Neutral Citation Number: [2014] EWHC 1163 (QB)

Case No: HQ13D00678

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 16/04/2014

**Before** :

MR JUSTICE DINGEMANS

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**Between :**

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|  | **(1) Dylan Weller****(2) John Paul Weller****(3) Bowie Weller****(Acting by their Litigation Friend, Paul Weller)** | Claimant |
|  | **- and -** |  |
|  | **Associated Newspapers Limited** | Defendant |

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**David Sherborne** (instructed by **Clintons**) for the **Claimants**

**Antony White QC and Catrin Evans** (instructed by **the Editorial Legal Department of Associated Newspapers Limited**) for the **Defendant**

Hearing dates: 24th, 25th, 26th and 27th March 2014

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Judgment

**Mr Justice Dingemans :**

1. This is an action which raises issues about the legal tests to be applied to determine whether there is a cause of action for misuse of private information. The claim arises in respect of an article which was published online on 21 October 2012 by Associated Newspapers Limited, as publishers of the Mail Online (“Mail Online”). The article was headed “A family day out” and showed photographs of Paul Weller and some of his children. Paul Weller is a well-known musician and was a former member of the “Jam” and “Style Council”. He is now a solo artist.
2. The photographs were taken on 16 October 2012 by an unnamed photographer in Santa Monica, Los Angeles, California, United States of America. The photographs were of Paul Weller and the children out shopping in the street, and relaxing at a café on the edge of the street.
3. The first child shown in the photographs was Dylan Weller (“Dylan”), then aged 16 years and now aged 17 years. Dylan was misdescribed in the photographs as Hannah Weller, who is Paul Weller’s wife. The other children shown in the photographs were the twins John Paul (“John Paul”) and Bowie Weller (“Bowie”), then aged 10 months, and now aged 2 years, sons of Paul Weller and Hannah Weller. All three children are the Claimants in this action acting by their father and litigation friend Paul Weller.
4. The article was illustrated with seven photographs which showed, among other matters, the faces of Dylan and the twins. The Claimants contend that the pictures of the children’s faces should have been pixelated and bring these proceedings for damages for misuse of private information and breach of the Data Protection Act, and an injunction. Mail Online deny that the publication of the unpixelated photographs was wrongful, or that the Claimants are entitled to any relief.
5. The whole of the article was taken down on 22 October 2012. This was because of the misdescription of Dylan as Hannah Weller. Although the readership of Mail Online is very extensive, it appears that the article with the photographs received some 34,000 hits, of which 24,000 were from England and Wales.

**The article and the photographs**

1. The article said:

**“A family day out… Paul Weller takes wife Hannah and his twin sons out for a spot of shopping in the hot LA sun”**

By Joel Cooper

“They may not be the most conventional family – with 54-year-old father Paul Weller, 26-year-old mother Hannah Andrews and their adorable eight-month-old twin sons.

But they certainly looked like a perfect family as they went for a stroll in the hot LA sun last Tuesday.

The former Jam front man looked totally relaxed as he looked after his family while they spent their day together”

*The first and second photographs were shown. The caption to the first photograph read:* ***“Family time: Paul Weller, his wife Hannah and their two sons were spending time together in LA on Tuesday.”*** *The caption the second photograph read:* ***“Legendary singer: The musical family looked serious as they went to hit the shops in LA.”***

“The happy couple looked content as they took their two boys – John Paul and Bowie, for a tranquil day of shopping, stopping off at a café to cool off along the way.

Paul and Hannah married just over two years ago on the Italian island of Capri before having twins at the beginning of this year.

The pair both dressed casually for their day out with their sons – with Paul opting for a sports vest, shorts and sandals, while Hannah wore a maroon tank top, skinny black jeans and brown ballet pumps.”

*The third and fourth photographs were shown. The caption to the third photograph read:* ***“New shoes? Paul, Hannah, John Paul and Bowie went into a number of stores to have a browse.”*** *The caption to the fourth photograph:* ***“Or a handbag? The original Modfather still managed to look effortlessly cool as he hung out in the handbag shop.”***

“The young boys were dressed in colourful T-shirts and shorts, with both parents alternating who would carry their son.

The couple bought a record player and decided to place it in one of the baby’s strollers while they carried their son in their arms instead.

The singer moved in with Andrews, who was backing singer on his 22 Dreams album, following the collapse of his relationship with Samantha Stock in October 2008.”

*The fifth and sixth photographs were shown. The caption to the fifth photograph read:* ***“Coffee break: The family stopped off in the shade to grab a quick drink during their travels around the town.”*** *The caption to the sixth photograph read:* ***“Style Fail? The style Council singer wore a strange pair of sunglasses as he hung out with his family for the day.”***

“Weller had two children with Samantha, as well as a daughter named Dylan, who was conceived during a short relationship with a makeup artist named Lucy.

Weller’s two older children, Leah and Natt, were born during his marriage to Dee C. Lee, who was backing singer in his second band, The Style Council.

The pair married back in 1987 but divorced 11 years later, but Weller is regularly spotted out and about with his children and is clearly still very close to them.”

*The seventh photograph was shown. The caption read:* ***“Getting their shop on: The couple bought a record player and decided it’d be easier to carry their son and wheel the large box back to their car.”***

1. The article was published with the seven photographs. The first photograph was a photograph of Paul Weller carrying Bowie with Dylan standing beside him. Bowie’s face was turned the other way, and was not shown, and the view of Paul Weller was also side on. Dylan looked slightly troubled and was looking away, and was wrongly identified as Hannah, Paul Weller’s wife. It did not appear as if either Paul Weller or Hannah had seen the photographer. As noted above the caption read*:* ***“Family time: Paul Weller, his wife Hannah and their two sons were spending time together in LA on Tuesday.”***
2. The second photograph was of Dylan carrying Bowie in one hand and pushing a wheelchair with a large box in it, while Paul Weller pushed John Paul in the other pushchair. Both Dylan and Paul Weller looked serious with slightly fixed expressions. It was obvious from the photographs that Paul Weller and Dylan had not seen the photographer. As noted above the caption read: ***“Legendary singer: The musical family looked serious as they went to hit the shops in LA.”***
3. The third photograph showed Dylan carrying Bowie in one arm while continuing to push the pushchair with the large box, while Paul Weller pushed John Paul in the other pushchair. Dylan is looking ahead and along the pavement, and Paul Weller, walking behind her just coming out of the shop appears to be looking across the street. The photograph only shows the back of Bowie’s head. John Paul is shown leaning back in his pushchair. It was suggested that John Paul’s face had been over-exposed and was not visible. In the copy provided to me John Paul’s face is visible, but it is right to say that either through reflection of the sun or over-exposure the definition of the features is not as distinct as in other photographs. Neither Paul Weller nor Dylan appears to have seen the photographer. The caption to the third photograph read: **“New shoes? Paul, Hannah, John Paul and Bowie went into a number of stores to have a browse.”**
4. The fourth photograph showed Dylan pushing John Paul in his pushchair. She is looking up the pavement. Paul Weller is carrying Bowie in one arm and pushing the pushchair with the large box in the other arm. There is a reasonably clear side view of John Paul’s face and a clear view of Bowie, who appears to be tugging at part of Paul Weller’s shirt. Paul Weller is looking out onto the street, and while it is apparent that Dylan has not seen the photographer the position is not clear in relation to Paul Weller. As noted above the caption to the fourth photograph was: ***“Or a handbag? The original Modfather still managed to look effortlessly cool as he hung out in the handbag shop.”***
5. The fifth photograph showed Dylan sitting at a table in a café whilst holding Bowie on her lap. Dylan has turned her face full onto the camera, and her expression appears to be fixed. It seems as if she has seen the photographer. There is a side view of Bowie’s face. The caption to the fifth photograph read:***“Coffee break: The family stopped off in the shade to grab a quick drink during their travels around the town.”***
6. The sixth photograph showed Paul Weller carrying Bowie while pushing an empty pushchair. Bowie’s face is fully visible. The caption to the sixth photograph read: ***“Style Fail? The style Council singer wore a strange pair of sunglasses as he hung out with his family for the day.”***
7. The seventh photograph showed Dylan carrying Bowie while pushing the pushchair with the large box. Paul Weller pushed John Paul in the pushchair. There is a side view of Bowie’s face, and John Paul appears to be asleep in the pushchair. Dylan appears to be looking at the photographer, and has her tongue part to the side of her mouth, as if she was in thought. Paul Weller was looking off to the side. The caption to the seventh photograph read: ***“Getting their shop on: The couple bought a record player and decided it’d be easier to carry their son and wheel the large box back to their car.”***
8. The article and photographs were removed from the website on the 22nd October 2012. This followed reports by readers that there was a mistake in the story, and that Dylan was not Paul Weller’s wife. In an email dated 22nd October 2012 Mail Online stated to the picture agency that Mail Online did not expect to get billed for the images, and by later email that was agreed.

