Neutral Citation Number: [2016] EWHC 2760 (QB)

Case No: HQ16X03591

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2016

Before :

MR JUSTICE NICOL

- -

Between :

ERY	**Claimant**
- and -	
Associated Newspapers Ltd	**Defendant**

- -
- -

David Sherborne and Julian Santos (instructed by **Lee and Thompson**) for the **Claimant**
Andrew Caldecott QC and Adam Wolanski (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

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Judgment Approved

Mr Justice Nicol :

1. This is a redacted and abbreviated version of a judgment which I gave in private. The alterations from the private judgment have been made to preserve the anonymity of the Claimant.

2. This is an application for the continuation of an injunction granted by Dove J. as the Out of Hours Judge on 15th October 2016. He granted the injunction until the hearing of the Claimant's application for its continuation. Simply to preserve the position until I was able to rule on the application, and without opposition from the Defendant, I continued the injunction on a temporary basis until further order.

3. The Claimant is a businessman.

4. The Defendant is the publisher of the *Mail on Sunday*, the *Daily Mail* and *MailOnline* amongst others.

5. The Claim Form seeks to restrain the Defendant from using, publishing, communicating or disclosing confidential or private information about the Claimant.

6. The Claimant's company (Company A) was in a business relationship with another company (Company B) .

7. Earlier this year officers from a police force outside London, investigating allegations of financial crime, searched the premises of Companies A and B.

8. The Claimant was later interviewed by police under caution. It is the information that he was interviewed under caution and, more generally, that the police are investigating his suspected involvement into financial crime which the Claimant says is private and confidential information that the Defendant should be restrained from publishing.

9. Mr Wellington's witness statement (which is dated 18th October 2016) says that the *Mail on Sunday* does not intend to publish the allegation that the Claimant has been interviewed under caution. Mr Wellington says that if that present intention changes, the Defendant would give the Claimant 24 hours advance notice before publishing anything about the interview. The *Mail on Sunday* does wish to publish an article referring to the police investigation of Company A, for possible financial crime. It would make clear that no person has yet been charged with any offence and no person employed by it had been arrested (as long, I assume, as that remains the position at the time the article is prepared for publication).

10. The Claimant's position is that a Court order is still necessary despite what Mr Wellington says as to the *Mail on Sunday*'s intentions. Mr Sherborne, on his behalf argues (in brief summary):

    i) When asked by me if the Defendant was prepared to give an undertaking not to publish any reference to the Claimant's interview under caution, Mr Caldecott QC, on the Defendant's behalf, declined to do so. Mr Sherborne argues that the Defendant's unwillingness to do so means that the Claimant's fear that such publication will take place remains justified. He refers me to the approach of Dingemans J. in *Weller v Associated Newspapers Ltd* [2014] EWHC 2127 (QB).

    ii) In any event, 24 hours' notice of any change in that intention is inadequate.

    iii) But, in any case, even if the Claimant's interview under caution is not mentioned, the Claimant fears that a story that is ostensibly about the investigation of Company A will be written in such a way as to convey the impression (explicitly or implicitly) that the Claimant as an individual is also under investigation. Mr Sherborne invites me to consider how past articles by the Defendant have emphasised the personal role of the Claimant in Company A. Mr Sherborne argues that, so far as the police are investigating the Claimant's involvement in financial crime, that is a matter in which he has a reasonable expectation of privacy. His rights under Article 8 of the European Convention on Human Rights ('ECHR') are therefore engaged. He accepts that the injunction would constitute an interference with the Defendant's rights under Article 10 of the ECHR, but in the present circumstances he submits the balance comes down firmly in favour of the Claimant. Consequently, I should find that the Claimant would be likely to succeed at trial and so an interim injunction would be compatible with s.12 of Human Rights Act 1998.

    iv) The Claimant alleges that the fact that he is being investigated by the police is also confidential information and the publication of that information by the Defendant would be a breach of confidence. The Defendant will not say who its source was, but if it was someone in the police (contrary to the Defendant's

denial that this was the case) or someone who worked for Company A, the disclosure to the Defendant would have been in breach of confidence. However, Mr Sherborne did not submit that the claim in confidence gave the Claimant any greater protection (on the present facts) than the claim based on intrusion on his reasonable expectation of privacy.

