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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
[2023] EWHC 232 (KB)



No. KB-2023-000058

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 17 January 2023

Before:

MR JUSTICE JOHNSON

B E T W E E N :

(1) RICHARD STOUTE
(2) SARAH STOUTE

Claimants/Applicants

- and -

NEWS GROUP NEWSPAPERS LIMITED

Defendant/Respondent

MR W BENNETT KC and MR G BUSUTTIL (instructed by Simon Burn Solicitors) appeared on behalf of the Claimants/Applicants.

MR A WOLANSKI KC (instructed by Wiggins LLP) appeared on behalf of the Defendant/Respondent.

J U D G M E N T

MR JUSTICE JOHNSON:

- 1 This is the return date of an injunction granted by Heather Williams J on 31 December 2022. That order restrained the defendant from publishing photographs of the claimants' second home and boat. An application for an injunction to restrain publication of photographs of the claimants themselves was refused. Photographs of the claimants appeared in The Sun on Sunday newspaper and its associated website the following day. The defendant does not oppose the continuation of the order made by Heather Williams J. The claimants, by an application made on 13 January 2023, seek an order restraining the publication of photographs that were published of them on 1 January 2023 and other photographs that may have been taken of them in the same general location since 26 December 2022. The defendant resists the application.
- 2 I take the facts primarily from the statements of the second claimant which have not been challenged in these proceedings. In 2002, Full Support Health Care Limited ("FSHL") was incorporated by the second claimant and her parents. FSHL sells personal protective equipment to the National Health Service and private hospitals. It is owned and run by the second claimant and her husband, the first claimant. In the accounting period to March 2019, its profits were just over £800,000. In the months that followed, there was a huge demand for health care personal protective equipment as a result of the Covid-19 pandemic. FSHL secured government contracts worth about £2 billion.
- 3 In late 2021, the claimants bought a second home which abuts a public beach in Barbados. On 26 December 2022, the claimants went to stay at their second home, together with their children, several adult friends and their children. On 27 December, the claimants and an adult child were on sunbeds at the front of their property when two women walked past them. The women were holding umbrellas and one of them was pointing a phone at the claimants. It was obvious that they were either photographing or filming them. The claimants' house manager recognised the two women as paparazzi and went to speak to them. One was holding a long lens camera. Shortly afterwards, another photographer arrived by jet ski. The claimants and the rest of the group went from their holiday home across the public beach to board a boat for an excursion. They were photographed by the three photographers. Another photographer was by the main entrance to the claimants' home.
- 4 On 28 December, the claimants and their friends again embarked their boat for an excursion. They went to a beachside restaurant, being dropped off by jet ski. The boat was moored approximately 150 metres from the beach. A single jet ski was used to ferry the members of the party from the boat to the beach. It therefore made multiple journeys. Once on the public beach, the party travelled on foot a distance of about 100 metres to the restaurant. The claimants were photographed as they went to the restaurant via the public beach. They say that they were unaware at the time that they were being photographed, that they did not consent to being photographed and that the photographs must have been taken from a considerable distance, using a telephoto lens with a long range. The claimants infer that the same photographers were involved on both occasions and that they had been stalking out the claimants' holiday home and that they had targeted them and followed them.
- 5 The defendant sought licences to publish photographs of the claimants from an agency called Backgrid. The defendant obtained a large number of photographs from Backgrid which feature the claimants and their friends. At 5.01pm on 30 December 2022, Eleanor Sharples, a journalist working for the defendant, emailed the claimants' solicitor and said that the defendant intended to publish photographs of the claimants "on a public beach" on 1

January 2023. Following discussions overnight, at 10.03am on 31 December 2022, the claimants' solicitor indicated that an application would be sought for an injunction to restrain publication. At 1.05pm on 31 December 2022, Oliver Doherty, the defendant's Editorial Legal Counsel, sent an email to the claimants' solicitor. It enclosed four photographs: one of the claimants' holiday home; one of their boat; one of the first claimant; and one of the second claimant. The clear implication was that these were the photographs that the defendant was intending to publish.

