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Case No: HQ06X02997

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th November 2006

Before :

THE HON. MR JUSTICE EADY

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Between :

X & Y	**Claimants**
- and -	
THE PERSON OR PERSONS who have offered and/or provided to the publishers of the Mail on Sunday, Mirror and Sun newspapers information about the status of the Claimants' marriage	**Defendants**

- -
- -

James Price QC and Matthew Nicklin (instructed by **Schillings**) for the Claimants
Richard Spearman QC (instructed by **Farrer & Co**) for MGN Limited and News Group Newspapers Limited
Andrew Caldecott QC (instructed by **Reynolds Porter Chamberlain LLP**) for Associated Newspapers Limited

Hearing dates: 13th and 16th October 2006

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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 HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

The obtaining of an interim injunction

1. On 5 October, at a private hearing, I granted what is nowadays often referred to as a John Doe injunction against "persons unknown" but identified by description. Reliance was placed for this purpose on the reasoning of Sir Andrew Morritt V.-C., as he then was, in *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 163. The order was intended to prevent the further dissemination of allegations about the state of the Claimants' marriage, which are said to be inherently confidential in character and, in so far as the circumstances were known by their friends or acquaintances, it would have been obvious to them that the information was subject to a duty of confidence. It was made *ex parte*; that is to say with one side only present.

2. The Defendants had not been notified simply because their identity was unknown. It has subsequently been suggested by reason of s.12(2)(a) of the Human Rights Act 1998 that it was incumbent upon those representing the Claimants, who have been referred to throughout as X and Y, to try and reach them through various newspapers, with whom they have apparently been in contact; alternatively, there was a proposal that the Claimants should attempt to notify them by serving all those friends and acquaintances whom they suspected as potential culprits (according to the evidence the number involved is approximately 20). I shall need to return to this issue shortly.

3. I shall not set out the order in full for present purposes. It is unnecessary to do so. It was, however, primarily directed towards preventing the "persons unknown" from publishing confidential information to the following effect:

> "Until further order, the Defendants must not, whether by themselves or by any other person, publish, communicate or disclose to any other person (other than to legal advisers instructed in relation to the proceedings for the purpose of obtaining legal advice in relation to these proceedings) any information or purported information concerning
>
> (i) [the Claimants'] personal relationship and any marital difficulties;
>
> (ii) the fact that the Claimants have obtained an injunction".

As it turned out, the order was only served on third party newspaper groups, with a view to notifying them so that they would be aware, should the "persons unknown" approach them with any relevant confidential information, that any such communication would or might be in breach of the terms of the order. From the point of view of the newspaper groups, it is said that the order was framed too widely or too imprecisely for them to know the kind of information publication of which would constitute a breach. Moreover, the order did not contain a public domain proviso. Various other criticisms have been made of the terms of the order to which I shall need to return.

The applications by Mirror Group and News Group Newspapers

4. Now there is before the court an application on behalf of MGN Ltd ("MGN") and News Group Newspapers Ltd ("NGN") to discharge the injunction. They are not, of course, parties to the litigation but they are just as effectively restrained by the terms of the order served upon them. There is also an application by Associated Newspapers Group Ltd to vary the terms of the order (if it survives at all). It is said that it would have been desirable for the newspapers to have been notified of the nature of the application on 5 October prior to its being made. They were told no more than that a "John Doe" application was to be made against persons unknown. The reasoning of Mr Nicklin, who appeared before me on that occasion on the Claimants' behalf, was that representatives had given assurances on behalf of each of the relevant newspaper groups, or undertakings, that no such information would be published until a certain period of time had elapsed. Those assurances were taken at face value and his application was therefore confined to those persons perceived to be the sources or potential sources.

5. Upon reflection, no doubt, it would have been better to notify the newspaper publishers more fully – not least because the scope of the order obtained by Mr Nicklin was wider than the undertakings given. They would all have had an interest in addressing the terms of the order because it affects them and, in particular, by restricting the exercise of their freedom of expression protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.

6. Mr Spearman QC, appearing now for MGN and NGN, raises a battery of arguments in support of his application for discharge. He relies primarily on the merits, arguing that the Claimants are not entitled to this protection, either because their Article 8 rights under the Convention are not engaged at all, in the sense that there is no reasonable expectation on their part to have information of this kind protected by the law, or because it is not likely, when the court comes to balance those rights with the Article 10 rights of the persons unknown and also, for that matter, of the newspaper groups, that the scales would come down in favour of the Claimants. That is arguably a question primarily of proportionality: See e.g. *Douglas v Hello! Ltd (No.1)* [2001] QB 967 at [137], *per* Sedley LJ.

7. It is necessary to have regard to the various principles canvassed by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 and *Re S (FC) (A Child)* [2005] 1 AC 593.

8. I should explain that Mr Spearman relies upon alternative arguments, such as that there was material non-disclosure on 5 October and that the terms of the order go significantly more widely than is necessary for any legitimate protection of the Claimants' Article 8 rights (assuming that they are engaged at all, which is contrary to his primary submission).