**Relevant principles of law**

1. There was much common ground in the helpful submissions made by Mr Sherborne on behalf of the Wellers, and by Mr White QC on behalf of Mail Online, about the relevant legal tests to be applied by me, and I am very grateful to them for their assistance. However there were some areas of disagreement.
2. It is common ground that the Claimants’ claim is for misuse of private information. It is also common ground that the claim for infringement of the Data Protection Act will stand or fall with the claim for misuse of private information. It is also agreed that, in relation to the claim for misuse of private information, the first question to be asked is “*whether there is a reasonable expectation of privacy”*, but there is a dispute about whether that needs to be “*known or ought to be known*” by the publisher.
3. If the answer to the first question is yes, and there is a relevant reasonable expectation of privacy, “*the next question would be how the balance should be struck as between the individual’s right to privacy on the one hand and the publisher’s right to publish on the other. If the balance were struck in favour of the individual, publication would be an infringement of his or her article 8 rights, whereas if the balance were struck in favour of the publisher, there would be no such infringement by reason of a combination of articles 8(2) and 10 of the Convention*”, see *Murray v Express Newspapers* at paragraph 40.
4. In addition to the disagreement between the Claimants and Defendant about whether the reasonable expectation of privacy either needed to be known or should have been known to the publisher to be actionable, there is a dispute about the effect of the local law at the location in which the photographs were taken. There was also a disagreement about the proper approach to issues of damages for misuse of private information, and I will address that issue at the end of the judgment.
5. Given the areas of disagreement, it is necessary to set out something about the cause of action for misuse of private information before I consider the evidence. The House of Lords decided in *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 that there is no general tort of invasion of privacy. That remains the law, see *McKennitt and others v Ash and another* [2006] EWCA Civ 1714; [2008] QB 73. There is no law of “image rights”. Different legal jurisdictions have taken different approaches to the law in England and Wales.
6. After the enactment of the Human Rights Act 1998 (“HRA 1998”), claims for misuse of private information were absorbed into the established claim for breach confidence, see *A v B plc* [2002] EWCA Civ 337; [2003] QB 195 at paragraph 4. In paragraph 53 of *Douglas and others v Hello! Ltd and others (No.3)* [2005] EWCA Civ 595; [2006] QB 125 Lord Phillips said “*we cannot pretend that we find it satisfactory to be required to shoehorn within the cause of action for breach of confidence claims for publication of unauthorised photographs of a private occasion*”.
7. This process of absorbing claims for misuse of private information into the cause of action for breach of confidence was undertaken to prevent the Court, as a public authority, from acting in a way which was inconsistent with rights in the European Convention on Human Rights (“ECHR”) incorporated into domestic law by the HRA 1998, see *A v B* at paragraph 4 and *McKennitt v Ash* at paragraph 10.
8. Both articles 8 and 10 of the ECHR were therefore accommodated in the new cause of action. The House of Lords in *Campbell* made clear that “*the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence”*. Article 8 of the ECHR provides that “*everyone has the right to respect for his private and family life, his home and his correspondence”.* Article 10 provides that “*everyone has the right to freedom of expression”*. Both articles 8 and 10 are rights which can be qualified pursuant to the respective provisions of article 8(2) and article 10(2).
9. It might be noted that alongside this development of the law of misuse of private information, which inevitably impacts negatively on freedom of expression, the law has also shown greater latitude towards freedom of speech in matters of controversy concerning public figures, see *Jameel v Wall Street Journal* [2006] UKHL 44; [2007] 1 AC 359 at paragraph 38.
10. This claim is an action for breach of confidence, which has been renamed as a cause of action for misuse of private information, see *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 at paragraph 14. It might be noted that the issue of whether the cause of action for misuse of private information is now a separate tort, as opposed to an equitable cause of action, is an issue to be addressed by the Court of Appeal on an appeal from the judgment of Tugendhat J. in *Vidal-Hall v Google Inc* [2014] EWHC 13 (QB). It is common ground that I do not need to say anything further on that issue, and I do not do so.
11. I have not been addressed on the debate between senior Judges in England and Wales, which has become more pronounced in recent extrajudicial lectures, about the extent to which decisions of the European Court of Human Right should be followed by domestic Courts. This is because the domestic law in this area is now based on both articles 8 and 10 of the ECHR, and it is therefore necessary to look at the judgments of the European Court of Human Rights to determine the content of both articles 8 and 10.

**Known or ought to be known**

1. As noted above it is common ground that the first question to be asked is “*whether there is a reasonable expectation of privacy”,* see *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 at paragraph 35. The dispute between Mr Sherborne and Mr White was whether the matters relied on to show the circumstances giving rise to the reasonable expectation of privacy need to be “*known or ought to be known*” by the publisher of the information.
2. The issue of whether there is a reasonable expectation of privacy (which has sometimes been expressed as “*the legitimate expectation of privacy”* but which is said to mean the same thing) is a broad test which takes into account all the circumstances of the case. This includes: “*the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher*”, see *Murray v Express* at paragraph 36. It is common ground that there is a threshold of seriousness before article 8 is engaged. This is to avoid a risk that article 8 claims become unreal and unreasonable.
3. In support of his submissions Mr White was able to point to paragraph 14 of Lord Nicholls’ judgment in *Campbell v MGN* in which Lord Nicholls stated that “*now the law imposes a `duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential*” (underlining added). Baroness Hale said the balancing exercise might begin “*when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential*” (underlining added). Therefore both Lord Nicholls and Baroness Hale referred to a requirement that the publisher either knew or ought to have known about the reasonable expectation of confidence.
4. On the other hand Lord Hope, in paragraph 99, said “*the question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity”*. This did not appear to have the limiting requirement of “*knows or ought to know*”, and is phrased in terms of the test set out in article 8 of the ECHR. Lord Hoffmann stated that although the principles had been expressed in varying language, and despite a division of opinion on the outcome on the facts, he could see “*no significant differences*” in approach between the Judges in the House of Lords.
5. In *Douglas v Hello! (No.3)* at paragraph 100 the test was described as having been established by *Campbell v MGN* and being “*whether Hello! knew or ought to have known that the Douglases had a reasonable expectation that the information would remain private*” (underlining added).
6. Mr Sherborne submitted that *Campbell v MGN* and *Douglas v Hello! (No.3)* were breach of confidence cases, and he relied on *Murray v Express Newspapers* where it was stated at paragraph 35 “*the first question is whether there is a reasonable expectation of privacy. This is of course an objective question”*.
7. In *Murray v Express Newspapers* reference was made to the test expressed in Lord Hope’s judgment in *Campbell v MGN* and it was stated “*we do not detect any difference between Lord Hope’s opinion in this regard and the opinions expressed by the other members of the appellate committee”*. However it should also be recorded that in *Murray v Express Newspapers* at paragraph 36 reference was made to *“the absence of consent and whether it was known or could be inferred*” (underlining added). Reference was also made to “*the circumstances in which and the purposes for which the information came into the hands of the publisher”* (underlining added). This necessarily takes account of what the publisher knew or ought to have known about the relevant material.
8. Later cases, such as *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 (QB); [2013] EMLR 2, have applied the test set out in *Murray v Express Newspapers*, see *AAA* at paragraph 64. The test was not commented on in express terms by the Court of Appeal in *AAA* [2013] EWCA Civ 554 hearing an appeal from the judgment at first instance. *Murray v Express Newspapers* has been applied in other recent cases including *RocknRoll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch) at paragraph 5 and *Othman v The English National Resistance* [2013] EHWC 1421 (QB) at paragraph 60.
9. Mr Sherborne submitted that if the cause of action for misuse of private information is to give effect to rights protected by article 8 of the ECHR, then full protection would not be given to the article 8 rights if there was a requirement that the reasonable expectation of privacy is either known or ought to have been known to the publisher. Mr White noted that the article 8 right is to “*respect for …*”, rather than an unqualified right to privacy.
10. Mr Sherborne also noted the finding that the reasonable expectation of privacy in *AAA* had been modified by a conversation which had not been known to the publisher of the information. He submitted that it would therefore be wrong to take into account matters unknown to the publisher to reduce the reasonable expectation of privacy, but not to take into account matters unknown to the publisher which might assist in demonstrating the reasonable expectation of privacy.
11. I accept that the phrase “*known or ought to be known*” was used in some of the earlier judgments because the cause of action for misuse of private information was grafted on to the cause of action for breach of confidence. “*Although the cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship*”, see *Campbell v MGN* at paragraph 14, the reason that breach of confidence was chosen for this development of the law was because the duty arose from the fact that a person was receiving information which was known or ought to be known was private. Therefore what was known or ought to be known was an important part of establishing the original cause of action. It is right to say that the law has continued to develop, but Mr White is also correct to note that, even before the limitations of article 8(2) are addressed, the right in article 8(1) is to “*respect for … private and family life*”.
12. In my judgment the law as it has now been developed is as stated in the broad objective test for the “*reasonable expectation of privacy*” set out in paragraphs 35 and 36 of *Murray v Express Newspapers.* As appears from *Murray v Express Newspapers* the question whether there is a reasonable expectation of privacy is a broad one, and takes account of all the circumstances of the case. However, and relevantly, this specifically includes “*the absence of consent, and whether this was known or could be inferred*” by the publisher, “*and the circumstances in which and the purposes for which the information came into the hands of the publisher”*. This broad test allows the Court to assess what the publishers knew, and what they ought to have known. It also allows publishers to take account of matters which they did not know, and could not have known about, at the time of publication to show that there was no reasonable expectation of privacy. This may be important to ensure proper respect for freedom of speech. The broad nature of the test also allows individuals to be shown the respect that is properly due for their private life.
13. I suspect that the reason that this specific issue about the publisher’s knowledge has not arisen before is because, in practical terms, very little is likely to turn on the point. It does not appear that the Court of Appeal in *Murray v Express Newspapers* was intending to modify the legal tests which had been previously held to apply. It is apparent from the analysis set out above that, in the broad test proposed in *Murray v Express Newspapers* the issue of what the publisher knew, and ought to have known, is engaged.

**The effect of the law of the location at which the photographs were taken**

1. As appears above, the photographs were taken in Santa Monica, Los Angeles. Santa Monica is in the state of California, United States of America. In paragraph 100 of *Douglas v Hello! (No.3)* Lord Phillips, giving the judgment of the Court to which the other members (Clarke and Neuberger LJJ) had also contributed, dealt with a submission based on the laws of the state of New York, which was the state in which the photographs in that case had been taken. Under the laws of New York there would have been no inhibition on the photographer taking the photographs, see paragraph 99 of that judgment. Lord Phillips held that the law of New York did not have any direct application on the facts of the case. The cause of action was based on the publication in England and Wales, and “*the test of whether the information was private so as to attract the protection of English law must be governed by English law*”.
2. However Lord Phillips noted that “*where the events to which the information relates take place outside England – in this instance in New York – the law of the place where they take place may none the less be relevant to the question of whether there is a reasonable expectation that the events will remain private*”. He continued at paragraph 101 stating *“If, in the present case, the law of New York had provided that any member of the public had a right to be present at a wedding taking place in a hotel and to take and publish photographs of that wedding, then photographs of the wedding would be unlikely to have satisfied the test of privacy*”.
3. Mail Online have adduced expert evidence from Jean-Paul Jassy (“Mr Jassy”) who has practised law in California since 1999. He had also taught law in the media and First Amendment fields at the University of California, Los Angeles South Western University Law School, The University of Southern California Law School, and The University of California, Irvine the School of Law. Mr Jassy gave evidence by way of a report, and although arrangements had been made for Mr Jassy to be cross-examined by video-link, in the event Mr Sherborne notified the Defendant that he did not propose to ask any questions of Mr Jassy, on the basis that the laws of California were irrelevant to the issue to be decided by me. I therefore accept Mr Jassy’s evidence on the laws of California.
4. Mr Jassy gave evidence that he had been instructed to answer two questions. First “can a member of the public in California lawfully take a photograph of a person in a public place in California such as the photographs of the Claimants in this case?” and secondly “can a person who’s taken photographs of a person in a public place in California (such as the ones of the Claimants) lawfully publish those photographs?” Mr Jassy said the answer to both questions was yes. He relied in particular on the decision of *Gill v Hearst Publishing Co. Inc* 40 Cal. 2d 224 (1953) and other subsequent decisions.
5. Mr Jassy also fairly recorded that a recent amendment to the California Penal Code known as “section 11414”, which purported to protect children who are harassed by photographers because of their parents’ occupation, had been enacted. Mr Jassy gave a number of reasons why the amendment had no effect on this case (including the fact that Dylan was too old and the twins were too young to qualify for protection). He also stated that he considered that section 11414 would be unconstitutional if applied to the facts of this case.
6. It is common ground that the law that I have to apply in this case is the law of England and Wales. This is because the relevant publication by Mail Online occurred within the jurisdiction of the Courts of England and Wales. The controversy is over the extent to which the laws of England and Wales should take into account evidence of the laws of where the photographs were taken, in deciding whether there is a claim for misuse of private information.
7. In my judgment the fact that it was lawful under the laws of California to take the photographs is something that I will take into account when assessing the legal tests in this case. However the fact that it would be lawful to publish the photographs in California does not, in my judgment, determine either the first or second tests that I have to apply. The relevant act complained of in this case is the publication in England and Wales of photographs of the children with unpixelated faces. Whether this is lawful will have to be determined by a fair application of the tests set out in English law (which as noted above have, since the enactment of the HRA 1998, been affected by the ECHR). The tests are not determined by the law of California. To permit the foreign law to determine the issue would mean that publishers and private individuals would be dependent on foreign laws, which might mirror the laws of England and Wales, or be very strict or very lax. In this respect it might be noted that it is apparent that many jurisdictions have developed their own laws in response to, among other matters, an increasing appreciation of the importance of rights of children. It would be unfortunate to end up attempting to second guess an issue of the constitutionality of a foreign statute (assuming it to have been applicable) in the Courts of England and Wales where the relevant event, namely the publication, had happened in England and Wales.
8. I do not consider that anything that was said in *Douglas v Hello! (No.3)* suggests a different conclusion. Lord Phillips simply noted that, in that case, the law of the place where the photographs had been taken might be relevant to the question of the reasonable expectation of privacy. That was in circumstances where the Claimants had licensed not only the taking, but also the publication of photographs from their wedding. If the laws of New York had meant that there was no right to prevent guests and others from taking photographs, it would follow that in that case there could not have been a reasonable expectation of privacy. That is a very long way from saying that the Courts in England and Wales should come to the same conclusions as a foreign Court on whether children have a reasonable expectation of privacy in relation to the publication of photographs of their faces.
9. As noted in paragraph 16 above, it was common ground that the Claimants’ claim for infringement of the Data Protection Act would stand or fall with the claim for misuse of private information. No submissions were addressed to me about the separate effect of the laws of California on the claim for infringement of the Data Protection Act.

