details about what one party of the relationship said to the other about the first party's other relationships in particular marital relationship, which crossed the line to a breach of confidence. Disclosure of information about one relationship in the course of another relationship, each of which

involved a degree of confidentiality, did not support the proposition that there was a duty of confidence owed by one party to an unmarried sexual relationship to the other party not to disclose to whom so ever he or she pleased, details of the sexual experience which they had between themselves.

47. Mr Spearman was critical of the reasoning of Jack J in *A v B* on a very large number of points. In particular he submitted that the extension of the protection of the law of confidence from sexual relations within marriage to any form of sexual activity was an untenable extension of the law of confidence. He submitted that the unreported decision of Lindsay J in *Shepherd v News Group Newspapers Ltd.*, in which the lewd bragging of the directors of a football club about their experiences in a Spanish brothel were held not to be confidential, was a more exact parallel to the circumstances here.

48. Mr Spearman then submitted that if the material were in principle capable of being confidential, it had ceased to be confidential in the circumstances here or had ceased to be entitled to the protection of the law as confidential information because some of the essential features of the Claimant's personality which it was sought to keep confidential were in the public domain or ought to be published in the public interest. As to the former he relied upon the extent to which the Claimant had already put his personal and sexual life into the public domain, consenting to the burnishing of his image as a man attractive to women and of considerable sexual prowess. He used this image to further his career as the sort of person whom the BBC would wish to employ in the presentation of popular music and other programmes for teenagers. The Claimant was prepared to discuss his private life and aspects of his sexual life, albeit not the details of his sexual activity, to that end. He did not complain about more explicit details of his sexual behaviour being placed in the public domain at least to the extent to which it portrayed him in a flattering light. He could not complain now if another sexual partner put material about his sexual activity in to the public domain which was of a less flattering nature.

49. Mr Spearman placed some weight upon *Woodward v Hutchins* [1997] 1 WLR 760. The incident in that case took place on a large jet aircraft and was known to the passengers on the flight. Mr Spearman emphasised that in that case the disclosure was made by an employee, who had signed a contract in which he had promised not to pass any information to a third party concerning the pop star whose sexual activities were in question. Mr Spearman referred me to the judgment of Lord Denning at page 763h in which the Master of the Rolls said:

> "If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of their afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth. ...."

50. Bridge LJ said:

> "it seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light."

51. Mr Spearman submitted that it was in the public interest that this material should be known because the BBC had made it clear that it regarded presenters of programmes of the sort which the Claimant presented, as owing some obligation to their viewers to behave in a responsible manner or at least in a manner consistent with the image which the BBC, its youngsters and teenage viewers and listeners and indeed their parents were entitled to know what sort of man it was who was presenting their programmes and for that reason the public interest was not adequately satisfied by the representation to the BBC in private of the material which the Sunday People had garnered.

52. Mr Spearman submitted that whatever adverse view I might have taken of the behaviour of the prostitute in seeking to obtain money in phone calls and text messages to the Claimant, there was no basis for suggesting that the Sunday People had either engaged in such behaviour or had encouraged or facilitated it. The newspaper had made no demands for money nor had it made any harassing phone calls. It was quite the reverse. The newspaper wanted to publish the article and was not seeking any money from the Claimant in return for not publishing it. It could not be said to be facilitating any form of blackmail because the essence of blackmail was that the material would remain unpublished in return for payment.

53. Mr Tugendhat submitted that the defences to a breach of confidentiality of consent to the publication, that the material was already in the public domain and that there was a public interest in the publication of the material were all specific to the particular material to which it was sought to publish and that it was impermissible to rely upon other material which had been published so as to show consent to this new material being published or to show that this new material was already in the public domain. Mr Tugendhat submitted that insofar as there was a public interest in the material being published the relevant public interest could easily be satisfied by its being communicated to the BBC.

54. I now turn to my conclusions. I considered first whether I should prevent the publication of the fact that the Claimant went to a brothel and engaged in sexual activity there.

55. I have very real reservations about both the approach of Jack J, in *A v B and C (No 2)*, in apparently treating as confidential all the facts concerning all sexual relations within any relationship outside marriage, and about the particular application of his approach in that case.

56. However, I considered that it would be very undesirable to have significant differences of approach to the granting of urgent injunctions amongst duty judges such that the

publication or otherwise of news items varied unduly according to who was the particular duty judge. I considered that point was particularly important in view of the imminence of the Court of Appeal hearing of the appeal from Jack J. I start therefore from the basis that I should regard the application in that case by Jack J of the protection of confidentiality as correct without accepting that the full range of all sexual relations in any relationship should be protected by confidentiality.