- 6 The claimants applied for an interim nondisclosure order to prevent the publication of the four photographs. The application was heard on an urgent basis by Heather Williams J later the same day. Heather Williams J granted an injunction in respect of the photographs of the house and the boat, but refused an injunction in respect of the photographs of the claimants. She also refused an injunction in respect of any photograph taken within 500 metres of the claimants' holiday home. She set today as the return date for the injunction that she had granted.
- 7 On 1 January 2023, the defendant published articles about the claimants in the print and online editions of The Sun on Sunday newspaper. The enjoined photographs were not used. Photographs of the claimants were used. These photographs were the same as the photographs that had been sent to the claimants the previous day, save that the copies that had been sent to the claimants were cropped in a different way from the photographs that were published. The photograph with the second claimant, in the version that had been disclosed pre-publication, was cropped so that it showed her from head to waist. The published version showed her from head to toe. She was wearing a loose-fitting kaftan-type top which covered her upper body down to her upper thigh, but her arms and legs were largely uncovered.
- 8 On the same day, The Daily Mail newspaper contacted the claimants' solicitor and said that it was going to publish photographs of the claimants. It did so later that day in the print and online versions of the newspaper. These photographs also included pictures of other adults from the group. The photographs were attributed to Backgrid.
- 9 On 3 January 2023, the claimants lodged a claim form with the court and paid the court issue fee. The claim form was not issued until 12 January 2023.
- 10 On 4 January 2023, the claimants wrote to the defendant about the publication and, in particular, pointed out that the photograph of the second claimant that had been submitted to the court and in respect of which argument had taken place was substantially different from the published version. The claimants asked the defendant to supply copies of all photographs held by the defendant of the relevant events with the embedded metadata so that the court would be better able to understand the circumstances in which the photographs were taken and the behaviour of the photographers who took them. The claimants also asked what steps, if any, the defendant had taken to ensure that the photographs obtained had not been obtained by oppressive or unwarranted paparazzi behaviour using long lenses. The defendant refused voluntarily to disclose the other photographs or the respective metadata and did not respond to the claimants' request regarding whether any safeguards had been applied in terms of checking the circumstances in which the photographs had been taken.
- 11 On 8 January, the defendant published a further article which republished the photographs. On 12 January, the proceedings were issued and served, following prompting by the court. No point has been taken in respect of this delay by the defendant. On the same day, the

defendant stated that it did not oppose the continuation until trial of the order that had been made by Heather Williams J.

- 12 On 13 January 2023, the claimants made an application seeking an order to restrain publication of any information that might identify the claimants' second home or boat, including any photographs of their home or boat, the photographs that were disclosed to the claimants on 31 December 2022, the photographs that were published by the defendant on 1 and 8 January 2023, and any further photographs that were taken of the claimants in the general area of their second home since 26 December 2022.
- 13 The second claimant has set out in a confidential schedule to her witness statement certain reasons why she objects to the publication of the photographs. I have taken that evidence into account.
- 14 The application that is now pursued is in some respects different from the application that was made to Heather Williams J on 31 December 2022. That is because the application before Heather Williams J sought to restrain publication of the four photographs that were disclosed by the defendant to the claimants on that day. The application that is now made seeks additionally to restrain republication of the different photographs that were published in early January 2023 and publication of any similar photographs.
- 15 The evidence before me is also different. That is because things have moved on. The publications have taken place. The photographs that were published have enabled the claimants to give further evidence about the circumstances in which the photographs were taken. There is, however, a considerable degree of overlap and the question arises as to whether what is, in substance, a repeat application should be permitted.
- 16 The claimants' underlying claim is for damage for misuses of private information arising out of publication of the photographs by the defendant, together with an injunction to prevent further misuse of the photographs. The claimants also seek, in respect of other photographs, damages for infringement of the claimants' copyright and an injunction to prevent further infringement of their copyright. The application for an injunction is made in respect of the claim for misuse of private information.
- 17 The authorities establish that:
 - (1) Misuse of private information is recognised in law as a tort: *Bloomberg LP v ZXC* [2022] UKSC 5; [2022] AC 1158 *per* Lord Hamblen and Lord Stephens at [45].
 - (2) The tort derives from the right to respect for private and family life under Article 8 of the European Convention on Human Rights. Article 8 states:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.”

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society”, for the purpose of a prescribed legitimate aim, which includes “the protection of rights and freedoms of others.”
 - (3) The tort of misuse of private information protects human autonomy and, in particular, “the right to control the dissemination of information about one’s private life and the

right to the esteem and respect of other people”: *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, *per* Lord Hoffman at [51].