**The second question and the ultimate balancing test**

1. If the answer to the first question is yes, and there is a reasonable expectation of privacy, “*the next question would be how the balance should be struck as between the individual’s right to privacy on the one hand and the publisher’s right to publish on the other. If the balance were struck in favour of the individual, publication would be an infringement of his or her article 8 rights, whereas if the balance were struck in favour of the publisher, there would be no such infringement by reason of a combination of articles 8(2) and 10 of the Convention*”, see *Murray v Express Newspapers* at paragraph 40.
2. It might be noted that both sides submitted that article 10 is engaged in every case such as this. There is no “threshold of seriousness” to be overcome. The importance of freedom of expression is such that there is no hurdle before article 10 is engaged.
3. When considering the second question it is important to recognise that there are two vital rights engaged and which need to be balanced, respecting issues of proportionality. In *Re S* [2005] 1 AC 593 at paragraph 17 Lord Steyn stated that when considering such a balancing exercise four principles could be identified. “*First, neither article has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test*”.
4. Domestic Courts have already specifically referred to, and followed, the relevant leading decisions of the European Court of Human Rights, in particular in *Von Hannover v Germany* (2004) 40 EHRR 1, and it is common ground between the parties that I should take account of the views of the European Court of Human Rights more recently described in *Von Hannover v Germany (No.2)* (2012) 55 EHRR 15. The *Von Hannover* cases might be described as an example of the dialogue that has sometimes occurred between the highest Courts of a jurisdiction and the European Court of Human Rights.
5. In *Von Hannover (No.2)* the Grand Chamber of the European Court of Human Rights set out in paragraphs 109 to 113 a number of relevant criteria to be considered when carrying out the balancing exercise which had been derived from the case law. These were: “*contribution to a debate of general interest … how well known is the person concerned and what is the subject of the report … prior conduct of the person concerned … content, form and consequences of the publication … circumstances in which the photos were taken*”. It might be noted that some of the relevant criteria might have been the subject of separate consideration when considering the broad test of whether there was a reasonable expectation of privacy.
6. It is important to note the provisions of section 12 of the HRA 1998. The section applies whenever a Court is considering whether to grant any relief which might affect the exercise of the right to freedom of expression. A claim for an award of damages against a publisher, which inevitably engages issues of the chilling of free speech, and a claim for an injunction which will regulate future publication, affect the exercise of the right to freedom of expression, and so section 12 will apply to this claim.
7. Section 12(4) of the HRA 1998 directs the Court to have “*particular regard”* to: the importance of freedom of expression protected by article 10 of the ECHR; the extent to which material has, or is about, to become public; the public interest in publishing the material; and any privacy code.
8. The Press Complaints Commission (“PCC”) Editor’s Code of Practice provided, at the material time, at clause 3 that everyone was entitled to respect for his or her private and family life, and that it was unacceptable to publish photographs of individuals in private places without their consent. There was a note that “*private places are public or private property where there is a reasonable expectation of privacy”*. This provision is subject to a public interest exception.
9. Clause 6 of the PCC Editor’s Code makes provision for children. It provides at (v) that “*editors must not use the fame … or position of a parent … as sole justification for publishing details of a child’s private life”.* This provision is subject to a public interest exception. The Code makes it clear that a very high public interest needs to be satisfied to justify publication of such details about children aged under 16 years.
10. Both parties referred me to relevant adjudications by the PCC. Mr White submitted that a breach of the Code does not create a cause of action, and whether there had been a breach was a matter for the PCC, and I accept those submissions. That said, I have to have regard to PCC Code. In *AAA* at paragraph 123 Nicola Davies J. recorded that the publication of unpixelated photographs of the Claimant in that action was in breach of the Code. Mr White suggested that this was because the child’s welfare was engaged.
11. The 2012 Editor’s Codebook states that “*the Code goes to exceptional lengths to safeguard children by raising the thresholds on disclosure and defining tightly the circumstances in which press coverage would be legitimate … The welfare of the child includes the effect publication might have … Children of the famous: The rules apply equally to children of parents from all walks of life”*.

**Article 8 and photographs**

1. Article 8 shows that private information is to be protected “as an aspect of human autonomy and dignity”, see Lord Hoffmann in *Campbell v MGN* at paragraph 50.
2. The authorities also recognise that “*special considerations attach to photographs in the field of privacy … As a means of invading privacy, a photograph is particularly intrusive*”, see *Douglas v Hello! (No.3)* at paragraph 44.
3. A similar approach can be found in the approach of the European Court of Human Rights. In *Reklos v Greece* [2009] EMLR 16 the Court was considering whether the taking photographs of a new born child without parental consent at a clinic, with a view to selling the pictures to the parents, infringed the provisions of article 8. The Court said at paragraph 40 that “*a person’s image constitutes one of the chief attributes of his or her personality, as it reveals the person’s unique characteristics and distinguishes the person from his or her peers*”. The Court went on to hold that obtaining prior consent was, in the circumstances of that case, essential.
4. The European Court of Human Rights said in *Von Hannover (No.2)* at paragraph 95 that *“regarding photos, the Court has stated that a person’s image constitutes one of the chief attributes of his or her personality, as it reveals the chief attributes of his or her personality and distinguishes the person from his or her peers”*.
5. The particular importance attached to photographs in the decided cases is, in my judgment, a demonstration of the reality that there is a very relevant difference in the potentially intrusive effect of what is witnessed by a person on the one hand, and the publication of a permanent photographic record on the other hand.

**Article 8 and the public place**

1. In *Murray v Express Newspapers* the Court of Appeal held that it was arguable that an expedition to the café was part of each member of the family’s recreation time such that publicity of it is intrusive and such as to adversely affect such activities in the future, see paragraph 55. The Court also stated that “*it seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child*”. The Court was careful to stress that such a finding was no guarantee of privacy, because holding that there was a reasonable expectation of privacy was only the first step.
2. The Court of Appeal in *Murray v Express Newspapers* did not follow the approach in the New Zealand courts in *Hosking v Runting* [2005] 1 NZLR 1, for the reasons explained in paragraphs 48 to 53 of the judgment in *Murray v Express Newspapers*. *Hosking v Runting* was a case concerning the publication of photographs of the face of two children of famous parents taken while they were on the street. In *Murray v Express Newspapers* the Court of Appeal noted that the legal tests applied in New Zealand were different, and that the judgment in *Hosking v Runting* had been subsequently doubted by some of the Judges (albeit in a dissent) in the Supreme Court in New Zealand.
3. Mr White also relied on the judgment in *Kinloch v HM Advocate* [2012] UKSC 62; [2013] 2 AC 93 which concerned an Appellant who was alleged to have been engaged in money laundering and was, for those purposes, carrying bags containing money in the streets, and who had been the subject of police surveillance. No authorisation had been obtained for the surveillance operation, and an issue arose whether the appellant had a reasonable expectation of privacy. It was held that there was no such reasonable expectation of privacy in such circumstances. Lord Hope noted at paragraph 21 that a person walking down a street and crossing a road had to expect that he would be visible and might be the subject of monitoring by CCTV. A person walking around in such circumstances took the risk of being seen and having movements noted. The criminal nature of what was being done, if that is what it was, was not an aspect of private life that the Appellant was entitled to keep private.
4. A similar approach was taken by Higgins LJ in the Court of Appeal in Northern Ireland when deciding *In the matter of an application by JR 38 for Judicial Review* [2013] NIQB 44. At paragraph 63 Higgins LJ stated that the answer to the question whether a private life exists in a public setting will be found considering whether the person had a reasonable expectation of privacy in the public circumstances in which he placed or found himself. In that case the applicant had placed himself in public view among a crowd of other persons alleged to be engaged in public disorder. He could not complain of the publication of photographs showing him involved in that activity, and such a publication did not show any interference with article 8 rights requiring justification, see paragraph 66 of the judgment.
5. It might be noted that Morgan LCJ agreed that taking the photograph did not engage article 8, but held, at paragraph 30 of his judgment, that the publication of the child’s image was an intrusion into private life. However the photograph was published for the reasons given in paragraph 37 of the judgment, which included a pressing need to identify those responsible for the violence, and was therefore justifiable under article 8(2). Coghlin LJ agreed with Morgan LCJ.
6. The facts of both *Kinloch v HM Advocate* and *JR 38* are very far removed from the circumstances of this case. It if it is necessary to say so, I respectfully consider that the approach of Morgan LCJ and Coghlin LJ in *JR 38* is the correct one. The taking of the photograph in those circumstances did not engage the provisions of article 8, but the subsequent publication in local newspapers did. This is because the publication of the photograph of the face of the child in a newspaper created a risk of stigmatisation, and engaged article 8 rights. The publication was however a justifiable interference with article 8 rights.