57. There is a whole range of relationships in human life in which sexual activity may occur, from marital relationships to unmarried but long term partnerships, to extra marital relationships long and short term, from one night stands to yet more fleeting encounters with prostitutes. Indeed it may well be that the very concept of a relationship for the purpose of confidentiality is simply inapplicable to such transitory or commercial sexual relationships. Sexual activities which can be intimate, private and personal and which might attract confidentiality can fall far short of full sexual intercourse; a passionate embrace could have all those qualities. Intimate physical relations can occur in a range of places from a private house to a hotel bedroom, to a car in a secluded spot, to a nightclub or indeed to a brothel.

58. The nature of the relationship, the nature of the activity and all the other circumstances in which that activity takes place, affect the attribution by the law of the quality of confidentiality to the acts in question. Indeed apparently similar circumstances could justifiably lead to different conclusions as to confidentiality depending on the individual personalities engaged.

59. I consider it impossible however to invest with the protection of confidentiality all acts of physical intimacy regardless of circumstances. I consider it artificial to draw a line at full sexual intercourse in the context of confidentiality, such that anything short of that is not confidential. Whilst the degree of intimacy is a very relevant factor, it cannot be taken in isolation from the relationship within which the physical intimacy occurs and from the other circumstances particularly the location. I do consider Jack J is right to point out that the protection of confidentiality in relation to any particular set of circumstances is also affected by the nature of the person to whom disclosure is proposed to be made, whether to partner, friend or lawyer or to the press for wider publication. The impact of disclosure on others, for example the children of a relationship may also be relevant to the very existence of confidentiality.

60. Sexual relations within marriage at home would be at one end of the range or matrix of circumstances to be protected from most forms of disclosure; a one night stand with a recent acquaintance in a hotel bedroom might very well be protected from press publicity. A transitory engagement in a brothel is yet further away.

61. If the sexual relations involved in the relationships in *A v B* are protected by confidentiality, which for these purposes I shall assume, that degree of protection represents to my mind the outer limit of what is confidential. In each instance the relationship endured longer than the short period of time necessary for sexual activity to

be undertaken, and the more intimate physical relations took place in a hotel bedroom. I distinguish circumstances there from those with which I am concerned here.

62. The Claimant went to what from the evidence was obviously a brothel. Anyone passing by could have seen him going in and coming out and have made simple enquiry as to what the place was. His face is apparently well known and could attract that degree of interest. A brothel is a place for the most transitory of sexual relationship based on the payment of money for sexual services. It is likely that other customers and a number of prostitutes and staff will see who comes and goes. More than one prostitute was involved. The relationship, if it can indeed be called a relationship without stretching the word to the point of depriving it of meaning, lasted no longer than was necessary for the sexual activity to be undertaken with an allowance for necessary and ancillary matters. I do not consider this brothel to be a private place for the purposes of the Code.

63. If this sexual activity in that fleeting relationship in this location were invested with confidentiality, the concept of confidentiality would become all embracing for all physical intimacy unless either some artificial line is to be drawn in relation to particular types of sexual act or unless those acts were undertaken under the public gaze.

64. I can see no reason why the question of confidentiality should be judged solely from the point of view of one participant in the activities and in the relationship, if it can be so called. The prostitutes clearly took a different view of the confidentiality of that they had seen and done with the Claimant. If a well known man has sexual relations with a prostitute in a brothel, the desire on his part to keep their actions and "relationship" confidential and the desire on the part of the other to exploit their actions and relationship commercially are irreconcilable. There was no express stipulation for confidentiality. If such a stipulation had been sought, it might have been agreed for a fee or refused because of the implicit admissions as to the potential for further profitable exploitation of the anticipated actions inherent in the request. It is not inherent in the nature of a brothel that all or anything that transpires within is confidential. The relationship between a prostitute in a brothel and the customer is not confidential of its nature and the fact that they participate in sexual activity does not in my judgment constitute a sufficient basis by itself for the attribution to the relationship, if such it be, of confidentiality. It is difficult to see why the protection of confidentiality should be imposed essentially for one party to a fleeting transaction for money when there is no reason to suppose that at the time the other party would have considered the relationship or the activity confidential for one moment.

65. In any event even if this fleeting relationship and the activity within it were confidential in principle, in these circumstances the exceptions to that protection were relevant. These were the Claimant had consented to the publication of the material, that the material was in the public domain and that there was a public interest in the publication of the material.