The application by Associated Newspapers Ltd

9. Mr Caldecott QC for Associated Newspapers sought to identify a principle of general application with regard to third parties likely to be affected by the grant of such an order having regard, in particular, to what is generally referred to as the *Spycatcher*

principle. This may be conveniently summarised in the words adopted by Lloyd LJ in *Att.-Gen. v Newspaper Publishing plc* [1988] Ch 333 at 380:

> "Since the test of contempt is not a breach of the order but interference with the administration of justice, it follows that *at common law* a contempt may be committed if no specific order has been made by the court affecting anyone other than those involved in the proceedings. At common law, if the court makes an order regulating its own procedure and the purpose of the order is plainly to protect the administration of justice, then anyone who subverts that order will be guilty of contempt".

10. The proposal which Mr Caldecott makes is consistent with the need generally to protect, so far as possible, the rights of such third parties to freedom of expression, taking into account both domestic and Strasbourg jurisprudence, and more specifically with the requirements of good practice identified in s.12 of the Human Rights Act 1998. While the provision expressly addresses protective measures for the benefit of parties (i.e. those who it is intended should be directly be bound by the proposed order), it does not embrace non-parties who, once served, are likely in practice to be as effectively constrained – although, in so far as it makes any difference procedurally, by the principles of criminal contempt rather than by the disciplines of "contempt in procedure" applying to parties who are directly bound.

11. In principle, an extension of the requirements of notification to third parties would be unobjectionable and entirely consistent with Parliament's intention. I have in mind also the (limited) provision made for third parties by CPR Part 25, 25 PD 9.2. They are entitled to a copy of any material read by the judge, once they have been served with an order, together with a note of the hearing. This would clearly enable them *ex post facto* to mount a more effective challenge to the terms of the order in so far as it affects them. The argument of Associated Newspapers is, in effect, that prevention would be even better than cure.

12. There may be theoretical difficulties in defining or identifying how far the category of interested third parties extends, but that will sometimes be less of a hurdle in practice where the applicant for injunctive relief will know, when coming before the court, whom it is intended to serve with the order and, in the case of media groups at least, it would be easy to determine which individual department should be given prior notification. Sometimes, however, it will be clear that the class of persons whose rights will be affected will be different from, and extend more widely than, those persons whom the applicant intends to serve.

13. When counsel came before the court on 5 October no restrictions were sought against Associated Newspapers because a form of undertaking had already been offered which, albeit limited in point of time, was acceptable to the Claimants. The need at that stage was to restrain the source of the allegations who was, apparently, a disloyal friend or acquaintance hawking the story round various media groups in the hope of making some money.

14. Accordingly, both Mr Nicklin and I were focussing on a draft which might capture as many permutations of misconduct as possible on the part such confidants. One is naturally conscious of the risk that a would-be infringer may be looking for loopholes.

That is why it is helpful to have someone put the other side of the case, and especially the risks of casting the net too widely.

15. What has displeased Associated Newspapers is that not only was the injunction served on it any way, but its terms were actually wider than those of the undertaking which had been proffered and accepted. I understand the frustration of the Associated Newspapers legal team, but I am quite satisfied that there was no intention to mislead the court or "pull a fast one" on the newspaper. It was simply a question of thinking on the hoof in a developing situation.

16. Another factor which played its part was that the Claimants' solicitor genuinely got the impression from a conversation with one of Associated Newspapers' in house lawyers that all interest had been lost in the story. Whether he read too much into his words is neither here nor there for present purposes, but from the evidence I am quite satisfied that this was another reason why Associated Newspapers were put out of mind.

17. Nonetheless, it was unfortunate that this should have happened and, if the suggestions now put forward by Associated Newspapers are accepted, as a matter of best practice for the future, it will be less likely that such misunderstandings will arise.

18. It is not for me to lay down practice directions, but what I can say is that a proper consideration for the Article 10 rights of media publishers, and indeed their rights under Article 6 as well, would require that where a litigant intends to serve a prohibitory injunction upon one or more of them, in reliance on the *Spycatcher* principle, those individual publishers should be given a realistic opportunity to be heard on the appropriateness or otherwise of granting the injunction, and upon the scope of its terms. As is well known, it is relatively easy for the media in such circumstances to instruct their lawyers to come to court at short notice and, if they are content to do so and no conflict arises, to arrange for common representation (just as, here, Mr Spearman represents the interests both of MGN and NGN).

19. The point of principle for which Mr Caldecott contends can be encapsulated in the terms of the draft placed before the court for this hearing, which obviously mirrors closely the provisions contained in s.12 of the Human Rights Act:

> "A claimant, who applies for an interim order restraining a defendant from publishing allegedly private or confidential information, should give advance notice of the application and of the injunctive relief sought to any non-party on whom the claimant intends to serve the order so as to bind that non-party by application of the *Spycatcher* principle … unless:
>
> (a) the claimant has no reason to believe that the non-party has or may have an existing specific interest in the outcome of the application; or
>
> (b) the claimant is unable to notify the non-party, having taken all practicable steps to do so; or

(c) there are compelling reasons why the non-party should not be notified".