**Article 8 and previous publications**

1. It is apparent that the reasonable expectation of privacy may be affected by activities carried out by the person claiming an interference with their private life or, if the person is a child, their parent. In *AAA* the reasonable expectation of privacy was modified by conversations which had taken place between the claimant’s mother and others. This meant that publication of private information became permissible, given the public interest engaged. It did not justify the publication of a photograph of the child claimant in that case.
2. In *McKennitt v Ash* the Court of Appeal rejected the proposition that disclosures in one “*zone*” of a person’s life justified a greatly reduced expectation of privacy in relation to any other information which fell within that zone. In that case the Claimant had given controlled and limited disclosures about her grief following the death of her fiancé, while raising monies for a fund to promote water safety. This did not justify publishing details of her reactions following her fiancé’s death about which she had a reasonable expectation of privacy. Buxton LJ noted that his rejection of this argument did not mean that a *public* figure could control or censor what was published about them.

**The importance of the freedom of the press**

1. The Courts have emphasised the constitutional importance of having a free press. In *K v News Group Newspapers* [2011] EWCA Civ 439; [2011] 1 WLR 1827 at paragraph 13 Ward LJ stated “*everyone has the right to freedom of expression but the ones with the greatest need for this constitutionally vital freedom are the organs of the media. In the interests of our democratic society we – and that includes the judges – must ensure that the press are freely able to inquire, investigate and report matters of interest. The press is the public watchdog.”*
2. Hoffmann LJ in *R v Central Independent Television plc* [1994] Fam 192 at 203-204 said “*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 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. The freedom is subject only to clearly defined exceptions …”*.

**The public interest in a thriving and vigorous newspaper industry**

1. The Courts have also made it clear that there is a public interest in having a thriving newspaper industry. Lord Woolf made the point in *A v B* at paragraph 11(xii) where he said “*courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.”*
2. Although in *McKennitt v Ash* at paragraph 66 Buxton LJ doubted Lord Woolf’s statement, he did not decide the point. I accept and follow Lord Woolf’s approach, which has since been affirmed on other occasions. Gross LJ referred to the importance of having *“a thriving and vigorous newspaper industry*”, see *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808; [2012] EMLR 2 at paragraph 34.
3. In *K v News Group Newspapers* Ward LJ also said at paragraph 13 “*we have to enable sales if we want to keep our newspapers. Unduly to fetter their freedom to report as editors judge to be responsible is to undermine the pre-eminence of the deserved place of the press as a powerful pillar of democracy.”*

**The best interests of children**

1. The decided cases establish that the position of a child claimant is different from that of an adult claimant. The Courts have recognised the importance of the rights of children in many different contexts, as has the international community by the United Nations Convention on the Rights of the Child, see *Murray v Express Newspapers* at paragraph 45. Having referred to those international developments it was said “*if a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the media, so too should the child of a famous parent. In our opinion it is at least arguable that a child of `ordinary’ parents could reasonably expect that the press would not target him and publish photographs of him”*. As the extract makes clear, *Murray v Express Newspapers* was considering whether the claims were arguable.
2. Courts when considering the rights of children in this area should, pursuant to the judgment in *K v News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827 at paragraph 19, have regard to Lord Kerr’s judgment in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166; at paragraph 46. Lord Kerr stated “… *in reaching a decisions that will affect a child, a primacy of importance must be accorded to his or her interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace them*”.
3. As *Spelman v Express Newspapers* [2012] EWHC 355 (QB) at paragraph 55 makes clear, the effect of the child’s age and circumstances will have different effects in different cases.

**The evidence**

1. Witness statements were filed on behalf of the Claimants by: Paul Weller; Hannah Weller; Claire Moon who is the personal assistant and manager for Paul Weller; and Dylan. They were all cross examined on their statements (Dylan’s cross examination was by video link to the United States).
2. Witness statements on behalf of the Defendant were filed by: Martin Clarke, the publisher of Mail Online who has in the past been editor of other newspapers. He had been in charge of Mail Online editorial since 2006 and was appointed the publisher in 2010; and Elizabeth Hazelton who was the deputy UK editor of Mail Online. Mr Clarke was not cross-examined, but there was cross-examination of Elizabeth Hazelton.
3. All of the witnesses were giving honest evidence and doing their best to assist me.
4. I will address some of the relevant evidence when considering the specific matters under the first and second tests. However much of the evidence in the case was directed to issues raised by Mail Online about: (1) whether what had been said and published by Paul Weller, Hannah Weller, Leah Weller (another child of Paul Weller) and Dylan had modified the reasonable expectations of privacy on the part the children; (2) why there had not been previous complaints about coverage; and (3) what were the motives of Paul and Hannah Weller in bringing this claim. Mail Online’s evidence was directed to the circumstances in which the photographs had been obtained, as well as the importance of the Mail Online being commercially viable. I will also address the evidence about these specific issues before addressing the legal tests and other evidence relevant to the legal tests.

**Paul Weller’s interviews**

1. Paul Weller said that he appreciated that the paparazzi and press liked to publish material about him because of what he did for a living, but he still regarded himself as a private person when not performing. He said he did not and never has sought celebrity status. He said he had given interviews over the years, generally coinciding with a new musical project or tour, and that on occasions this had included some biographical details about him or his family because interviewers, understandably, want more than just a lengthy description of the nature or genesis of a new song or album. He said he had avoided doing the sort of in depth interviews about private life or features in the lifestyle magazines such as Hello!
2. Relevant extracts from the newspaper interviews included an interview with the Independent on 20th June 2008 in which Paul Weller described in detail the appearance and hairstyle of his then three-year-old son (who is not a Claimant in this action). There was an interview with the Guardian on 12th March 2012 in which Paul Weller spoke of the medical condition and treatment of his then 11 year old daughter (not a Claimant in this action) and the sleeping and feeding routines of the second and third Claimants who were then two months old. Paul Weller said that that was chit chat with the interviewer, he didn’t think his statements would end up in the interview, but he said that was still completely different to being followed around by a photographer who was taking photographs of the children. He said he wasn’t volunteering information but he was responding to questions. He said if people asked him about politics, the album, love, God and the children he would talk about it. He said interviewers didn’t want to talk only about the bass guitar on track 5 of an album, and what was printed by the journalist was not in his control.
3. Paul Weller denied that he was promoting his image as a devoted father, he said he wasn’t interested whether the public knew that and it didn’t work like that. He was a devoted father and the important people in his life knew that. He denied that the image of a devoted father helped him to sell records.
4. Some time was spent considering an article in the Sun on 20th March 2012 following an interview during which Paul Weller had shown the journalist photographs of the Second and Third Claimants on his phone. Paul Weller said that he had known the interviewer in the Sun for some ten years. He said the photographs hadn’t appeared in the Sun article and the journalist did not have access to copies of them. Paul Weller had not allowed copies to be taken, and had not forwarded copies for publication. In the interview Paul Weller described sleeping arrangements, behaviour and development of the twins. Paul Weller said he’d not written up the article, it was up to them to decide what to write but that it was, as he put it, lazy journalism simply to write about his family.
5. Hannah Weller was aware that Paul Weller had given various interviews to promote the album “Sonik Kicks”. The interview with the Sun had been carried out by someone he had known for some ten years. Hannah Weller said that she knew he had spoken about the children and it was normal for him to speak about the children if asked.
6. In an interview with Big Issue reported on 18th June 2012, Paul Weller spoke of the Second and Third Claimants and described the Second Claimant’s appearance. Paul Weller said there was a big difference between those descriptions, and photographs of babies. He said he wasn’t happy to discuss his children but he would answer questions.
7. Paul Weller was taken to an article in the Times Magazine dated 3 March 2012 and accepted that there were lots of references to the family and the fact that he had gone to a school event, as well as references to the twins. Paul Weller said that it was one thing to talk about it and it was a completely different thing for the children to be photographed. He said he didn’t really have a public image as a musician and artist, and he wasn’t interested in promoting his image. Hannah Weller was shown the same article in the Times Magazine. Hannah Weller said that this was simply Paul Weller gushing about his family like any new Dad. She accepted it was a by-product of the interview to promote the album.
8. Paul Weller was asked about the article in the Portsmouth News which was about a shopping trip with Dylan and he said that he was happy to volunteer that he would go shopping with her. Dylan was asked whether she had any objection to her father’s description in a newspaper article about his plan to take her shopping. It was not apparent that Dylan had understood the question (she was being asked questions on video-link) because she replied that it was normal to go shopping. Dylan made it clear in later evidence that she didn’t really read what her father said in interviews.
9. Paul Weller was asked about the involvement of his children in performances he’d carried out. He was taken to an article written in August 2009 written at a time when his son Natt was then aged 20 years. The article suggested that Natt had performed with Paul Weller when Natt was aged 15 years. Paul Weller thought that the article was wrong because the relevant song had not even been published until Natt was aged 17 years. Paul Weller was asked about the statement about music being a family affair and he said that his 5 and half year old son had gone with him to a studio.
10. Paul Weller was asked whether he should have refused to discuss his private life when interviewed and he said that it would otherwise have been a very dull interview. He said if he was asked a question about how was fatherhood he would answer it. He said his preference would simply be to talk about music, but that that would be a dull interview. Hannah Weller was asked whether Paul Weller should have refused to discuss family life and she responded asking why not, and she said that he would have no interest in pretending that he did not have children. Hannah Weller said that photographs of the faces of the children published to millions of persons were very different. Hannah Weller said that Paul Weller was very personable and that it would be very strange to pretend that they were not who they were.
11. Claire Moon said that Paul Weller had agreed to do interviews in the past but it was not something which he enjoyed or actively sought. He was essentially a private person despite his success in the music industry. She said that as to photographs of the children “*this is a complete no no as far as I had always believed*”. Claire Moon said that offers had been made to Paul Weller to feature in Lifestyle and Hello! magazine articles but he had refused them. Claire Moon said that with the launch of “Sonik Kicks” in March, and the birth of the twins in January, all the journalists had therefore asked Paul Weller about the twins. Claire Moon said that it did not assist Paul Weller’s image to be known as some sort of super dad.
12. Claire Moon said that Paul Weller had no need to consider how he portrayed himself, he was not the same as any new X Factor act. She said that if there had been any unhelpful images portrayed in the media she would tell him but she had never had to do that.