66. Mr Tugendhat submitted and I accept that within the law of confidentiality in its normal reach those defences are specific to the material in question. However I do not consider that that can represent the whole picture as the law of confidence extends to embrace more closely the related but different concept of privacy. If these events are to be regarded as confidential, it would involve a very considerable extension of the law of confidence, the basis for which would be found in the contest of freedom of expression, in the right to privacy within Article 8. If the protection of the law, whether labelled confidentiality or privacy, or whether derived from the direct application of Article 8 via Article 10(2) or whether via the PCC Code of Practice, is to be extended by virtue of section 12 to Article 8 privacy, the resolution of the conflict between Article 10 and Article 8 cannot be dependent on narrowly defined exceptions to the law of confidentiality appropriate for a more restricted concept and inapt for so greatly extended a protection.

67. Section 12 specifically requires this protection for Article 8 rights be balanced with the right to freedom of expression. The language of Article 8(2) and Article 10(2) each bring in the competing rights contained within the other article. The striking of that balance involves an examination of the combination of circumstances present here. It is not a balance to be struck by the application of exceptions to the law of confidentiality derived from a jurisprudence from which the right to privacy was absent and where confidentiality was more narrowly circumscribed. The passages from the speeches in the House of Lords in *Reynolds v Times Newspapers Ltd.* and the other decisions on the freedom of expression to which I refer in paragraphs 31 and 32 above also justify taking a broader view of the exceptions to the law of confidentiality as its reach extends. I consider that the application of section 12(4)(a) permits a broader view to be taken of the material already in the public domain.

68. Mr Spearman correctly characterised the circumstances upon which he relied by way of exceptions to the protection of confidentiality, were it to arise in this case, as reflecting in part a consent by the Claimant to this sort of material being published, the presence of this sort of material about the Claimant being in the public domain already and the public interest in its publication. The circumstances here also are much stronger in that respect than those with which Jack J was dealing in *A v B.* I consider that the Claimant has pleaded aspects of his private life, whom he has intimate relations with and his general attitude towards sexual relations and personal relationships into the public domain, discussing them willingly so as to create and project an image calculated to enhance his appeal to those who do or would employ him, through enhancing his fame, popularity and reputation as a man physically and sexually attractive to many women. He has not objected either to those with whom he has had sexual relations discussing those relations both in general and in more explicit and in more intimate detail. These references have been both flattering and to some extent less so. He has courted publicity of that sort and not complained of it when, hitherto, it has been very largely favourable to him. The comments of Lord Denning and Lord Justice Bridge in *Woodward v Hutchins* are apposite. The Claimant cannot complain if the publicity given to his sexual activities is less favourable in this instance.

69. I consider also that there is a real element of public interest in the publication at least of the first aspect of the proposed article with which I am currently concerned. The BBC

employs him and projects him through his role on "Top of the Pops" to younger viewers, and also to listeners on his programmes as a suitable person, for them to respect and to receive via the television into their homes. Whilst he may not be presented as a role model, nonetheless the very nature of his job as a T.V. presenter of programmes for the younger viewer means that he will be seen as somebody whose lifestyle, publicised as it is, is one which does not attract moral opprobrium and would at least be generally harmless if followed. I consider that the BBC itself recognises this in comments made to the press about the image of its presenters. The activity in question here may make viewers or the parents of viewers react differently. It is insufficient in my judgment to overcome this point for Mr Tugendhat to say that the newspaper could take its information to the BBC. The free press is not confined to the role of a confidential police force; it is entitled to communicate directly with the public for the public to reach its own conclusion. Indeed the more that Mr Tugendhat emphasised the potential degree of damage to the claimant's employment from the publication of the article the more it seemed to me that he was emphasising the public interest in its publication.

70. I also recognise that the prostitute appeared to be engaged in blackmail but I did not consider that publication was illegitimate on that account. The apparent attempt to blackmail the Claimant did not remove her freedom of expression nor her right to seek publication of the material. The Sunday People did not engage in improper acts. The material had not been obtained as a consequence of blackmail but rather because of its failure. Nor was the material obtained in order to blackmail the Claimant save perhaps in relation to the photographs.

71. Even if the acts in these circumstances and regardless of any law of confidentiality were private and protected by Article 8, those considerations simply mean that a balance has to be struck between the competing Article 10 and Article 8 interests. I consider that they would clearly be struck against the grant of an implication in relation to the first aspect of the proposed publication.

72. The second aspect which I considered was whether the details of the sexual activity should be restrained from publication. I did not see the proposed article and I was concerned about both the drafting of any sufficiently clear injunction as well as the extent to which a specific and clear injunction would involve the Court in assuming an inappropriate degree of interference with the editorial function. However, Mr Spearman accepted that an appropriate injunction could be framed and that the editor would abide by its intent were it imposed.

73. The balance of competing rights was less clear here, though of course it had to be recognised that once the information that the Claimant had engaged in sexual activities in a brothel was made public, the extra degree of intrusion into his privacy from the revelation of the details of the activity, would be less than if no mention of his sexual activity in the brothel at all had ever been made.