20. It was no part of Mr Caldecott's case to argue that the injunction should be discharged altogether. As to that, he was neutral. His clients were only concerned to ensure that, in so far as the restrictions survive, they should be proportionate and not inhibit their freedom of communication beyond what the court believes necessary for the Claimants' legitimate purposes. It is Mr Spearman who seeks to set the order aside in its entirety. To that I now turn.

Have the Claimants justified the grant of an injunction at all?

21. Am I to set aside the injunction? Mr Spearman's primary stance is that it should never have been granted in the first place. Secondarily, he argues that, even if the Claimants were able to establish the necessity for an injunction to protect them against the exposure of information in respect of which they had a reasonable expectation of privacy, nevertheless it should now be discharged for reasons of material non-disclosure; that, in effect, they should be punished for having misled the court. These two arguments need to be addressed separately.

22. In the light of the House of Lords' decision in *Re S (A Child)*, cited above, it is clear that the first step is for me to decide whether the Claimants' Article 8 rights are engaged at all. It goes without saying that the grant of the injunction affects the Article 10 rights of anyone, party or not, who would be restrained from publishing the specified category of information. Thus, if the Article 8 rights are engaged, the next stage would be to carry out a balancing exercise as between the competing Convention rights without according automatic priority to either. It is no longer fashionable, as it was for a short time a few years ago, to describe Article 10 as a "trump card": *cf R v Central Independent Television plc* [1994] Fam 192, 203; *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908 at [36]-[41]; *Douglas v Hello! Ltd* [2001] QB 967 at [137].

23. The Claimants are concerned that information in certain categories, now relatively narrowed as compared to the terms of the original order, should not be published for the reason that it is such as to attract "a reasonable expectation of privacy". This is the terminology to be found in *Campbell v MGN Ltd*, cited above, at [21] and [85], and in the Strasbourg decisions of *Von Hannover v Germany* (2005) 40 EHRR at [51] and *Halford v United Kingdom* (1997) 24 EHRR 523 at [45]. They also wish to prevent the inevitable hounding they believe they will suffer from the media if any of this information is revealed. There is no doubt that, in general terms, this is the sort of information which most people would reasonably expect to be able to keep to themselves and, in so far as it is discovered by or imparted to friends or acquaintances, to restrain any breach of confidence. The question is whether this particular couple, in the circumstances in which they found themselves, were entitled to any less privacy or confidence than the general run of married couples.

24. Mr Spearman suggests that by their own conduct they have exhibited a willingness to forego the privacy to which they would be *prima facie* entitled; that they have, in effect, drawn public attention to their relationship and through interviews and comments made in the public domain offered a running commentary upon it. This is partly a question of fact and partly of evaluation upon the facts established by

evidence. A considerable number of newspaper articles has been introduced, with a view to making good Mr Spearman's proposition. They had not been placed before me on the original application.

25. It is necessary to note that, by reason of her profession as a model, X is constantly the subject of media attention and enterprising journalists are anxious to find out as much as they can about her to put before their readers – much of which can fairly be categorised as trivial or tittle-tattle. There is no question of it being required to contribute to an ongoing "public debate" of the kind contemplated in *Von Hannover v Germany*, or for the purpose of revealing (say) criminal misconduct or anti-social behaviour.

26. It is not always right to infer that information that has been published about her, or her relationships, was either accurate or revealed with her consent.

27. It is necessary to distinguish in this context between the concept of being in the public eye and that of being a publicity seeker – although inevitably the two will sometimes overlap.

28. In the present context, that distinction can be of some importance. It by no means follows that an individual who is photographed and described in print, and about whom information or speculation is published regarding his or her private life, must have so behaved as to forfeit or waive the entitlement to privacy with regard to (say) intimate personal relationships or the conduct of a private life generally. Close attention may need to be paid as to how such information came into the public domain and as to its limits. Some well known people are prepared to go along with "lifestyle" pieces which reveal, for example, their likes and dislikes, and how they spend their spare time, without wishing to cross boundaries into personal relationships. Others, on the other hand, will be less fastidious and take the view that any publicity is good publicity, being prepared to reveal any titbit to attract attention to themselves or to make money. There is no hard and fast rule, since the general proposition has to be recognised that even well known people are entitled to some private life: see e.g. the observations in *A v B plc* [2003] QB 195 at 208. The court will in every case have to examine the specific evidence and make an evaluation (on which, inevitably, there may be room for differing opinions).

29. There is a significant volume of material in the papers about X. That is clear from the evidence, and Mr Spearman has highlighted those articles which he regards as best making his case. I am quite satisfied, in the light of X's evidence in particular, and the other material before me which I find consistent with it, that X is not a person who willingly sets out for self-promotion to live her private life in the public eye. Yet she is under contractual obligations to those whose products or services she promotes to give interviews from time to time. That is an important part of the context in which the court has to reach its conclusion.

[At paragraphs [30]–[34] I considered certain matters which would be capable of leading to identification of the Claimants and have therefore omitted them in this open judgment.]