11. For the Defendant, Mr Caldecott (again in summary) submits:

    i) The Defendant has made its intention clear. Moreover, in the course of the hearing, he accepted that publication of the fact that the Claimant had been interviewed under caution would engage the Claimant's rights under Article 8 and he would not submit (as matters presently stood) that the Defendant's Article 10 rights should prevail. The inevitable conclusion of these concessions was that, as matters presently stood, Article 8 would preclude publication of the fact of the interview under caution.

    ii) The position of Associated Newspapers Ltd in the *Weller* litigation was different. It had there contested the Article 8 claim. In any event, while the Court of Appeal did not overturn the injunction, it reached this decision on the narrow basis that its grant was not outside the Judge's discretionary area of judgment even though his reasons for granting it were not 'compelling' – *Weller v Associated Newspapers Ltd* [2016] 1 WLR 1541 at [81] – [88]. In view of the Defendant's open position in the present case, the Claimant could not show sufficient grounds for his fear that the fact of the interview under caution might be published to justify the grant of an interim injunction.

    iii) 24 hours' notice of any change in the Defendant's intention regarding non-publication of the fact of the interview under caution would be sufficient for the Claimant to invoke the assistance of the Court, if that was what he wished.

    iv) There was a public interest in knowing that the police were investigating financial crime into the industry in which Company A trades and the Defendant should be able to report this. However, the Claimant's role in Company A was so prominent that a reference to the company was likely to be taken as, or to include, a reference to him personally. Such inferential reference was a common feature in libel litigation. The risk for the Defendant though, if the injunction as sought was granted, was that it might be held in contempt. Injunctions had to be drafted with precision. In a libel context, a publisher might try to avoid an inferential reference by expressly excluding the individual from the defamatory imputation. That was not possible in the present context. It would be untrue for the Defendant to say that the police investigation was into Company A and not the Claimant.

The facts in further detail

12. The Claimant has children. The eldest child attends a nursery and the Claimant is concerned that information about the police investigation of him by the Defendant (and other media who pick up the story) is bound to be repeated at her nursery and have a damaging effect on the child.

13. For various reasons put in private before the Court, the threatened publication was likely to have an adverse effect on the Claimant's health.

14. The raids by the police on the premises of Company B and Company A were reported locally. It appears to have involved a large number of police officers. A number of people were arrested in what was described as an 'ongoing financial investigation'.

15. According to Mr Wellington, thereafter a *Mail on Sunday* journalist, spoke to a legal representative of the Claimant who said that there were contentious issues between Companies A and B.

16. A further article then published in the local press said that the arrests had been on suspicion of financial crime and the investigation was supported by the National Crime Agency.

17. Thereafter, a third journalist with the *Daily Mail*, emailed the Claimant's public relations representative asking for the Claimant's response to the police investigation into Companies A and B, the police raid and arrests made, the steps the Claimant would be taking as a result given the relationship and whether the Claimant would be helping the police with their inquiry.

18. The Claimant's public relations representative provided an on the record response.

19. Thereafter, the Defendant published an article on *MailOnline* referring to the police investigation and quoting from the press statement provided by the Claimant's public relations representative.

20. Mr Wellington says that on the same day, a journalist working for the Defendant spoke again to a legal representative of the Claimant who spoke of the internal investigation being carried out by Company A. According to Mr Wellington, the Claimant's legal representative was adamant that the police investigation was into Company B and not Company A. In his second witness statement (20th October 2016) Mr Yates says the same legal representative has told him he believed at the time of his conversation with the same journalist that the police were not investigating the Claimant and Mr McCluskey (a partner in Taylor Wessing) has told Mr Yates (a partner in Lee and Thompson, the Claimant's solicitors in the present proceedings) that it was only later that the police informed Mr McCluskey that they wished to interview the Claimant under caution.

21. The day after it was reported that other people had been arrested in connection with the police raid. The article also reported a police spokesman as saying that warrants had been executed and further searches carried out in various locations.

22. That same day, the Claimant's public relations representative issued another press release on behalf of the Claimant. The press release said it was in response to articles in the Defendant's titles. It repeated that no assistance had been sought from the Claimant, but he intended to cooperate fully with the authorities if requested. The statement also said that the Claimant was taking legal action against Associated Newspapers Ltd in connection with the articles published that day. I was told that no such action has in fact been filed.

23. Shortly afterwards, the *Times* published an article saying that there was no suggestion that Company A was under investigation and quoting from the Claimant's statement.

24. The *MailOnline* published a further article 12 days later which again referred to the raid on the premises of Company A and also quoted from the press statement issued earlier by the Claimant's public relations representative.

25. David McCluskey, as I have said, is a solicitor at Taylor Wessing. They are advising the Claimant in connection with the police investigation. In his witness statement of 17th October 2016 he says that he was asked to assist the Claimant because it appeared that a search warrant was being executed at one of 'his' properties. Mr McCluskey spoke to the officer in charge of the operation and said that he represented the Claimant. He added that if the officer wished to speak to the Claimant he (Mr McCluskey) should be contacted. As I have also said, later on the police said that they did wish to interview the Claimant. The interview with the Claimant was subsequently arranged. Shortly before it took place, Taylor Wessing was told that it would be an interview under caution.