**Hannah Weller’s tweets**

1. Considerable attention was devoted to tweets which had been posted by Hannah Weller. Hannah Weller said in her statement that she was a private person and had never been in the public eye. She had been very strict in terms of how she protected her children and ensuring that so far as possible no visible images of their faces were printed in the media. She had even refused to allow her mother to post pictures or email them to anyone as they were worried that they might get picked up and published.
2. Hannah Weller confirmed that she started using Twitter in March 2012. She had used it for entertainment purposes, to read the news and to post anecdotes about her life and experiences as well as to read other people’s tweets. The Twitter opening page disclosed that she was married to her soul-mate. Hannah Weller accepted that it could be read on iPhones as well as iPads or computers. Hannah Weller said her homepage made it clear that it was simply her as a mother. She said her job as a mother was to protect the children and that adults could look after themselves and she said there was simply no correlation between sharing private information about sleepless nights and showing pictures of the face of the twins. She complained that the Defendant would be making money and no one should do that, from the photographs of the twins.
3. Hannah Weller said she had never put any photographs of the faces of her children on the Twitter account and she said that the whole point about her complaint about the Mail Online was that the photographs of the children’s faces had not been pixelated. She said that any photographs that she had posted on Twitter had been photographs in which it was not possible to distinguish her children from others. Hannah Weller confirmed that her complaint was about the publication of the facial images of the children. She did not think that they should be publicly available. A birthday party photograph which she had tweeted showed that she had cropped that photograph to ensure that one of her step children was not seen.
4. Hannah Weller was asked about the Tweet showing her pregnant body which had been picked up by national newspapers including the Mirror, News of the World, the Mail Online and the Sun. Hannah Weller said that she hadn’t thought that that would happen but accepted that it was foreseeable.
5. Paul Weller was asked about the Tweet showing Hannah Weller’s bump. He said it was quite a bump but he didn’t understand social media and whether it was private or public. His wife wasn’t making money and exploiting the children and there were no pictures showing the twin’s faces.
6. Hannah Weller was asked about the factual and textual information that was given in the Tweets to the effect that: the twins wouldn’t look at each other; they were hard work; they were going to their first gig out of the womb on one week; and Bowie had been smiling for a couple of weeks but John Paul only smiled for Paul Weller. In another tweet Hannah Weller had tweeted that permanent requests for her attention were being made, and that when a Christmas tree had fallen over one of the twins had picked up a swear word that had been used. In another tweet Hannah Weller had recorded that the boys had cuddled up to her and said love you, noting that it was the best thing to happen this year. Hannah Weller said that this was simply her as an adult sharing anecdotes with other women in a similar position. It wasn’t personal in the sense that the boys were not seen.
7. Hannah Weller was asked about the photograph that she had Tweeted which showed the twins standing naked with their backs to the camera on a toy sofa. Hannah Weller said that that wouldn’t identify them from any other blonde toddlers and wouldn’t show who they were. It wouldn’t make them the target for a kidnap nor enable them to be picked out in the school playground. Hannah Weller was taken to a passage in her witness statement in which she had noted her concerns about uses that could be made of photographs of her children which she clarified to be concerns about abuse of the images and said that the important point about this photograph was that the twins were not identified.
8. Hannah Weller was also taken to other photographs, but was able to make the point that no facial features were shown of the children. Paul Weller was asked about the Tweets published by his wife Hannah Weller and he said he was relaxed about those, there were no photographs of facial images and lots of other people were doing the same thing. He said that his family was a very normal unit and that they led very normal lives which was why he was protective about them when they were out.

  **Leah’s photograph of Bowie**

1. Paul Weller said that he was aware that in 2012 his daughter Leah had posted a photograph on Instagram of herself with Bowie which Paul Weller had asked her to remove and which Leah had done. It appears that the image was in fact tweeted by Leah.
2. Paul Weller said he wasn’t happy about an image of one of the twins being put out in to the cyber world and he thought that Leah was sensitive to the needs of the family but wouldn’t necessarily know where it could go. He said there was a difference between that and the publication in the Mail Online. He was asked why if they hadn’t thought it was objectionable the Defendant should think it was objectionable. Paul Weller said he didn’t know what Mail Online thought.
3. Paul Weller referred to various websites which had been created by fans and his official website. He had also been asked about website accounts held by his children and had it explained to them on a number of occasions the importance of not posting photographs where any one other than friends and family might see. They had apparently understood and agreed with that advice and ensured that their accounts were set to private. Paul Weller had never heard of a website on which the photograph was apparently still visible before seeing the Defendant’s supplemental disclosure, and he had made every effort to take the photograph down.
4. Claire Moon had commented on the Paul Weller news website which was a fan site run by a fan and which was completely separate from Paul Weller. Claire Moon confirmed that no photographs of the twins had been posted on any of the websites which were managed by her. Claire Moon said that she had been in contact with the Paul Weller news website when she became aware that the picture of Leah and one of the twins had been retweeted. She had asked the person who ran the website to take it down and he had agreed to take it down. Claire Moon said she’d checked Twitter and Instagram and the image had been removed. She had not checked Facebook and when it had been brought to her attention that it was still available to be seen on Facebook through disclosure from Mail Online she had contacted Paul Weller news website again who had been very apologetic and had removed it.
5. Claire Moon agreed that the Paul Weller news website was broadly supportive and that she suspected that the person in charge of the website had not thought about the matter before he had published the photograph as a retweet.
6. Dylan said she hadn’t been aware that Leah had shared on Instagram a photograph of Bowie. Dylan had never seen it but she confirmed that she didn’t check her Instagram every day.

 **Dylan’s activities**

1. Dylan said that she was now 17 and that although she’d grown up in the United Kingdom she’d been living in LA with her mother for the last four years or so. She said she was still very close to her father but only got to see him on average 3 to 4 times a year when he was touring in the US or when she was on holiday back in the UK.
2. Mail Online had relied on the fact that Dylan had been described as a model, and that there were some photographs which were available of Dylan. Dylan said that her father had always kept her out of the media spotlight and that she had never been to any red carpet event or to any celebrity parties.
3. Dylan commented on the photographs which had been included in an issue of Teen Vogue a few years ago. Dylan said that when she was 14 she’d asked her mother to sign her up with a modelling agency to see what it would be like. Dylan said that she did only one shoot and that was for Teen Vogue. The photograph had been published in the 24th February 2011 edition of the magazine. Dylan said that she had left the agency a year after joining and had done nothing more with it since. The Teen Vogue photograph shows Dylan in a white top, skirt, platforms, necklace and bracelet. She was asked about her modelling and she said she had done a shoot for Teen Vogue. The article was wrong to say she had been modelling for a year and that she hadn’t done several shoots. She considered that to be a bit out of context and that the article writer had exaggerated. She said that Teen Vogue was at the time one of her favourite magazines that she read all the time. Dylan said that there was a difference between photographs that she felt comfortable in, and the photographs in this action. Dylan was pleased to appear in Teen Vogue and to have that published. She didn’t know what the publication figures were for Teen Vogue.
4. Paul Weller said that when Dylan was about 14 years old, she had joined a modelling agency for a year during which she did one modelling shoot. He said that was a different and controlled environment for a photograph to be taken and published and that it could not be said to deprive her of any right to complain about the paparazzi photographs which had been taken. She had given her consent for those photographs. He said that there was a difference between posed photographs in studios and taking photographs of children just to raise money did raise moral issues.
5. He was asked about the letter of complaint to Associated Newspapers which referred to security concerns about Dylan because her image would be available. Paul Weller was asked how that could be a concern when Teen Vogue had also published images and he said there was a different audience as Teen Vogue was directed to other children and that there had been consent to that photograph.
6. Dylan also said that at roughly the same time her godmother Mary McCartney had asked if she might take some shots of her to feature in her new book and Dylan said she was happy to do so as their families had been close for a long time. The photographs in that book are also in the bundle. They show Dylan standing (2 photographs) and sitting on a bench (1 photograph) in a park wearing leggings, top and denim skirt. Dylan is also shown leaning forward on cushions on a sofa with her face showing to the camera, and there are two shots showing Dylan standing and sitting on a skate board. Dylan said that she drew a distinction between the photographs splashed across a tabloid newspaper and the photographs in the book. Dylan said that the photographs had been taken while she was at her house and at the park by her godmother Mary McCartney. She assumed the reference to Paul McCartney in the Teen Vogue article was a mistake and she had not done a photo shoot with Paul McCartney. She thought she’d been around 11, perhaps between 10 and 12 when the photographs had been taken by Mary McCartney. Her godmother was used to carrying a camera around and she hadn’t understood that they had been taken to be published. Dylan Weller said that she had no objections to them being published but she wasn’t pleased either. She had been comfortable with them being published because they had been taken by her godmother.
7. Dylan accepted that on the 25th June 2013 she had attended a function which was a launch party for a brand of sunglasses. She had attended hoping that she might get free sunglasses. She had not seen any of the images that had been taken that day. Dylan said that that was the first event that she’d ever been to. She didn’t know that the photographs had been for sale. There had been photographs taken of Leah and then Leah had asked if Dylan had wanted to be in one.
8. Dylan was asked about her Twitter account. She said that had been set up in August 2010, but that she hadn’t used it since then and didn’t even know the password. Dylan didn’t remember having a Twitter account until it was brought to her attention.
9. Dylan said that she had started using Instagram about 2 and a half years ago. Dylan said that her Instagram profile was set to private and all of her followers had been accepted by her. She said that followers (about 470) were either direct friends or a friend of a person that she had known. Dylan said she used it to share pictures of her and her friends and to see pictures of her friends, but no one could see it unless they were following, she had followers who were friends or friends of friends, but the public had not been able to see her pictures. Dylan stated that she believed that this was totally different from the photographs published of her and her baby brothers in the Daily Mail.

**Absence of previous complaints**

1. It was suggested to Paul and Hannah Weller that they had not before complained about invasions of their privacy. Paul Weller was asked about the article in Ticket showing a picture of him holding his daughter. He said that when that was published the picture was ten years out of date and that was why he had not made any complaint. Hannah Weller was asked about the Daily Mirror article dated 27 February 2012. This showed a photograph of Paul Weller holding one of the twins, whose back was to the camera. Hannah Weller noted that the children’s faces couldn’t be seen. She was asked why she had not made the position clear to the media and Hannah Weller had replied that she’d had not much faith in what they would do.
2. Paul Weller said that he hadn’t complained about photographs being taken on the 23rd August 2012 of him being out with his son John Paul because they were not full frontal shots of his face and he hoped it was a one off not to be repeated. Hannah Weller was asked about the same article and pointed out that there was a vast difference between a full frontal photograph of a face and the photograph in that article. She said she was not happy with it but that the photographs in this claim had definitely crossed the line and massively so. She said it was simply not comparable to the picture showing Dylan holding one of the boys looking like a rabbit in the headlights.
3. A further article had been published on 6th October 2012 showing the twins being pushed, but again their faces had been obscured by the carrying handle on the double buggy handle. For those reasons Paul Weller had not taken any action. Hannah Weller was asked about the same photographs and said she wasn’t happy but there was a very big difference between that type of photograph and a photograph showing their faces.
4. Paul Weller was asked about whether he had complained about the Mail Online beforehand. He said they’d all complained internally within the family but no formal complaint had been made either through him or Claire Moon who was his personal assistant who coordinated interviews with the press. He said that he had not been happy with some of the coverage but that he couldn’t make a court case every time. He said that the Mail Online had overstepped the line with the LA photographs. These were pictures showing clearly the boys’ faces. He said he could live with photographs of himself, perhaps him and Hannah, but that was completely different from photographs of the children.
5. Hannah Weller was asked why she hadn’t complained and she said she thought the only way that she could be guaranteed protection was if she sued. She was taken to the pre-action correspondence where Associated Newspapers had written stating that they would take the Weller’s views in to consideration which she said was not good enough. She had considered the offer to discuss further reassurance as too weak a promise. There was no absolute guarantee and she didn’t want the flimsy promises of a newspaper. Hannah Weller noted the first article in the Mail Online on 24th August 2012 and the second article on 6th October 2012 and contrasted it with the current article which she said was far more intrusive. She said she didn’t want to spend her whole life looking over her shoulder to see whether there were people taking photographs.
6. Claire Moon said that if there was anything that she objected to she wouldn’t know where to complain and would go through the solicitors. She said she only dealt with the music journalists rather than any editors. She said that she was not responsible for fan sites and it was impossible to keep an eye on them.