30. []

31. []

32. []

33. []

34. []

35. People often give bland answers in response to enquiries as to how things are going in their lives, which do not constitute a "waiver" of Convention rights. To take an obvious example, if a journalist asks how a celebrity is and she replies "Very well, thank you", that can be hardly said to open up her health to journalistic probing or exposure when she subsequently develops a serious illness.

36. Similarly, if someone asks "How's married life treating you?" and the response is "Fine", that does not mean that the public is entitled to a ring-side seat when stresses and strains emerge (as happens in most relationships from time to time). It is disingenuous to pretend otherwise. Ordinary polite "chit chat" of this kind is qualitatively different from volunteering to release private information for public consumption.

37. To give bland responses when things are going well is very different from having to be subjected to an intrusive investigation of the individual pathology of marital breakdown – still less of every tiff, disagreement or quarrel. One is inevitably reminded of Tolstoy's well known observation at the beginning of *Anna Karenina*: "All happy families are alike, but an unhappy family is unhappy after its own fashion". The circumstances of marital breakdown or tension are likely, beneath the surface, to be individual and specific to the people concerned. They will be generally unknowable by others without the revelation of what is in the nature of things private information by one party or the other. Naturally, if there are public rows, or recriminations in the media as sometimes happens, the situation will be rather different. But that is not so here. It is easy to give obvious examples, but in real life most cases would fall somewhere in between such extremes. Obviously, however, the reasons for a breakdown in a relationship can only be protected if they have remained private.

38. This reasoning suggests that a distinction is to be drawn between matters which are naturally accessible to outsiders and those which are known only to the protagonists. So, if the parties are separated and are living at different addresses, it is difficult to see that this bare fact is one as to which there could be a reasonable expectation of privacy. If two people are no longer regarded by acquaintances as an "item", that fact is a matter of public perception. That is to be distinguished, however, from private incompatibilities or disputes which may have contributed to the breakdown. Accordingly, in most (one can never say "all") circumstances, if a separation has occurred between two people, it will not be appropriate to cast an injunction so widely that mention of the mere fact of separation itself is prohibited.

39. Moreover, when it comes to identifying the information to be protected, this will need to be defined specifically to take account of Tolstoy's aphorism. What are the individual marital problems or *casus belli*? It will be difficult for a third party served with an injunction merely referring to information about the marriage or the

relationship. In the case of well known people, or "celebrities", there will be much general information in the public domain any way, and even new information may not of itself have about it "the quality of confidence" or be such as to give rise to a "reasonable expectation of privacy".

40. A solution would appear to be that adopted here, namely to attach to the order a confidential schedule containing the specific allegations, said to be private in character, which there is reason to suppose will be made public in the absence of protective interlocutory relief.

Non-disclosure: "The punitive expedition"

41. Mr Spearman's alternative stance is that, even though the court would otherwise be inclined to grant some form of interlocutory protection to these Claimants, it should in this instance be refused because of the way they and their advisers went about the application of 5 October.

42. It is becoming increasingly common for media defendants to carry out what used to be called a "cuttings" search in these cases. Such investigations can obviously be executed more quickly and efficiently by electronic means and, in the case of newsworthy people, a huge amount of published material can be conjured up at the press of a button. The object is obviously to demonstrate, or at least give the impression, that the individual concerned has forfeited rights to privacy or confidentiality and become, to all intents and purposes, public property. It is important not to be beguiled into drawing such a conclusion simply because of bulk.

43. The coverage in question, and especially that expressly relied upon by the relevant media defendant, needs to be scrutinised carefully on an individual basis in order to see whether the proposition is made out. It involves, after all, drawing the conclusion at an early stage of the litigation, and often without detailed evidence or full argument, that the citizen who seeks protection from the court (albeit only on a temporary footing) is already precluded from reliance on an increasingly significant Convention right. The court will naturally guard in that context against a rush to judgment.

44. This is especially so, perhaps, in a situation where it is clear from s.12 of the Human Rights Act, and the House of Lords' interpretation of it in *Cream Holdings v Banerjee* [2005] 1 AC 253, that the threshold usually to be passed is not that of an "arguable case", or even a "strong *prima facie* case", but rather whether the particular claimant is *likely* to succeed in restraining publication at trial. The court thus cannot generally avoid coming to a conclusion on the merits. Such a decision, inevitably at that stage to a greater or lesser extent inchoate, will have the consequence if it is adverse to the claimant that the publication will take place and any confidentiality will be gone for ever.

45. In this context, each party will wish to provide the court with as much relevant information as possible on the merits to enable a favourable conclusion to be reached. So far as a claimant is concerned, it has always been necessary on an application without notice to give full and frank disclosure of material which is likely to have a genuine bearing, one way or the other, on the chances of success. It is right to note, in

the developing area of protecting privacy, that there is room for differing interpretations on what is truly relevant.

46. There is a natural tendency on the part of newspaper lawyers to dredge up everything yielded by an electronic search on the relevant "celebrity" in order to persuade the court that he or she has indeed become public property. As I have already suggested, however, close scrutiny is required of each private revelation and how it came about. The claimant's lawyers may genuinely come to the conclusion that a significant proportion of what is in the public domain is not relevant to an application for injunctive relief. That may be because the information already published is not such as to fall within the law's protection at all, or because it is speculation by journalists or purported revelations wrongly attributed to the particular claimant. It is only too easy in these uncertain waters for a media defendant to point the finger of criticism at an applicant's lawyers for supposed non-disclosure. Yet a claimant is not necessarily to be criticised for not having disclosed everything which a defendant subsequently chooses to dredge up in support of its argument.