26. Prior to the interview, a colleague of Mr McCluskey's spoke to the officer in charge of the operation who confirmed on behalf of the police and National Crime Agency that the Claimant's involvement in the investigation would remain confidential.

27. Mr McCluskey went with the Claimant to the police station. They were taken to a waiting room out of sight of members of the public and then into the interview room where a voluntary interview under caution took place. The Claimant was told that he was not under arrest and he was free to go at any time.

28. At 13.09 on Saturday 15th October 2016 a journalist for the *Mail on Sunday,* emailed the Claimant's public relations representative to say (the statement has been altered in order to preserve anonymity),

> 'This is to let you know that we propose to report the following in tomorrow's edition of *The Mail on Sunday*:
>
> - Company A has been drawn into a police investigation
>
> - The Claimant was interviewed under caution by detectives
>
> - He was accompanied by lawyers
>
> - That a spokesman for the Claimant has previously said [and there followed a quotation from the previous press statement]
>
> Would you or your client like to respond or comment?'

29. At 15.23 the Claimant's public relations representative asked the journalist whether this was the full extent of any allegation he intended to make about the Claimant. At 15.25 the journalist responded that it was.

30. Michael Yates of Lee and Thompson, had been instructed at about 2.10pm on that day. After taking instructions he wrote to Martin Wood, the in house lawyer for the Defendant, at 5.01pm. He protested at the late notice of the Defendant's intended story. He said that the Claimant did not consent to publication of information regarding him being questioned by the police or any other private information. He sought an undertaking by 6.00pm that the Defendant would not publish any reference to the Claimant having been interviewed under caution by detectives and accompanied by lawyers.

31. Mr Wood and Mr Yates spoke over the next hour or so. Although at least some of the conversation was said to be 'without prejudice' both sides have given evidence as to its content. Mr Wood says that at about 17.50 he said to Mr Yates that, in order to avoid the injunction hearing going ahead, the *Mail on Sunday* was prepared to publish an article which made no mention of the fact that the Claimant had been interviewed under caution. In his second witness statement, Mr Yates observes that the Defendant still appeared to wish to be able to publish that the Claimant was being investigated (even if reference to the interview under caution was omitted).

32. At 7.07pm on 15th October, Mr Wellington emailed that they were not prepared to give an undertaking not to publish the points listed in his journalist's earlier email of 13.09 that day.

33. A telephone conference was arranged for the hearing before Dove J. which took place between approximately 8.10pm and 8.40pm.

34. Mr Sherborne represented the Claimant for that hearing and Mr Wolanski (junior counsel for the Defendant at the present hearing) represented the Defendant. During the call, the Judge was told that the newspaper would go to print at 8.30pm. It is obvious that the hearing was necessarily brief. There were at that stage no claim form, no witness statements, no skeleton arguments, but Mr Sherborne had prepared a draft order. The Judge was reminded of the test under s.12 of the Human Rights Act which had to be satisfied before an injunction restricting freedom of expression could be granted.

35. In his short *ex tempore* judgment Dove J said that he was satisfied that an injunction should be granted. The shortage of time in which the Court had to deal with the matter was a product of the late notice which the Claimant had been given. The Judge was not persuaded that the order should be refused because it was in essence a claim in libel. He said,

> 'it is strongly arguable that there is a privacy claim and that what is sought to be injuncted is private. Once run the information in the story would have breached his privacy for good. I emphasise that this decision has been reached on the most sketchy details as I have seen no correspondence and simply the draft order and the details which are in the order.'

He was prepared to grant the injunction on a holding basis with a short return date.

36. The essential terms of the injunction provided that the Defendant must not,

> 'use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings (the Defendant's legal advisers) for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the information referred to in the Confidential Schedule 1 to this Order (the information)'.

The confidential schedule then defined the 'information referred to in the order' as,

> 'any information or purported information concerning any investigation by [redacted] Police into the Claimant for [redacted].'

37. The Claim Form was then issued. It said the Claimant's claim was for 'an injunction to restrain the Defendant [prevent] from using, publishing, communicating or disclosing confidential or private information concerning the Claimant.' [I have assumed that the bracketed wordage is a typographical error] '. Particulars of Claim were not attached but were said to follow. They have not yet been served.

38. For the hearing before me the Claimant relied on the witness statements of himself, David McClusky and the two statements of Michael Yates. The Defendant relied on the witness statements of Mr Wellington and Mr Wood.

39. In his witness statement Mr Wellington said what the *Mail on Sunday* wished to publish, including that Company A and B are both under current police investigation and, in paragraphs 9 – 11, he said:

> '9. Although the *Mail on Sunday* has been informed that the Claimant has been interviewed under caution, the *Mail on Sunday* does not intend to publish that allegation. It is prepared to give the Claimant advance notice of no less than 24 hours' notice if it decides in future to publish anything about the interview.
>
> 10. For the avoidance of doubt the source of the *Mail on Sunday'*s information about the interview of the Claimant is a confidential source who is neither employed by nor connected with the police or the Serious Crime Agency.
>
> 11. The article to be published by the *Mail on Sunday* (provided the current court order is discharged or varied) will make it clear that no person has yet been charged and no person employed by Company A has been arrested.'