74. I do not consider it likely that the nature or detail of the sexual activities engaged in within the brothel are confidential. They are activities with a number of prostitutes in return for promises of payment in a brothel accessible to anyone with the money and the inclination. There is nothing about the activity, the participants or the location beyond the mere fact that the activities were of a sexual nature to warrant the imposition of confidentiality. It is difficult to see that the activities were carried out in the course of a relationship that had any purpose beyond sexual activities. Any confidentiality would be one sided. No confidentiality was sought by the Claimant nor was it assented to by the prostitutes nor is it something which is obviously implicit from their engagement in sexual activities.

75. If the scope of confidentiality is extended so as to protect generally intrusions into privacy, it is clear that there is a greater degree of intrusion into privacy from the disclosure of the details of the sexual activity engaged in by the Claimant with the prostitutes. This makes the balance between Article 10 and Article 8 less clear. But it needs to be recognised that what may be private to the Claimant may lack any such quality from the point of view of the prostitute. I also consider that the exceptions to the protection of confidentiality provided by consent, the fact the material might be already in the public domain and the public interest in the publication of the material are much less weighty here. I can see no public interest in the publication of the details of the activity. The Claimant has himself never put the details of his activity into the public domain. The details do not relate to the burnishings of his image and it is only in respect of a failure to complain about others with whom he has had a relationship, publicising those details in the press, from which any form of consent could be inferred. It may well be that consent cannot readily be inferred and the Claimant has a good case for saying that he has not consented to the publication of such details through merely failing to object to others revealing them.

76. I concluded however that an injunction would be unlikely to be granted at trial because in the resolution of the conflict between Article 10 and Article 8, the freedom of expression of the Sunday People and of the prostitute would be given greater weight than the extra degree of intrusion into the Claimant's privacy. I consider that the scales would be likely to come down in favour of the freedom of expression of the newspaper and of the prostitutes unless it was clear that there was a strong case for inhibiting it. I do not consider that the confidentiality or privacy case in relation to the details of the sexual activity is nearly strong enough to warrant the degree of restriction involved. I do not think that confidentiality or privacy is inherent in the fact that fees were paid or promised to be paid for sexual activities. Sexual conduct for payment in a brothel where other people had access and could see what was happening, where a number of prostitutes at least to some degree were engaged with the Claimant and where it is clear there was no stipulation for or mutual joint expectation of confidentiality, means that the case for one party to such actions to claim that they were private is not strong.

77. I now turn to the third aspect, which concerns the photographs of the Claimant in the brothel. There is an issue as to whether they were taken by one of the prostitutes or by another customer but there is no issue but that they were not taken with the consent of the Claimant. The evidence suggests that the photographs include some which show the Claimant engaged in some forms of sexual activity. I concluded that it was likely

that at trial an injunction would be granted to restrain the publication of any photographs of the Claimant inside the brothel and accordingly I granted an injunction restraining the Sunday People from publishing any such photographs and also requiring the Sunday People to preserve the photographs and make no other use of them pending a decision as to what was to happen to them.

78. The authorities cited to me showed that the Courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish. This protection extended to photographs, taken without their consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in public or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars. I concluded that this part of the injunction involved no particular extension of the law of confidentiality and that the publication of such photographs would be particularly intrusive into the Claimant's own individual personality. I considered that even though the fact that the Claimant went on to the brothel and the details as to what he did there were not to be restrained from publication, the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a peculiarly humiliating and damaging way. It did not seem to me remotely inherent in going to a brothel that what was done inside would be photographed, let alone that any photographs would be published.

79. I could see no public interest in their public publication. There was no consent to the photographs being taken or published and there was no equivalent material that had been placed in the public domain either by the Claimant or by acquaintances of his, without objection on his part. I further took the view that taking the Defendant's case as being that the photographs had been taken by a customer, the only freedom of expression that was at issue was that of the Sunday People. I considered that the right to freedom of expression by publication of such photographs was outweighed by the peculiar degree of intrusion in to the integrity of the Claimant's personality which their publication would entail.

80. I also considered that if indeed the photographs had been taken by a customer as the Defendant claimed, though the same would apply if they had been taken by a prostitute as the Claimant contended, the only purpose for which such photographs would have been taken, would have been to facilitate the blackmailing of the Claimant. Although the Sunday People would not be publishing the photographs for the purposes of blackmail, it would be publishing information which had been acquired for the purposes of blackmail. I considered that that would have involved a breach of the Code of Practice. That factor does not apply in relation to the Claimant going to the brothel and engaging in sexual activity there.

81. I gave my ruling accordingly.

Judgment Approved by the Court for handing down
(subject to editorial corrections)