47. That is, however, a practical difficulty which arises from the fluid nature of the law and the inevitable uncertainties as to how material came into the public domain. Yet the principle remains clear. If and in so far as the exigencies of the occasion permit, anyone applying for an injunction must comply with his or her obligation of full and frank disclosure. In cases of this kind, that will generally involve a search of the internet or previous publications relating to the same category of information now sought to be protected. The court will need all the assistance available, for the purpose of deciding "likelihood" of success, and in particular for making a preliminary judgment as to whether "the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential" (in the words of Lord Goff's "first limiting principle" in *Att.-Gen. v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109, 282).

48. Depending upon the circumstances, it may also be necessary for the court to decide whether the evidence shows that there has been a genuine "waiver" of privacy on the part of the applicant (which, of course, is not necessarily the same as Lord Goff's public domain test). I use the term "waiver" somewhat loosely as a convenient label, while bearing in mind the analysis in Tugendhat & Christie, *The Law of Privacy and the Media* (OUP 2002), at 9.29-9.37, which suggests that the doctrine of waiver may not be a relevant consideration. Each situation must be judged according to the circumstances of the case. For example, it should be assessed objectively, and without having to determine the claimant's state of mind, whether it is any longer reasonable for there to be an expectation of privacy in respect of material in the public domain (and that will include material which the claimant has revealed).

49. Another question which may have to be determined, if it is relevant to the case, is whether there is information which shows that the public has been misled by the applicant in some respect, so as to justify a journalist putting the record straight by revealing information which would otherwise fulfil the criteria for legal protection (*cf* Miss Campbell's denials of drug-taking). Of course, at the stage of applying for an interlocutory injunction a claimant will not necessarily be aware of which or how many of these possible arguments a defendant is likely to deploy. In some cases, it may be obvious: in others not. For the purpose of discharging the obligation of

disclosure, an applicant and his or her advisers will sometimes be operating in uncertain territory.

50. A reasonable test against which to judge non-disclosure may be whether the applicant has taken all practical steps to reveal material which is reasonably likely to assist the respondent's probable defence(s) at trial. That obligation is not to be identified, however, or confused with a need to dredge up everything about the claimant in the public domain.

51. It is therefore necessary for an applicant to anticipate any possible (i.e. realistically possible) defences. Some guidance may be obtained by consulting the Press Complaints Commission's Code of Conduct and its attempts to grapple with the concept of "public interest". In the present case, there could be no suggestion of the public having been misled. There is no evidence, for example, of X having made false claims of marital harmony at a time after the stresses had emerged. (One could argue that she would be entitled to keep them to herself anyway, but that is a separate point.) Nor are the tensions in the Claimants' relationship otherwise a matter of general public interest. Still less could there be any suggestion here of what used to be called "iniquity"; in other words, criminal or other wrongdoing on the Claimants' part requiring to be exposed in the public interest.

52. The most likely areas for debate (confirmed by the submissions which have now been made on the present applications) would appear to be whether Article 8 is engaged at all in relation to these particular circumstances or, if it is, whether there has been an effective "waiver". Accordingly, the obligation on the Claimants' part (subject to questions of urgency) was to disclose to the court any material (specifically, published articles) which could *reasonably* be thought to assist on one or other of those arguments.

53. Naturally, it is open to an applicant to "confess and avoid" when any such material is presented to the court, as X has done here, but it should nevertheless be disclosed.

54. On 5 October, Mr Nicklin touched upon the subject of the Claimants' public disclosures, specifically the fact that wedding photographs had been permitted, but gave the impression that (so far as he knew) there was nothing they had put into the public domain concerning the more private or personal aspects of their relationship. (As we now know, there had also been some "exclusive" coverage of the honeymoon.) This represented a reasonable summary of the position as he personally understood it at the time, but the court will generally need, and be entitled to, greater assistance than this.

55. This is a recently developing area of law and practice, and the interpretation of s.12 by the House of Lords is being implemented in a rather experimental environment. Practitioners are still feeling their way, and I do not make any criticism of Mr Nicklin. The court, however, has to be supplied with as complete a picture as possible of the knowledge of the applicants and their advisers, so that the judge can come to a personal and informed conclusion on the chances of success at trial – rather than being simply given general reassurance (albeit in good faith) from an inevitably partisan source relying, quite possibly, on partisan or incomplete information. Despite the room for differing interpretations of (say) what is in the public domain, or as to those matters in respect of which there is a reasonable expectation of privacy, it is

sometimes easy to think that one's own perspective is the only valid way of looking at the available facts. But an advocate seeking interim relief without notice must consciously strive to understand what other perspectives there might reasonably be, bringing to bear his or her own knowledge and experience.