The legal principles

40. For the most part these were uncontentious. I can summarise them relatively briefly.

Quia Timet injunctions

41. Injunctions can be granted in advance of a legal wrong being committed. Indeed, that is one of their most useful functions. However, as Lord Dunedin said in *Attorney-General for Dominion of Canada v Ritchie Contracting and Supply Co. Ltd.* [1919] AC 999 (PC) at 1005,

> 'But no one can obtain a *quia timet* order simply by saying "timeo"; he must aver and prove that what is going on is calculated to infringe his rights.'

The same point was made by Fry LJ in *Proctor v Bayley* (1889) 42 Ch. 390, 401 when he said,

> 'Now an injunction is granted for prevention, and where there is no ground for apprehending the repetition of a wrongful act, there is no ground for an injunction.'

'Tugendhat and Christie: The Law of Privacy and the Media' (3rd edition 2015) at para 12.27 say,

> 'The degree of probability of future injury that is required will obviously depend on the circumstances of the case, in particular the gravity of the injury that may follow. However, the authorities suggest that an injunction will only be granted to restrain an apprehended or threatened injury where the injury is certain or very imminent, or where the likely injury is extremely serious.'

More generally, it seems that the nature of the prospective injury will affect the degree of probability which the court requires to be established – see *The Principles of Equitable Remedies* ICF Spry (9th edition 2014) pp. 390-395 and *Snell's Equity* (23rd edition 2015) paragraphs 18-026 – 18-029. Spry speaks of a risk that is 'reasonably certain … or more than an insignificant or illusory risk' and Spry speaks of 'an appreciable risk'. There is an echo here of the standard which the Court applies in the very different context of an immigrant's fears of ill-treatment in the intended country of removal. There must in those circumstances be a 'real risk' of ill treatment. While (a) the context is obviously different and (b) the approach may need to be refined if the nature of the feared interference is particularly serious, the 'real risk' test seems to me to be a useful one.

Interim injunctions to restrain freedom of expression

42. Since the proposed injunction would restrain publication and communication, it is plain that the principles which usually guide the court in the case of interim injunctions (*American Cyanimid Co Ltd v Ethicon Ltd* [1975] AC 396) have to be adjusted. In particular, the Court must observe the Human Rights Act 1998 s.12 which, so far as is material, says,

> '(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> …
>
> (3) No such relief shall be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
>
> (a) the extent to which

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published.

(b) any relevant privacy code.'

43. The test in s.12(3) in most cases requires the Court to consider whether the Claimant would be likely to succeed in restraining publication at trial – see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. I say in 'most cases' because the House of Lords recognised that this may set too high a threshold where the adverse consequences of publication would be particularly serious - see Lord Nicholls in *Cream Holdings* at [19]. I did not understand Mr Sherborne to be arguing that the present case came within that exceptional category where something less than likely success at trial was appropriate.

Misuse of private Information

44. Although this tort had its origin in remedies for breach of confidence it has outgrown those confines under the influence of Article 8 of the ECHR. A court considering such a claim does so in two stages: the first is to consider whether the Claimant's right to a private life is engaged; the second stage is to consider whether, in all the circumstances, the Claimant's qualified right has to give way to some competing consideration.

45. So far as the first stage is concerned the inquiry is whether the Claimant has a reasonable expectation of privacy in the matter in question – see *Campbell v MGN Ltd* [2004] 2 AC 457.

46. So far as the second question is concerned, in many cases (like the present one) the Court has to balance the Article 8 right of the Claimant with the Article 10 right of the Defendant. In conducting that balance, the court has to apply an intense focus to the particular facts and rights being claimed – *In Re S (A Child)* [2005] 1 AC 593. Despite what might at first appear to be the case from s.12(4) of the Human Rights Act 1998, neither of these provisions has any presumptive primacy –*In Re S (A Child)* above and *PJS v News Group Newspapers Ltd* [2016] 2 WLR 1253 SC.

47. In carrying out the balancing exercise, the Court must be alive to any Article 8 interests of others, particularly children - see *PJS* (above) and *K v News Group Newspapers Ltd* [2011] 1 WLR 1827 CA.

48. The role and importance of the press in a democracy as a 'public watchdog' has been reiterated on numerous occasions by the Strasbourg and domestic courts.

49. The second stage may also require investigation of the extent to which publication of the material in question would be in the public interest. The authorities make that clear and so, too, does s.12(4)(a)(ii) of the 1998 Act.