**Reasons for bringing the action**

1. Paul Weller and Hannah Weller had referred to the fact that the photographs had been published for money, and that consent had not been obtained. Paul Weller said the complaint in this action was not about privacy it was about unauthorised photographs being taken and published of his children without any attempts at pixilation of their faces. He said he considered that: his children being followed; pictures being taken despite his asking for them not to be taken; photographs being published in a national newspaper without consent and without any attempt to hide or disguise their faces; was completely wrong. He said that just because a father is well known doesn’t mean that the children should be. Paul Weller said that the primary objective in bringing this claim on behalf of the children was to ensure that it never happened again.
2. Paul Weller was asked about the security issues that he referred to in his witness statement. In answer to the suggestion that nothing had increased the security risk to his children, he said who knows. Paul Weller asked whether any father would like pictures of his children being published regardless. He said there might be threats when the children were out with nanny, granny or aunty. He said there was an intrusion in to his family life. He said that pixilation would make it better but it would be better still if it didn’t happen. He said it was impossible to prevent paparazzi photographs and that responsibility should lie on the magazine.
3. Paul Weller confirmed that if he had been asked for permission to publish these photographs or the photographs that he’d shown the Sun journalist he would have replied “absolutely not”. He had never done any lifestyle shoots showing the children, saying that he couldn’t think of anything more “*naff*”.
4. He said he wasn’t promoting an image of himself. His work didn’t work like that and he wasn’t in showbiz. He wasn’t interested in nice photos only, he just wanted no photos until the children were 16 or 18 and could make up their own minds.

**Conclusions on the previous publications, the absence of complaints and reasons for bringing this action**

1. I find that Paul Weller had, in the course of interviews to promote albums, spoken about his family life and children. I accept that this was in response to questions which had been asked. Paul Weller’s expectation that this sort of information would be considered just chit-chat and would not be picked up in articles was not realistic, and it is plain that he would answer questions when asked.
2. It is also plain that Paul Weller did, as Hannah Weller put it, “gush” when asked about the twins, but this was, as she also put it, just like any proud new father. There was also the fact that the release of the album was at a time shortly after the birth of the children, and it is not particularly surprising that Paul Weller was asked about the twins, or that he gave honest accounts of sleepless nights and feeling “knackered”. However Paul Weller had never said anything to give any indication that he would consent to photographs of the faces of Dylan or the twins being published in newspapers.
3. I also find that Hannah Weller had shared a considerable amount of information in her tweets about the twins growing up. Hannah Weller was naïve in some of her posts, for example tweeting the photograph showing her pregnant stomach which was then picked up by national newspapers. I accept that Hannah Weller had gone to considerable efforts to avoid showing the faces of any of the children, or any other distinguishing features, but again it was naïve, particularly in the light of the concerns that she expressed in her witness statement, to tweet a photograph of the backs of the twins as they were standing naked on a toy sofa.
4. I accept that Leah had not thought that there was anything wrong with posting the photograph showing one of the twins, but also accept that Leah had not given the matter any real thought. I also accept that the unofficial fan website had not thought that there was anything wrong in tweeting on the photograph which had appeared on a platform open for all to see.
5. I find that Dylan was not a model in any meaningful sense, whatever description had been given by Teen Vogue in its article. Dylan had signed up as a 14 year old to a modelling agency, and had been shown once in Teen Vogue. Dylan had also been photographed by her godmother on a visit to the Weller’s home, during which Dylan had gone to the park. The godmother had then sought and obtained permission to use some of those photographs in a book.
6. Dylan had not used Twitter, and her Instagram account was shared with friends, and friends of friends. It was not generally available to others, as is part evidenced by the fact that photographs from it did not feature in the photographs obtained from searches of the internet. Dylan had agreed to being photographed at an event attended by her older sister Leah to promote sunglasses. It does not appear that the photograph had been widely published. Dylan had not given any consent for photographs to be taken of her wherever she might be.
7. It was apparent that part of the reason for the examination of the fact that Paul Weller and Hannah Weller had not complained was because the evidence suggested that, if previous complaints had been made, Mail Online would have been unlikely to have published the photographs of the children without pixilation of the faces. I understand that it would have been desirable from the point of view of both the Claimants and Defendant to have avoided the publication and this litigation, but I do not find that the absence of previous complaint was any sort of consent to the publication in this action. There were relevant differences about what could be seen of the children’s faces in the other photographs.
8. I accept, as Mr White submitted, that some of the answers by Paul Weller and Hannah Weller did suggest that they were unhappy that Mail Online had published the photographs for profit. However I do not accept that this was the main gist of the reason for this complaint made by Paul Weller and Hannah Weller. I accept that they would have refused to give consent for the photographs showing the faces of Dylan, Bowie and John Paul if asked. This appears to have been their consistent approach to dealings with the media. For example when it was discovered that Leah had released a photograph, it was taken down and removed from other sources, including the unofficial fan website. I accept that it had lived on in the Facebook archive about 16 pages in, and in Leah’s Tumblr account (until discovered for the purposes of this action) but it had not been widely published. I accept that Paul Weller and Hannah Weller had general concerns about security in relation to their children, but had no specific evidence for those concerns. They had the normal concerns of any parent for the safety and security of their children, heightened by the fact that Paul Weller was well known. I accept that the main purpose of Paul and Hannah Weller in bringing the action was to attempt to ensure that the children were left alone as they grew up.

**Circumstances in which the photographs became available**

1. Elizabeth Hazelton said she was employed as the deputy UK editor of Mail Online. She had worked for Mail Online for six years and reported to Martin Clarke. Before this she had worked at Katers News Agency, The Coventry Telegraph and the Hayles Owen News. Elizabeth Hazelton stated that she was editing on Sunday 21st October 2012 when the pictures were published on Mail Online. She didn’t remember anything about the discussions or thought processes that took place prior to publication. She stated that on the day of publication in question she would have been responsible for all content produced by the London office including show business stories. She stated that she would have seen the pictures before they were published because of the process that leads to publication. That process was: the picture editor would review the photographs; he would then pick out the sets of photographs he thought might be of interest to the editor; and he would put those photographs in to a special queue. When editing Elizabeth Hazelton would review the content of the queue and decide which pictures should be published.
2. Elizabeth Hazelton said that as the pictures showed children she would check whether they were with one of the parents in the images. She would then consider whether there had been complaints from the celebrity in the past and to the best of her knowledge there were no legal issues with either Paul Weller or his family. She said that in some instances some celebrities will issue a notice that they don’t want their children to be pictured in the press and that they might still consider running images but with faces pixelated if warranted, but that there had not been any such request from Paul Weller.
3. Elizabeth Hazelton said she would examine the pictures themselves and having looked at the pictures she could see clearly they were taken in a public place and that nothing private or confidential was being revealed. There was nothing to suggest that anything wrong had been done to obtain the pictures and that Paul Weller and his family did not look upset or harassed. Elizabeth Hazelton said that having looked at the pictures she would have concluded that there was nothing about them which concerned her in regards to privacy.
4. Elizabeth Hazelton said that she had been shown a copy of the article dated 6th October 2012 but couldn’t say that she would have had it in mind when she had seen the pictures on the 21st October. She said that prior to this complaint she was not aware of any conversation with Paul Weller and the photographer who took the photographs in this action.
5. Elizabeth Hazelton said that she’d noted from the caption that the pictures had come from Los Angeles which would have meant that there were no problems. It was not as if they had come from France which had privacy laws. She confirmed the viewing figures for the article in question as about 24,000 in England and Wales and 34,000 world wide. Elizabeth Hazelton accepted that Mail Online was not challenging the evidence that the photographs were taken largely without Paul Weller’s or Dylan’s knowledge, that some were taken with a long lens, that the photographer had been asked to stop and that after that he’d taken close up photographs while Dylan was in the café and had intimidated and embarrassed her.
6. Elizabeth Hazelton accepted that Dylan and Hannah Weller had become muddled up in the article which had picked up an error made by the person submitting the photographs for publication. Elizabeth Hazelton accepted no one had rung to speak to Paul Weller before the photographs were published.
7. Martin Clarke said that he was not personally involved in the editorial decisions taken in relation to the publication. He said that he had read Elizabeth Hazelton’s witness statement and confirmed that her description of how pictures would have been considered accorded with his approach and experience. He said the photographs were obviously taken in a public place and showed innocuous every day activity.
8. Mail Online became aware of the photographs through a picture agency. The picture agency posted photographs to be purchased and used by the media to, among others, Mail Online. The photographs were captioned “*Paul Weller with twins in LA*”. The caption was “*Legendary British musician Paul Weller and his wife Hannah Andrews and twin sons John Paul and Bowie are spotted out for a walk and a coffee and do some shopping on the 16th October 2012 in Venice, California* ”. The price per picture was £40, although the evidence shows that because of the misdescription in the caption of Dylan for Hannah Weller, no monies were paid.