56. With the benefit of hindsight, one can see that there should have been some scrutiny of any public assertions or comments by the Claimants, and X in particular, on the subject of her marriage or relationship with Y, with a view to seeing whether the relevant media might be able to construct a respectable argument to the effect, for example, that the public had been invited in, so to speak, to follow the progress of the relationship, or had genuinely been misled by the volunteering of information which, at the time it was imparted, was known to be inaccurate. (As it happens, in the event that has not even been suggested by either Mr Spearman or Mr Caldecott.)

57. I emphasise again that this is not to say that an applicant has to carry out the "dredging" exercise which defendants tend to undertake. There must be some discrimination. What would appear to be reasonable is that the applicant's advocate should make a conscientious determination, in the light of the information which has been obtained on the relevant topic, as to which points he or she would wish to make if instructed to represent media defendants on the other side. One would simply try to step into the shoes of a hypothetical opponent, just as one does when considering which authorities should be drawn to the court's attention as potentially undermining the submissions one is advancing. It is not necessarily always easy to do this in situations where conflicting rights come into play under Articles 8 and 10, as so much is ultimately a matter of impression. Nevertheless, this exercise needs routinely to be carried out. Obviously, it cannot be addressed merely on an *a priori* basis. A conclusion can only be reached after enquiry and establishing the true factual position to the extent that circumstances permit.

58. There may sometimes be such pressure of time that the client's interests require that steps be taken with less thoroughness than would be ideal. All depends on the circumstances. Here, it emerges from the evidence that solicitors were instructed on the Claimants' behalf on 30 September, some five days before the application was made. But Mr Kelly of Schillings explained in a witness statement that there was a hiatus after Associated Newspapers' undertaking on 1 October and that he was, in effect, re-instructed on 5 October, shortly before the application was made. This was when it became apparent that two other newspapers had wind of the story, and it was thought necessary to restrain the activities of the source. As a general proposition, it seems to me right that, as soon as it is contemplated that injunctive relief is likely to be required, a search will need to be carried out along the lines I have suggested. On the facts of the present case, however, as explained in evidence, time was very tight.

59. In fairness to the applicants' solicitors it should be made clear that X's public relations consultant was asked if she had given any interviews about her marriage, and she replied in the negative. It is most unlikely that it will suffice, however, to have a one word answer from a lay person who does not understand the legal issues involved, and the possible arguments that could be adduced in the light of the recent appellate authorities. Lawyers will generally need to establish the facts for themselves and form an independent judgment.

60. As it happens, I would have held for the reasons explained above that injunctive relief was appropriate in this case (albeit on a narrower basis than was originally ordered) despite having been shown the published articles now prayed in aid by the media applicants. I can see no basis for depriving this couple of the protection of confidence or privacy in relation to their marital stresses and strains. I would have concluded that they were more likely than not, applying the *Cream Holdings* criteria, to obtain an appropriately drafted injunction at trial. Mr Spearman emphasises, however, that my conclusion is by no means enough to dispose of his complaints of non-disclosure and that punishment should be meted out to the Claimants nonetheless. I have now suggested the kind of steps which should have been taken, with the benefit of hindsight, and it is to be hoped that this may help to prevent similar problems arising in the future.

61. In the particular circumstances of the case I would list the following mitigating circumstances which lead me to conclude that the Claimants should not, on this occasion, be penalised by the refusal of injunctive relief:

(i) There was no intention on the part of Mr Nicklin or his instructing solicitors to mislead the court.

(ii) It was perceived on 5 October that urgent action was required to restrain the "persons unknown" from approaching yet further newspapers or taking other steps to profit from the Claimants' misfortunes. The hearing was arranged in hurry at the last minute. The pressure of time meant that corners were cut.

(iii) Enquiries were made of X's public relations consultant, as I have said, to find out whether any interviews had been given on the subject of the marriage, such as might be thought effectively to "waive" the reasonable expectation of privacy: a negative response was received.

(iv) The court was informed about the willingness to have wedding photographs published in the media (that being the extent of counsel's knowledge at the time).

(v) The emphasis at the hearing on 5 October was upon restraining the "persons unknown", which was given priority in the light of the undertakings/assurances given by the individual newspaper lawyers.

(vi) Accordingly, the drafting was directed to restraining the Defendants from revealing any confidential information about the relationship within their knowledge.

(vii) Although it was in the minds of the Claimants' legal team to serve third parties to discourage them from relying on information sourced from the Defendants, insufficient attention was focussed at that point on the difficulties *from the third parties' point of view* in complying with the terms of the injunction, tailored as it was to the knowledge of the Defendants. As a counsel of perfection, no

> doubt, the Claimants should have raised the concerns which have now been articulated on the part of Associated Newspapers, but this is the first case to arise (so far as I am aware) in which these matters have been addressed, and the omission was more understandable than is likely to be the case on future applications.

In all the circumstances, I decline to exercise my discretion against the grant of an injunction which I consider otherwise to be appropriate. The non-disclosure was, on these particular facts, not such as to merit this disciplinary or punitive step.