What potentially private information has the Claimant shown the Defendant might publish?

50. In posing this question I am examining what the evidence shows the Defendant might do unless restrained by court order. I will postpone the question as to whether the information is indeed such as to engage Article 8 (i.e. stage 1 of the analysis) until later.

51. It is, in my view, helpful to separate out the fact that the Claimant was interviewed under caution and to look first at the evidence as to whether the Defendant will publish that fact. The Defendant now says that it does not (presently) intend to publish that fact and will give the Claimant 24 hours' notice if its intention changes. Mr Sherborne argues that this is not good enough. The Defendant through Mr Caldecott was not willing to give an undertaking to this effect. If the Defendant should not observe its statement of intention, there would be no penal consequences, as there could be if the statement was fortified by an undertaking to the court. As it happens, the very same publisher stated its intentions not to repeat the infringement of the claimant's rights in *Weller v Associated Newspapers*, but that was not sufficient to comfort Dingemans J and the injunction which he granted was held by the Court of Appeal to be within his discretion. Furthermore, Mr Sherborne argues, it is unsatisfactory that the Defendant appears to contemplate changing its mind about publishing the fact that the Claimant has been interviewed under caution and even more unsatisfactory that it will give only 24 hours' notice to the Claimant of its wish to publish that fact.

52. On this aspect, I am against Mr Sherborne. My reasons are as follows:

i) In this case the managing editor of the publication in question has said that it does not intend to publish the fact of the Claimant's interview under caution. Mr Caldecott has repeated that before the court. Furthermore, he has accepted that, as matters presently stand, publication of that fact would impinge on the Claimant's reasonable expectation of privacy and there is not a sustainable argument as to why the Defendant's Article 10 freedom of expression should prevail over the Claimant's Article 8 right. He has, therefore, in effect accepted that, as matters presently stand, the Defendant would not have the right to publish the fact that the Claimant was interviewed under caution by the police. While I accept that this is short of an undertaking to the Court, it would be an extremely serious matter for the Defendant to resile from that position without giving notice to the Claimant. Associated Newspapers Ltd is a not infrequent litigant and a recognition of the harm which would ensue to its reputation in the courts from taking such a course would, in my view, be a significant disincentive from doing so.

ii) Mr Caldecott's acceptance that, as matters stand, the Defendant would have no right to publish the fact of the Claimant having been interviewed under caution means that his client's position in the present litigation is different from what Dingemans J recorded as their position in the *Weller* litigation – see [7] of his judgment. In any case, while I have taken into account how he exercised his discretion (and the Court of Appeal's observations on that), I have to reach my own decision on the facts of the present case.

iii) I am not surprised that Mr Caldecott repeatedly emphasised that his concessions were based on facts as they presently stand. It is not possible to predict what may happen in the future. So far as I am aware, the police investigation is ongoing. There may be other developments which affect either stage 1 or stage 2 of the Article 8 analysis.

iv) I have considered whether 24 hours' notice is too short to give the practicable opportunity to seek an injunction. In my view it is not. The only evidence I have about the Claimant's financial state is that he is a very wealthy man. In the

> exhibit to Mr Yates' 2nd witness statement there is an email from October 2015. It is a submission to the designer of Company A's website. It refers to the Claimant's total estimated wealth. Perhaps for this reason, the Defendant has taken no issue as to his ability to give a good cross undertaking in damages for the injunction he seeks. He also has ready access to lawyers. On only about 7 ½ hours' notice they obtained an injunction from Dove J. The Defendant operates in a milieu where news can be, and is, updated very fast. I do not, in the circumstances, view this length of notice as unreasonable or ineffective.

53. But Mr Sherborne is concerned that, even if the Defendant does not publish the fact that the Claimant was interviewed under caution, its article may nonetheless convey to its readers that he, as well Company A, is being investigated by the police. He submits that this would be in line with the Defendant's past reporting with its focus on him personally.

54. I was not sure whether Mr Caldecott disputed that there was a real risk that readers of the *Mail on Sunday* might get the impression from the article which the paper wished to write that the Claimant as well as the company was under police investigation. Rather, his position seemed to be that because that risk was so real, an injunction ought not to be granted since it would then prevent the Defendant from reporting the police investigation into the company. That is a matter which I will have to consider as part of the Stage 2 analysis and in connection with the issue of whether the injunction can be framed with sufficient precision. At this stage, though, I am only considering whether the Claimant has satisfied the *quia timet* test. As to that, it seems to me that he has.

The Stage 1 inquiry: does the Claimant have a reasonable expectation of privacy in the information that the police are investigating him?