**Commercial viability**

1. Martin Clarke said that there would have been no reason to prevent publication of the pictures since “there is a public interest in freedom of expression in its own right and no privacy issue to tilt the balance the other way.” He considered that this claim illustrated a wider and increasing concern about obstacles the Mail Online and other UK newspapers faced in competing globally with bigger news providers. He said their online presence and global reach was such that unless the Mail Online could compete with them for stories, the revenue base and continued ability to publish would be diminished. Martin Clarke said that the relatively recent dominance of the internet as a resource for information had led to fundamental changes to the way newspapers had to operate and had created a highly competitive global market for news. Martin Clarke said that Mail Online was a free website but generated revenue from advertising. He said that digital content was becoming more and more important to the future of the Defendant and all other newspapers.
2. Martin Clarke said that Mail Online was by now the biggest newspaper website in the UK and the most visited newspaper website in the world. He said that despite success in terms of popularity it was still a small player in online news generally and faced intense competition from global competitors all of which were based in the United States of America. He noted that Mail Online competed for revenue against Google, MSN, AOL, Yahoo and the Huffingtonpost, as well as the US based celebrity news websites. He noted that because of the explosion of online news provision, a substantial amount of news in the UK was provided by corporations based in the United States of America. Martin Clarke said that his competitors had a huge advantage brought by economies of scale, and they enjoyed the right of relatively unfettered free speech enshrined in the constitution of the United States of America. Martin Clarke said that it meant that the Mail Online found itself unable to publish stories published in the United States of America even though they were freely available to read in this jurisdiction.
3. Martin Clarke said that business or celebrity stories were important to Mail Online because of the public interest in free speech and because show business or celebrity stories are popular and generate revenue through digital advertising spend which was critical to Mail Online’s commercial model. A profitable news website allowed for freedom in journalism.

**Findings about the circumstances in which the information became available to Mail Online and commercial viability**

1. I accept Elizabeth Hazelton’s evidence about the process which was employed when the photographs were published, and as Mr White noted, this evidence was not challenged. The evidence shows that Elizabeth Hazelton must have known from the photographs that they had been taken without consent, because this part appears from the caption sent to Mail Online with the photographs which refers to Paul Weller and his family being “*spotted*”. I accept that Elizabeth Hazelton did not think that there were issues of privacy engaged. I also find that the photographs showed, and the caption accompanying the photographs said, that Paul Weller was out with twin children walking, having coffee, and shopping.
2. I accept Martin Clarke’s evidence about some of the difficulties faced by UK newspapers and websites in attempting to compete in a global market.

**The first test: reasonable expectation of privacy**

1. I turn then to consider the first test, namely whether the Claimants had a reasonable expectation of privacy. I will do this by reference to the relevant factors identified in *Murray v Express Newspapers*.

**The attributes of the Claimants**

1. The relevant attributes of the Claimants which are identified in this case are the images of each of their faces, showing a range of emotions and engagement as the children are on a shopping and café trip with their father. The photographs are published with the children’s surnames. In the case of the Second and Third Claimants their first names are also given, but in the case of the First Claimant, she is misdescribed as “Hannah”.
2. The authorities have established that a person’s image constitutes one of the chief attributes of his or her personality. This is because it reveals the person’s unique characteristics and distinguishes the person from his or her peers.
3. I have set out descriptions of the photographs earlier in the judgment, and do not repeat them. In my judgment it is not fair to describe the pictures of the twins as just pictures of white babies, as suggested by Mr White (who was borrowing from a phrase used in one of the authorities). The difference in reaction and interest on that shopping trip shown by Bowie and John Paul, and captured by the photographs, part demonstrates that. The photographs of Dylan show her in various states of emotion.

**The nature of the activity in which the claimants were engaged**

1. Dylan said that on the afternoon in question she had been staying at the Fairmont Hotel with her father and that she had persuaded her father to come shopping and that they had taken the twins in the buggy. She had seen her father cross the road to speak to a man taking photographs and that after her father had spoken to him he had appeared to put his camera away, get on to a motorcycle and leave the parking lot. However he had returned at a time when Dylan was sitting at the café holding one of the twins.
2. Paul Weller said that he had been on tour in 2012 playing some shows in Los Angeles. He’d spent some time with Dylan as she lived there and it coincided with her being on a break from school. Hannah, his wife, and the twins were also with him. They were all staying at the Fairmont Hotel in Santa Monica. Dylan had been asked to stay, even though she lived nearby, so that she could spend more time with her father. On 16th October 2012 Paul Weller had an afternoon off from rehearsals and decided to spend some time with Dylan shopping. They had been out for about two hours. He had taken the twins to provide his wife Hannah with a break. Paul Weller said that “*regardless of the fact that technically we may have been out in public, we were still doing something essentially private*”.
3. I find that the Claimants were on a private family trip out with their father. The activity was an afternoon trip of shopping and having a drink at a café.

**The place at which it was happening**

1. The Claimants and Paul Weller had gone to a pedestrian precinct in Santa Monica known as Third Street Promenade. Paul Weller said that they had had no control in the public place, they had asked the photographer to leave and when he was getting drinks the photographer had frightened his 16-year-old daughter when she was holding her baby brother.
2. Paul Weller said that he gave no thought to what the law of California was, and said that there was no public interest or justification for publishing the photographs. The evidence of Mr Jassy shows that it was lawful to take the photographs under the laws of California, and it would have been lawful to publish those photographs in California.
3. I find that the private family activity was carried out in a public place on the street, and partly in a café which was visible from the street and partly situated on the street. The Editors’ Code recognises that private activities can take place in a public place. The taking of the photographs at those locations was lawful under the laws of California.

**The absence of consent and whether it was known or could be inferred**

1. Paul Weller said he became aware of a paparazzi photographer taking photographs when they were in the car park of Fred Segal. He recognised him as a paparazzi photographer as he had a long lens, and Paul Weller even thought he recognised the photographer. Paul Weller had gone over to ask him to stop taking photographs of his children. The photographer had replied saying something along the lines of “*no I respect you its fine, they’ll pixelate the photographs of the kids*.” Paul Weller said he did not at any time give his consent to the taking of these photographs.
2. As noted above Mail Online knew that the photographs had been taken without consent because of the wording of the accompanying caption and the use of the word “*spotted*”. However the Mail Online was not aware of the harassment by the photographer of Dylan at the café or the promise made by the photographer to ensure that the children’s faces were pixelated in any publication.

**The effect on the claimant**

1. Dylan said that it was obvious from the photograph of her in the café that she had seen the photographer, but she couldn’t do anything as she was holding one of the twins and her father was getting drinks. She said that she was shocked and that the photographer was extremely threatening and she felt really awkward. She said she felt threatened and that her privacy had been invaded and he’d come close to her and she was uncomfortable about it. Paul Weller said he was not happy with the behaviour of the photographer although he was happy with the reassurance the photographer had given him before the incident in the café.
2. Dylan said that a few days later her mother had shown her an article that had appeared on the Mail Online and her mother was really annoyed. Dylan said that her immediate reaction “*was one of real embarrassment at the amount of people that would get to see the photographs and identify them as being of me*”. She said that the fact that the article had suggested that the photographs of her were of Hannah Weller was “*also really creepy and, frankly, stupid*”. She said that these photographs were embarrassing, but the Teen Vogue photograph was not.
3. Hannah Weller said that she remembered seeing the photographs published on the Mail Online and went all hot and cold and was really angry and disgusted. Hannah Weller said “*I really do not understand why there should be any photographs of my children published in a national newspaper*”. Hannah Weller said that she felt really worried that these photographs were now up on the internet and wondered what might be done with the images and what sort of people might see them now.
4. Paul Weller said that a few days later he’d received a call from his PA Claire Moon who told him that some unpixelated photographs of the children had been published on the Mail Online. He went online to see them and his initial reaction was one of extreme anger. He said he was livid and extremely concerned.
5. Claire Moon had remembered the day that the photographs had been published and that Paul Weller was extremely unhappy about them. Claire Moon said she recalled how upset and embarrassed Dylan had been by the whole thing.
6. I accept that the circumstances in which the photographs were taken were upsetting, in particular for Dylan. However it is relevant to note that the taking of the photographs was lawful under the laws of California, and Mail Online did not have knowledge of the particular circumstances in which the photographs had been taken.
7. I accept that Dylan was genuinely embarrassed by the publication of the photographs, and that she considered the publication to be a real intrusion into her private family time with her father. I accept that Paul Weller and Hannah Weller were very upset and concerned about the publication of the photographs showing the faces of the twins, and had general security concerns as a result.

**The circumstances in which and the purposes for which the information came into the hands of the publisher**

1. I have set out earlier in the judgment, the evidence showing the circumstances in which the information came into the hands of Mail Online, and I accept Elizabeth Hazelton’s evidence about the process which was employed when the photographs were published. The evidence shows that Elizabeth Hazelton must have known from the photographs that they had been taken without consent, because this part appears from the caption sent to Mail Online. I accept that Elizabeth Hazelton did not think that there were issues of privacy engaged. I also find that the photographs showed, and the caption accompanying the photographs said, that Paul Weller was out with twin children walking, having coffee, and shopping, and that Mail Online proposed to publish the photographs, and did publish the photographs, because the photographs were likely to be of interest to readers.

**Conclusions on whether there was a reasonable expectation of privacy**

1. In my judgment the photographs were published in circumstances where Dylan, Bowie and John Paul had a reasonable expectation of privacy. This was because the photographs showed their faces, one of the chief attributes of their respective personalities, as they were on a family trip out with their father going shopping and to a café and they were identified by surname.
2. The photographs were different in nature from crowd shots of the street showing unknown children. The photographs showed how Dylan, Bowie and John Paul looked, as children of Paul Weller. The photographs also showed how Dylan, Bowie and John Paul looked on a family day out with their father.
3. Although it was lawful to take the photographs of the Claimants, and it would have been lawful to publish them in California, this did not prevent the Claimants having a reasonable expectation of privacy in relation to their publication in this jurisdiction. Whether the publication is unlawful depends on the outcome of the ultimate balancing test, below.

**The second test: the ultimate balancing test**

1. It is therefore necessary to address the second test as set out in *Murray v Express Newspapers*. As noted above the question is “*how the balance should be struck as between the individual’s right to privacy on the one hand and the publisher’s right to publish on the other”.* I will address this test considering the matters identified in *Von Hannover (No.2)*.

**Contribution to a debate of general interest**

1. The publication of the photographs was undertaken because Paul Weller was a well known person. The publication of the photographs did not contribute to a current debate of general interest. This is a matter of relevance, see paragraph 118 of *Von Hannover (No.2)*.
2. Mail Online considered and then published the photographs in order to make their publication interesting to members of the public. This in turn enables them to attempt to compete in the global news market, and there is a general public interest in having a vigorous and flourishing newspaper industry.

**How well known is the person concerned and what is the subject of the report**

1. Dylan, Bowie and John Paul were all children. As set out above there had been disclosures to the media about them in the past, including the fact that Dylan was going to go on a shopping trip in Portsmouth with her father.
2. These photographs showed the faces of the children on a family afternoon out with their father going shopping and to the café.

**Prior conduct of the person concerned**

1. The relevant conduct includes evidence of the parents of the children. The evidence, set out above, showed that Paul Weller had spoken about the twins as a proud father when interviewed by newspapers, and a considerable amount of information had been tweeted about the twins as they were growing up. A photograph of Bowie had been tweeted by Leah, which had been retweeted on a fan website but that had been removed. The photograph had remained on Facebook and on Tumblr until it was discovered in the course of preparations for the trial. The twins had been shown in the media as photographed from a distance, but there were no published media photographs showing a full view of their faces. Dylan had been shown in a photograph in Teen Vogue, and in photographs of a book published by her godmother. She had been photographed at an event launching sunglasses, but the image had not been reprinted to any measurable extent.
2. Photographs showing the faces of the children on an afternoon out with their father had not previously been published.