The need for a public domain proviso

62. It is now recognised that generally speaking an order restricting the communication of ideas and information should include a public domain proviso: see *Att.-Gen. v Times Newspapers Ltd* [2001] 1 WLR 885; *Harris v Harris; Att.-Gen. v Harris* [2001] 2 FLR at [208] and [353] (Munby J); *A v B, C & D* [2005] EMLR 36 at [16]–[17].

63. In the order of 5 October such a proviso was omitted – it seems again through haste. Mr Nicklin recognised that his draft should have included this exemption but suggested that a reasonable construction of the order would have taken such a term to be implied. Things are not so straightforward unfortunately. Those who are on risk of contempt proceedings cannot afford to assume that the express wording of the court's order is subject to an implied qualification. They are entitled and bound to take it at face value.

64. In any event, in the context of personal information (as opposed to commercial secrets) it does not necessarily follow, from the fact that something has been published, that further coverage cannot itself infringe a claimant's privacy: see e.g. the observations of Lord Keith in *Att.-Gen. v Guardian Newspapers Ltd (No.2)*, cited above, at p.260. It may be more difficult to establish that confidentiality has gone for all purposes by virtue of such information having come to the attention of certain readers or categories of readers.

65. Also, even where a claimant has chosen to put personal information into the public domain, it does not necessarily entail that the media is free to publish any other details relating to the same subject-matter. Individuals appear to be permitted some degree of control over how much information is released: *Douglas v Hello! Ltd* [2005] EWCA Civ 595; [2005] EMLR 609.

66. These are other factors which illustrate how unrealistic it would be to expect anyone served with an injunction simply to assume a public domain proviso and, correspondingly, that any topic which has already received press coverage can be pursued further with impunity. On the other hand, if it is the court's intention to prevent further publication of material even though it has apparently reached the public domain, on the basis that its confidentiality has not thereby been utterly lost, it will need to be made expressly clear that it is not to be treated as being within the proviso.

67. The wording of such a proviso may be directed to matters already in the public domain at the time of the order or may cover, additionally, information published subsequently. So, for example, if X or Y were to choose in the future to discuss the

reasons underlying their temporary problems, then a suitably worded proviso could ensure that the media were correspondingly released to cover the same subject-matter. Whether a prospectively worded proviso is appropriate will depend on the circumstances of the case. Here, I believe that it would be apt, since matters are fluid and the situation could well go on developing.

"Persons unknown"

68. It is submitted by Mr Spearman that, by contrast with the circumstances in the *Bloomsbury Publishing* case (cited above), the description of the "persons unknown" is not sufficiently certain as to identify those who are, and those who are not, included within the restrictions. He is making two points. First, he says that the description of the "persons" is in itself too wide. Secondly, they are restrained by the terms of the original order in respect of too wide and uncertain a class of information about X and Y. I address the second point elsewhere and accept that a narrower formulation, by reference to a confidential schedule, is to be preferred. I propose at this stage to consider the first argument.

69. The *Bloomsbury Publishing* case concerned persons who had offered an advance copy of the novel *Harry Potter and the Order of the Phoenix* to *The Sun*, the *Daily Mail* and the *Daily Mirror* newspapers, and persons who had physical possession of a copy of the book, or any part of it, without the consent of the publishers. The Vice-Chancellor said that it was crucial that the description used must be sufficiently certain to identify both those who are included and those who are not. It had been submitted by the publishers' counsel that no confusion should arise because anyone to whom it was shown would know immediately whether it was descriptive of and therefore directed to him or her.

70. True it is that a copy of the relevant novel was a more specific concept than "information about the status of the Claimants' marriage". But it is unlikely to cause confusion because anyone served is likely to know whether or not they have been offering such information to the relevant newspapers. I cannot accept that X and Y are powerless to take any step to protect the dissemination of information, in respect of which there is a reasonable expectation of privacy, just because they do not yet have the identity of the person(s) concerned or know the precise nature of the titbits offered.

Other submissions on the scope of the order

71. The order was criticised for a number of reasons, including the absence of any return date or provision for serving the "persons unknown" (either with any evidence or the order itself). It was therefore argued that the Claimants had effectively obtained permanent relief and restricted the media indefinitely from venturing into the prohibited topics.

72. One consequence would be that the *Spycatcher* doctrine 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).

73. This sounds Draconian, but of course there was liberty to apply forthwith for discharge or variation accorded to any interested person without the need to issue a formal application. In a case where the only parties to the action are "persons unknown", there may be little point in fixing a return date, since it is likely to be ineffective and cause the claimant to incur unnecessary costs. Some provision should, however, be made for drawing the injunction to the attention of the unknown defendants, which will have to be tailored to the particular case in hand. That is relatively straightforward where they are known to attend at a specific location, as in the case of "travellers": see *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280. But that clearly has no application in the instant case. The Claimants can only guess who or where the relevant persons are.

74. As I mentioned earlier, one suggestion was that an attempt should be made to serve them through some or all of the newspapers who have apparently been approached with a view to selling the private information. It is being assumed that someone on the newspaper's staff will, in each case, know the identity of the source(s) and have some means of making contact.