55. Mr Sherborne made his submissions on this aspect, primarily with regard to the discrete piece of information that the Claimant had been interviewed under caution. As to that, I have found that the Claimant fails at the first hurdle. Since there is no real risk of that particular piece of information being published the issue as to whether, if it was, it would engage the Claimant's rights under Article 8 does not arise. Nonetheless, I recognise that Mr Sherborne's submissions could be (and were) directed also at the more general concern that the Defendant's publication will suggest that the Claimant personally (as well as the company) is suspected of financial crime or the subject of the police investigation into financial crime.

56. Mr Sherborne points to the 'Guidance on Relationships with the Media' published by the College of Policing in May 2013 which says at para 3.5.2,

> 'Police forces must balance an individual's right to respect for a private and family life, the rights of publishers to freedom of expression and the rights of defendants to a fair trial. Decisions must be made on a case-by-case basis but, save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are *arrested or suspected* of a crime should not be released by police forces to the press or the public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence. This approach aims to support consistency and avoid undesirable variance which can confuse press and public.' [my emphasis]

The relevant police force has adopted this Guidance in respect of people who had been arrested.

57. The College of Policing's Guidance followed the report of the Leveson Inquiry which had said at Vol2, G2.39,

> 'I think that it should be made abundantly clear that save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are *arrested or suspected* of a crime should not be released to the press or public.' [my emphasis]

58. Some judicial support for this approach can be found in the decision of the Court of Appeal in *PNM v Times Newspapers Ltd* [2014] EMLR 30. In that case, the Appellant had been arrested as part of a child sex abuse investigation. He was not charged with any offence, but his name was mentioned at the trial of those who were. A temporary restriction on publication of his name was ordered under s.4(2) of the Contempt of Court Act 1981, but when that order came to an end he issued the present proceedings for a permanent injunction in reliance on what he said were his rights under Article 8. The claim failed because the Court held that the right of the press to report what had been said in open court should prevail. In the course of her judgment, however, Sharp LJ said at [41],

> 'Mr Barca has also drawn our attention to some recent material, which considers where the police should publish the name of someone who has simply been arrested. I accept this material provides some support for the proposition that there should be a more careful consideration of such a person's rights than there might have been in the past: see for example, the Judicial Response to Law Commission's Consultation Paper on Contempt of Court at para 5 (written by the judge [i.e. Tugendhat J.] and Treacy LJ) and the 2013 College of Policing Guidance on Relations with the Media…'[1]

59. Even in relation to an arrest, a person may not have a reasonable expectation of privacy. As the Court of Appeal said in *Murray v Express Newspapers Ltd* [2009] Ch 481 at [36] one of the features of a case which can affect whether there is a reasonable expectation of privacy is the place at which the events in question took place. In *Axel Springer v Germany Application No. 39954/08* (2012) 55 EHRR 6, the Court said that the fact that the arrest took place in public would be a significant feature in what is always a fact sensitive exercise (and see the observations of Mann J in *Hannon v News Group Newspapers Ltd* [2015] EMLR 1 at [101]).

60. The Claimant had not been arrested (still less had he been charged) but Mr Sherborne observes that the College of Policing and Leveson LJ bracketed together those who were arrested or suspected of a criminal offence. Mr Sherborne also argued that it would be anomalous if a person who had been arrested would usually have a reasonable expectation of privacy in that information while a person, whose investigation had not reached even that stage, did not.

[1] I was told that an appeal against the Court of Appeal's decision was due to be heard by the Supreme Court in January 2017.

61. Some indication of the stage that the police investigation of the Claimant had reached is given by the fact that he was interviewed under caution. Code of Practice C under the Police and Criminal Evidence Act 1984, paragraph 10.1 says that

> 'A person whom there are grounds to suspect of an offence'

must be cautioned before he is questioned about the offence. Note 10A supplements what is meant by 'grounds to suspect' and says

> 'There must be some reasonable, objective grounds for the suspicion, based on known facts or information which are relevant to the likelihood that the offence has been committed and the person in question committed it.

62. Mr Sherborne relies as well on the definition of 'sensitive personal data' in the Data Protection Act 1998 s.2. This includes

> '(g) the commission or alleged commission by [the data subject] of any offence.'

63. The present claim is not for infringement of the Claimant's rights under the Data Protection Act 1998 and, if it were, the special exemption for the media in s.32 would, no doubt, be invoked by the Defendant. Because the claim is not under the Data Protection Act, I did not find the decisions of the Upper Tribunal (Administrative Appeals Chamber) which Mr Sherborne cited to be of assistance. Mr Sherborne also relied on *In Re JR 38* [2015] 3 WLR 155 where Lord Kerr and Lord Wilson refer to the photograph of the appellant (who at the age of 14 had allegedly been taking part in a riot) as sensitive personal data. However, this is also of limited value. Lord Kerr and Lord Wilson were in the minority in their view that publication of the photograph engaged the Appellant's rights under Article 8. The majority considered that his rights were not engaged.