**Content, form and consequences of the publication**

1. The content and form of publication has been set out at the beginning of the judgment above. The consequences of the publication on the Claimants in terms of embarrassment and concern are set out under the heading “the effect on the claimant”, in paragraphs 162 to 168 above. Mail Online hoped that publication of the photographs would assist in maintaining public interest in the Mail Online and therefore profitability.

**Circumstances in which the photos were taken**

1. The photographs were taken by an unknown photographer on the streets of Santa Monica when Paul Weller and the children were on a family afternoon out shopping and going to a café. The photographer had been asked to stop, and had given some assurances about pixelation, but the assurances had not been known to Mail Online. The taking of the photographs in Santa Monica was lawful, as would have been the publication of the photographs in California.

 **Conclusion on the balancing test**

1. In my judgment the balance comes down in favour of finding that the article 8 rights override the article 10 rights engaged. These were photographs showing the expressions on faces of children, on a family afternoon out with their father. Publishing photographs of the children’s faces, and the range of emotions that were displayed, and identifying them by surname, was an important engagement of their article 8 rights, even though such a publication would have been lawful in California. There was no relevant debate of public interest to which the publication of the photographs contributed. The balance of the general interest of having a vigorous and flourishing newspaper industry does not outweigh the interests of the children in this case. I consider that, although the interpretation of the Editors’ Code is not for me, this conclusion is consistent with the approach set out in the Editors’ Code which recognises that private activities can take place in public, and that editors should not use a parent’s position as sole justification for the publication of details of a child’s private life.
2. For these reasons I find that the Claimants have established their claims for misuse of private information.

**Data Protection Act claim**

1. It is common ground that the claim for infringement of the Data Protection Act stands or falls with the claim for wrongful misuse of private information. In the light of my finding above I find that the claims for breach of the Data Protection Act are established.

**Relief for the Claimants**

1. The Claimants claim damages and an injunction. As indicated in paragraph 18 above, there was a disagreement between Mr Sherborne and Mr White about the proper approach to issues of damages for misuse of private information. It was not suggested that any different approach should be taken to the assessment of damages, or to the grant of an injunction, because of the breach of the Data Protection Act.
2. In the Claimants’ Skeleton Argument there was a lack of information about how the Claimants put their case for relief, see paragraphs 109 and 110 of the Skeleton Argument, and it was suggested that part of the submissions on remedies might be based on the Defendant’s behaviour at trial. There was nothing in the behaviour of the Defendant at trial which justified any increase in damages. The Defendant was entitled to take and make the points that were made in the trial. It is important that the rights of Defendants to a fair trial (and article 6 rights) are not adversely affected by generalised suggestions that defending the action might increase damages.
3. In oral submissions Mr Sherborne submitted that the Claimants should each have an award of at least £15,000, by reference to the award that was made in *AAA*. Reference was made to vindicatory damages and *Mosley v News Group Newspapers Limited* [2008] EWHC 1777, as applied in *AAA*. Mr White submitted that in this case damages should be nominal or minimal. He also submitted that there was no place in the law for vindicatory damages following the judgment of the Supreme Court in *R(Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245. He submitted that damages should be modest, for the reasons set out in the judgment of McCloskey J. in *McGaughey v Sunday Newspapers Limited* [2010] NICh7 as upheld by the Court of Appeal in Northern Ireland in [2011] NICA 51.
4. Mr Sherborne also asked for an injunction in the terms pleaded in the action, and he suggested that the terms of an injunction could be addressed once judgment had been delivered. Mr White said that there was no need for an injunction in relation to the pictures because the Defendant had made it plain that it would not republish these photographs. After Mr White had made other points about the width of the injunction, Mr Sherborne modified the terms of the injunction that he sought in his closing submissions. This elicited a courteous, but firm, complaint from Mr White that this was the first time that this formulation had been put, and Mr White addressed the new wording briefly at the end. Mr White noted that the change in wording illustrated the problem with the claim for an injunction, and that it would not be suitable to order an injunction, with penal consequences, on such wording. Mr Sherborne pointed out that in *AAA* an undertaking had been accepted by Nicola Davies J.

**Damages**

1. As appears from paragraph 100 of the judgment of Lord Dyson in *R(Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, the term vindicatory damages was suggested and used in a case involving infringement of constitutional rights in Trinidad and Tobago in the Privy Council, namely *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15; [2006] 1 AC 328. That was a case in which the claimant would have been entitled to exemplary damages if he had brought an action for wrongful assault and false imprisonment. The claimant had brought a claim for infringement of constitutional rights, and there was some authority suggesting that exemplary damages could not be awarded for claims of infringement of constitutional rights. The Court of Appeal had allowed an appeal from a refusal to award exemplary damages, and remitted the matter for an assessment of “exemplary/vindicatory damages”. The Privy Council dismissed an appeal against the Court of Appeal’s judgment, and upheld the remission to the trial Judge, noting that “vindicatory damages” might be awarded. The phrase “vindicatory damages” was later used in *Mosley v News Group,* which was followed in *AAA.* Following the judgment in *Lumba* it has been suggested in the third supplement to the eighteenth edition of McGregor on Damages at 42-009A-42-009C that vindicatory damages have no place in the law of misuse of private information.
2. In my judgment it is clear that, following *Lumba*, in particular at paragraphs 97 to 101, “vindicatory damages” as a separate head of damages should not be awarded for misuse of private information. Although it is right to say that the cause of action for misuse of private information does accommodate both articles 8 and 10 of the ECHR, the claim is for misuse of private information and not a direct claim for infringement of human rights or infringement of constitutional rights. Therefore the specific reasoning which applied in *Ramanoop* does not apply in this case, and it should be recorded that in *Ramanoop* the claimant would have had exemplary damages if the claim had been framed in tort.
3. I accept that, as submitted by Mr Sherborne, the effect of an award might be said in general terms to “vindicate” the Claimant. However the use of the phrase “vindicatory damages” in this area of law is in my judgment unhelpful and liable to mislead, by creating a consequential risk of either overcompensation because of double counting, or undercompensation because relevant features about the conduct are not considered.
4. In these circumstances the following principles apply. First damages for misuse of private information should compensate the Claimants for the misuse of their private information. Secondly aggravated damages may be awarded where appropriate in such cases.
5. The analysis of the cases carried out in *McGaughey* show that, with the exception of *Mosley*, very substantial awards have not been made in this area. There was an award of £2,500 (and aggravated damages of £1,000) for the publication of the photographs in *Campbell v MGN*; an award of £2,500 for the publication of medical information in *Archer v Williams* [2003] EWHC 1670 (QB); £3,500 for each Claimant for the publication of the photographs in *Douglas v Hello! (No.3)*; and £2,000 for the publication of private information about protected characteristics in *Applause Store Productions Limited v Raphael* [2008] EWHC 1781 (with a separate award of £15,000 for libel).
6. In *Mosley* the award of damages was for £60,000, and in *AAA* the award of damages was for £15,000. In *AAA* the award was for publication on three separate occasions, as appears from paragraph 127 of the judgment, and the publication on the last occasion was alleged to have been in breach of an undertaking, see paragraph 6 of the judgment.
7. It should be noted in *Spelman v Express Newspapers* Tugendhat J. recorded at paragraph 114 that the sums awarded in the early cases for misuse of private information were very low, and that those levels were not the limit of the Court’s powers. The effect of inflation and the increase in awards of general damages should also be recorded.
8. In relation to the assessment of the award in this case I have in mind the following matters. First the misuse of private information is the publication only of the facial features of the children, which means that it is important not to compensate for the publication of other parts of the photographs or information. However these photographs were intrusive as they showed a range of emotions shown by the children on a family outing with their father. Secondly the Defendant did not know of the actual circumstances in which the photographer had taken the photographs, and what I accept was Dylan’s particular discomfort when cornered in the café, and I should leave that out of account in the award of damages against Mail Online. Thirdly the article was withdrawn (albeit for unrelated reasons) on 22 October 2012. Fourthly, although the readership of the Mail Online is very extensive, the actual readership of this publication in England and Wales was some 24,000 persons. Fifthly I have in mind the fact that the twins will not have suffered any immediate embarrassment from the publication, but that Dylan did suffer real embarrassment.
9. Although, as was made clear by Paul and Hannah Weller in their evidence, this case was more about stopping the future publication of photographs of the children, it is still necessary to attempt to ascertain a fair sum to award by way of compensation for the misuse of the private information. In my judgment a fair award of compensation is an award of damages of £5,000 for Dylan, £2,500 for John Paul, and £2,500 for Bowie. There is nothing to suggest that an award of aggravated damages would be appropriate in this case.

**Undertaking**

1. In my judgment there is no evidence to suggest that the Mail Online will publish these photographs again, and they have said that they will not do so in the letter dated 4 December 2012. Mail Online also said in the letter dated 12 November 2012 that they would take “*into account*” Paul Weller’s stance if offered similar pictures for publication. The assurance already offered in this action in the letter dated 4 December 2012 about not publishing the photographs should be provided by way of undertaking to the Court. This will provide all parties with certainty about what and what is not permitted in circumstances where the letter dated 4 December 2012 was written at a time when liability was denied.
2. I understand Hannah Weller’s concern about the limitations of the words in the letter dated 12 November 2012. However I consider that there is force in Mr White’s complaints about the wording of the injunction asked for in this action, and the late changes of wording proposed on behalf of the Claimants. The grant of injunctions against the press is a matter always of importance, see the discussion of relevant principles involving defamation and injunctions in *Spelman v Express Newspapers* at paragraph 59. It is obviously important to protect the children in this case. The onus is on the Claimants to identify wording dealing with future publications and photographs. The failure of the Claimant to identify satisfactory wording is, in my judgment, an illustration of the difficulties identified in *Spelman v Express Newspapers* in attempting to regulate future unknown matters. That said, the effect of this judgment should be to provide some reassurance to Paul and Hannah Weller that unpixelated photographs of the faces of the children will not be published again to illustrate articles of the type which was the subject of this action.

**Conclusion**

1. For the reasons given above I find that there was a misuse of private information in the publication, from 21 to 22 October 2012, by Mail Online of photographs showing the faces of the Claimants on a family outing with their father. There was also a breach of the Data Protection Act. I have made awards of damages of £5,000 for Dylan, £2,500 for John Paul and £2,500 for Bowie, and I have made no award of aggravated damages. The undertaking not to publish the photographs again should be offered to the Court to provide clarity for the parties. I do not grant any other injunctive relief.