75. It may be that on some occasions it would be appropriate to request a newspaper editor or lawyer to notify the source. If in the particular case there is a willingness to co-operate, well and good. It would not be right, on the other hand, for the court routinely in such cases to order a newspaper to act as a process server. Nonetheless, because of the requirements under s.12 all practicable steps should be taken to notify defendants in advance (unless there are compelling reasons for not doing so), it might have been worth at least making the request in this case (however forlorn the hope of compliance). But this did not occur to the Claimants' advisers as being "practicable". The prospect of any of the newspapers agreeing was surely, in the real world, remote.

76. In any event, there may be good reasons from the newspaper's point of view for not wishing to perform this service. It might antagonise a particular source or, at least in theory, discourage others from coming forward with information on later occasions.

77. On the other hand, if a claimant is content to sit back and make no attempt at all to serve the defendant against whom an injunction has been obtained, with the order or the evidence on which it was based, then the tail will be wagging the dog. The *Spycatcher* doctrine has been acknowledged by the Court of Appeal and the House of Lords over the past twenty years because it is recognised that third parties should not knowingly frustrate orders of the court whether made *inter partes* or *contra mundum*: see e.*g. Att.-Gen. v Punch Ltd* [2003] 1 AC 1046 at [32]. The primary relief will usually have been obtained against a party who, it is anticipated, will otherwise infringe the claimant's rights. It is not desirable that this remedy should be sought as matter of formality, while depending primarily on the ancillary *Spycatche*r doctrine – salutary though it is.

78. Some effort should be made to trace and serve the primary wrongdoer. If appropriate, advantage can be taken of the provisions of CPR 6.8 for service by an alternative method (formerly "substituted service"). Otherwise, the litigation will go to sleep indefinitely, which is hardly consistent with the policy underlying the CPR, and what

is supposed to be a temporary holding injunction becomes a substitute for a full and fair adjudication.

79. In some cases, and this would appear to be an example, it would be appropriate to direct that best endeavours be used to trace and serve the individual concerned. How could that be achieved in circumstances such as these? As I mentioned at [2] above, it appears that so far the Claimants have whittled down in their own minds the field of suspects to about 20 of their acquaintances who are likely to know at least some of the relevant information. It has been suggested that they should therefore serve all of those potential "suspects". That is all very well from the point of view of the media, but it is a rather scattergun approach and may be counter-productive for these Claimants. It may alienate people unnecessarily and alert interest in their difficulties among some who had not been aware of them.

80. There may be a half way house available, in the sense that they may be able to approach some friends, tell them that someone has been trying to sell information to the newspapers about their domestic circumstances, and enquire if they have any idea who the culprit could be. This might help narrow the field to some extent. Much will depend on the individuals concerned and such an approach may not yield dividends. What would be the most appropriate "best endeavours" will inevitably have to be tailored to the circumstances by those best qualified to judge (i.e. in this instance X and Y).

81. I referred earlier to the proposal for a confidential schedule identifying the specific information or categories of information intended to be the subject of restriction. This is becoming standard practice and it recognises the need for certainty. A loosely worded injunction is no use to a claimant, since the court will be reluctant to enforce by process of contempt if it clearly cannot be established that its terms have been infringed: see e.g. *Redwing Ltd v Redwing Forest Products Ltd* [1947] 64 RPC 67, 71 and *Att.-Gen. v Greater Manchester Newspapers Ltd* [2001] All ER (D) 32 (Dec).

82. There is a particular need for specificity in this type of case because the scope of the legal protection for Article 8 rights is itself somewhat uncertain, and in a state of apparent development at the moment. The nature of the information so protected will also vary from case to case, depending on such factors as I have been considering. Whereas it may not be too difficult, in a defamation context, to construe "the said or any similar words defamatory of the Claimant", it is much more problematic to ascertain in relation to particular individuals what information is or is not, for example, "subject to a duty of confidence", or "is not in the public domain", or in respect of which there remains "a reasonable expectation of privacy". Hence the need to identify it clearly in the order (preferably having afforded a reasonable opportunity to hear submissions from any persons with a legitimate interest in the outcome).

83. Having regard not only to s.12 of the Human Rights Act, but also to the need for "necessity" and "proportionality" whenever the court is contemplating a restriction on anyone's freedom of expression, it is important for an advocate making submissions, and to the court itself, to have enough information on which to decide whether any proposed restriction fulfils those criteria. Thus, where a claimant anticipates, on the basis of evidence adduced, that a particular person is likely to reveal only limited facts or make specific assertions, it would be inappropriate to hack away more broadly at his or anyone else's freedom to communicate than is necessary to prevent those

identifiable revelations. It would not be right to wield an axe where a scalpel would do.

84. In the course of correspondence and submissions, with a certain amount of give and take, a confidential schedule has emerged which complies with these objectives. It pinpoints effectively the relatively few items of information which are alleged (whether accurately or not) to be the immediate causes of, or to have contributed to, the marital difficulties. There is no real problem for any journalist or media lawyer served with such an order in identifying these "hot spots" and avoiding any such coverage if someone tries to sell a story encroaching upon them.

85. Before finalising the order, I will hear counsel in case there have been any further adjustments to the wording of either the order or the schedule.