64. However, Mr Sherborne argues that the heightened protection for information concerning the alleged commission of an offence in that statute, supports his case that this is information in which the Claimant has a reasonable expectation of privacy. In *Commissioner of Police of the Metropolis v Times Newspapers Ltd* [2014] EMLR 1 Tugendhat J. did indeed refer to s.2 of the 1998 Act in the course of his consideration of a claim for return of police documents by reference to Article 8.

65. I have decided that there is no real risk (as matters presently stand) that the Defendant will publish the fact that he has been interviewed under caution. So far as that specific piece of information is concerned, the application fails at the first hurdle. Yet, as Mr Caldecott explained, the Defendant has adopted this position because it recognises that publication of that piece of information would be publication of information in which the Claimant would have a reasonable expectation of privacy. It seems to me that that concession is of significance when I am considering whether the Claimant would have a reasonable expectation of privacy in the more general matter of the police investigation. If the Claimant has a reasonable expectation of privacy in the fact that he has been interviewed under caution, I struggle to see why he does not also have a reasonable expectation of privacy in the information that he is being investigated by the police.

66. It is convenient at this stage to address Mr Caldecott's argument that the Claimant is not entitled to an injunction because his claim is really to restrain a defamatory statement (viz that he is being investigated by the police). Were this a claim in libel, the Defendant would have a clear defence of truth under Defamation Act 2013 s.2 or public interest under s.4 and no court would restrain a defendant from publishing a libel in advance of trial which the Defendant swore it would defend as true - see *Bonnard v Perryman* [1891] 2 Ch 269 and *Greene v Associated Newspapers Ltd* [2005] QB 972.

67. The difficulty for the Defendant in advancing this argument is that in many cases there has been an overlap between privacy and defamation. A threatened publication may jeopardise both the claimant's reputation and his privacy. It is no answer to an application for an injunction to restrain a threat to the claimant's reasonable expectation of privacy that he could, alternatively, have pleaded a cause of action in defamation. Mr Caldecott relied on *Terry v Persons Unknown* [2010] EMLR 16, but as Mann J observed in *Hannon v News Group Newspapers Ltd* [2015] EMLR 1, *Terry* was a case where Tugendhat J found that the claimant had no case in breach of confidence and none either in privacy. Mann J. did, however, recognise that, if the 'nub' of the claimant's claim was the protection of reputation he could not avoid the restrictions which apply to defamation actions by formulating the claim in confidence, privacy, or some other cause of action. *Hannon* was a strike out application by the defendant which failed, but I do not see the judge's discussion of these principles as affected by that context.

68. In the present case, I cannot agree that nub of the Claimant's claim is protection of reputation. There is a reputational element to it, but, since that is the case with many privacy cases, that does not take the Claimant far enough. Mr Caldecott has not persuaded me that the nub or essence of the claim is the protection of the Claimant's reputation to the exclusion of that cluster of interests which privacy is intended to protect.

The Stage 2 Inquiry: Does the Defendant's freedom of expression prevail over the Claimant's reasonable expectation of privacy?

69. In his witness statement, Mr Wellington gave a number of reasons as to why there was a public interest in the story which the *Mail on Sunday* wished to write. In summary, they were as follows:

    i) On the basis of the various press releases there was an incomplete and misleading impression which the *Mail on Sunday* should be free to correct.

    ii) There was a public interest in a story concerning serious financial crime within the relevant industry.

    iii) Company A was a significant player in the trade and the public to whom the company offered its services were entitled to know that the company was under investigation.

    iv) The *Mail on Sunday* was carrying out its own investigations into Companies A and B and the proposed injunction would inhibit those legitimate activities. This

was particularly because the injunction granted by Dove J and which the Claimant sought to continue, prohibited not only the publication of the information that the police were investigating the Claimant, but also the use of that information by the Defendant.

70. In his oral submissions, Mr Caldecott refined these submissions.

i) The police investigation was clearly substantial. A large number of officers had been involved in the raids on multiple premises. The NCA was involved. A considerable number of people had been arrested.

ii) He acknowledged the point made by Mr Sherborne in his skeleton argument that the injunction which the Claimant sought would, nominally, not prohibit the paper from publishing the fact that Company A was being investigated by the police as opposed to the Claimant (as an individual). However, he submitted, the distinction was chimerical. Because of the position which the Claimant held in the company and because of his public prominence, a story about the company being the subject of investigation would be understood as a reference to an investigation of the Claimant. As I have already noted, the paper could not neuter that risk by saying in terms that the Claimant, personally, was not the subject of investigation because that would be untrue. The Claimant had complained that the Defendant had not put forward a draft of the article which it wished to write, but behind this argument lay erroneous reasoning. A person who feared that a publication might infringe his rights could not compel the publisher to explain what exactly he did intend to publish. There was, moreover, the risk of the court being drawn into the role of editor which was not its task (see for instance *Kent County Council v The Mother, The Father and B* [2004] EWHC 411 (Fam)).

iii) He accepted, on the evidence, the date upon which the Claimant was asked to attend an interview was after the two statements of the Claimant's public relations representative and therefore, that these statements were not misleading at the time that they were issued.

71. In my judgment this is not a case where the Defendant's rights under Article 10 are likely at trial to prevail over the Claimant's rights under Article 8 so far as publication of information is concerned that he, personally, is being investigated by the police.

i) The injunction which the Claimant seeks will not, in terms, prohibit the *Mail on Sunday* from publishing the fact that Company A is being investigated or naming that company. To the extent that there is a public interest in a story about this element of the trade concerned, the role of Company A in it, or whether Company A are more than a victim of wrongdoing by others, the paper will not be expressly prohibited from publishing its article.

ii) I recognise that such a story may have to be written with care to avoid conveying the meaning that the Claimant personally is also the subject of a police investigation. It is also easy to slip into equating the Claimant with the company. I referred above (paragraph 26) to Mr McCluskey's witness statement. He said that the Claimant had sought his advice because of a police raid on one of 'his' properties. One of the statements issued by the Claimant's

public relations representative had said that the property in question belonged to Company A, as opposed to the Claimant himself. With appropriate care, the Defendant could avoid such slips in their article. It is also possible that by other means the article could convey the impression that the Claimant was being investigated by the police and, as such, would infringe the order which the Claimant seeks. However, I am not persuaded that that would inevitably be so. In other words, I am not persuaded that, if the order is made prohibiting publication of the information that the *Claimant* is being investigated by the police, the Defendant will be effectively prohibited from publishing that *Company A* is so being investigated by the police.

iii) Mr Caldecott rightly said that an injunction should be framed in precise terms. That is not only the case where the injunction interferes with rights of freedom of expression. It is a general requirement of all injunctions and is a result of the penal consequences which can follow if the injunction is broken. However, this does not mean that an injunction must be refused because there may be nice questions as to whether it would be broken in particular circumstances. In my view the order proposed by the Claimant does have sufficient precision.

iv) The order sought concerns information regarding the police investigation into the Claimant. Mr Caldecott noted that the order sought would prevent the Defendant from 'using' such information as well as publishing, communicating or disclosing it. He argued that this would inhibit the Defendant from conducting its own investigations into the Claimant's alleged financial crimes. There is some force in this submission. Mr Sherborne recognised it and did not press for the future injunction to include the word 'using'. If it was omitted, it would not prevent the investigations to which Mr Caldecott referred as long as, in the course of them the Defendant did not publish, communicate or disclose information concerning the police investigation. At times in his submissions, Mr Sherborne argued that the right people to investigate any criminal allegations were the police rather than the newspaper. Such a submission was difficult to square with the repeated recognition in decisions of the Strasbourg and domestic courts that the press has a valuable role as a public watchdog. Of course the police have a vital role in the investigation of crime, but that is not their monopoly. Yet, Mr Sherborne did not need to succeed in this argument since, as I have said, the order which the Claimant seeks (and with the amendment he concedes) would not preclude the Defendant from undertaking such an investigation if that was what they wished to do.

v) I have reached this decision as to the balance to be struck between the Article 8 right of the Claimant and the Article 10 right of the Defendant independently of other factors personal to the Claimant's present state of health and his children. While Mr Sherborne is entitled to say that a court must take into account all the circumstances in striking the balance between these competing rights and the courts have emphasised the particular care which must be accorded to the Article 8 rights of young children, Mr Caldecott is also right to observe that the present context is one of business activity where stress and strain may be said to come with the job. It is not a case about sexual or relationship issues where the impact of disclosure to children can be particularly acute. It would be a barren exercise

to consider whether these two particular factors would have been more important if the remaining facts had been otherwise.

Conclusion

72. For the reasons which I have given, I conclude that the Claimant should in principle be granted an extension of the order of Dove J.

73. I say 'in principle' because the word 'using' will need to be omitted.

74. Ordinarily an interim injunction continued after full argument would last until trial or further order. I have noted above that the Defendant qualified its intention not to publish the fact that the Claimant had been interviewed under caution by saying that, if its intention changed, it would first give the Claimant 24 hours' notice. Since the police investigation is on-going I have said that this reservation was understandable and I thought that the 24 hour notice period was reasonable. For the same reason, it seems to me that the order which I make should likewise be qualified. The Defendant will be at liberty to apply for the order to be discharged or varied on 24 hours' notice to the Claimant or his solicitors. There has been full argument at the present hearing and any such application would not have any prospect of success unless there has been a significant change of circumstances.