- (4) The ingredients of the tort of misuse of private information track Article 8. There are two ingredients to the tort. The first is the use by the defendant of information which is private. The second is the lack of justification for that use.
- (5) Information is private if the claimant has a reasonable expectation of privacy in respect of that information: *McKennitt v Ash* [2006] EWCA (Civ) 1714; [2008] QB 73 *per* Simon LJ at [42]; and *Bloomberg* at [47]. This is a partly subjective and partly objective question. The question is what a reasonable person of ordinary sensibilities would feel if she were placed in the same position as the claimant and faced with the same publicity: *Murray v Express Newspapers plc* [2008] EWCA Civ 446; [2009] Ch 481 *per* Sir Anthony Clarke MR at [35].
- (6) The question of whether a person has a reasonable expectation of privacy in respect of any particular information is highly fact-sensitive. Relevant considerations include “the attributes of the claimant, the nature of activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, 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”: *Murray v Express Newspapers* [2008] EWCA Civ 446; [2009] Ch 481 *per* Eady J at [36].
- (7) Special considerations apply to photographs. Photographs can amount to a particularly intrusive invasion of privacy. They can capture every detail of a person’s image, more so than can be conveyed in even a thousand words. They can convey something of a person’s mood or character or personality. Someone may be quite happy for a posed image to be published, but may at the same time reasonably wish other images that they consider to be embarrassing or unflattering to remain private: *Douglas v Hello! Ltd (No.3)* [2005] EWCA Civ 595; [2006] QB 125 *per* Lord Phillips at [84] and [106-107].
- (8) Depending on all the circumstances, being photographed whilst in a public place “must be taken as one of the ordinary incidents of living in a community”: *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176; [2016] 1 WLR 1541 *per* Lord Dyson at [18], *Kinlock v Her Majesty’s Advocate* [2012] UKSC 62; [2013] 2 AC 93 *per* Lord Hope at [19] and [21].
- (9) A claimant may enjoy a residual right of privacy in respect of some events, even if they take place in public, because there is “a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life”: *Peck v United Kingdom* [2003] 36 EHRR 41 at [57].
- (10) As to the second ingredient, the use of private information can be justified where the claimant’s privacy rights must yield to the defendant’s rights of freedom of expression recognised by Article 10 of the European Convention on Human Rights. This involves a proportionality balance. Neither Article 8 nor Article 10 takes presumptive priority. The balance is to be struck depending on the particular facts of the individual case and the comparative importance of the competing rights in the light of those facts: *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593 *per* Lord Steyn at [17].

- 18 This is not the substantive hearing of the claim. Disclosure has not taken place and I have not heard live evidence. It is not, therefore, appropriate or relevant to seek to determine the substantive claim. Instead, the claimants seek an injunction that will last until trial to restrain the publication of photographs. A court will only grant such an injunction if there is a real risk of publication and only if an injunction would have practical utility. The injunction sought by the claimants would, if granted, affect the exercise by the defendant of its right to freedom of expression. It follows that section 12 of the Human Rights Act 1998 applies: section 12(1). It further follows that the court must not grant an injunction to restrain publication before trial unless the court is satisfied that the claimants are likely to establish at trial that publication should not be allowed: section 12(3). That does not impose an inflexible balance of probabilities test; rather, the question is whether the prospects of success are sufficient to justify an injunction in all the circumstances of the case. Nevertheless, in general, a claimant must show that it is more likely than not that she will succeed at trial: *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC *per* Lord Nicholls at [20]-[23]. In addressing that question, the court must have particular regard to the importance of the Convention right to freedom of expression: section 12(4).
- 19 The defendant claims that the photographs amount to journalistic material. It follows that the court must have regard to the extent to which the material has become available to the public and the extent to which it is in the public interest for the material to be published and the Editors Code of Practice published by the Independent Press Standards Organisation: section 12(4). That Code states:

“2 *Privacy

- i) Everyone is entitled to respect for their private and family life, home, physical and mental health, and correspondence, including digital communications.
- ii) Editors will be expected to justify intrusions into any individual’s private life without consent. In considering an individual’s reasonable expectation of privacy, account will be taken of the complainant’s own public disclosures of information and the extent to which the material complained about is already in the public domain or will become so.
- iii) It is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.

3. *Harassment

- i) Journalists must not engage in intimidation, harassment or persistent pursuit.
- ii) They must not persist in questioning, telephoning, pursuing or photographing individuals once asked to desist; nor remain on property when asked to leave and must not follow them. If requested, they must identify themselves and whom they represent.

iii) Editors must ensure these principles are observed by those working for them and take care not to use non-compliant material from other sources.

The public interest

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

1. The public includes, but is not confined to:

...

vi. Raising or contributing to a matter of public debate...

2. There is a public interest in freedom of expression itself.

3. The regulator will consider the extent to which material is already in the public domain or will become so.

4. Editors invoking the public interest will need to demonstrate that they reasonably believe publication -- or journalistic activity taken with a view to publication -- would both serve, and be proportionate to, the public interest and explain how they reached that decision at that time..."

20 Further, the claimants must show that the balance of convenience favours the grant of injunctive relief. In other words, the claimant must show that the risk of an injustice occasioned by refusing relief now if the claimants subsequently succeed at trial outweighs the risk of injustice occasioned by granting relief now if the claimants subsequently fail at trial. In this context, the fact that the material that the claimant seeks to protect is already in the public domain is a relevant, but not decisive, factor. In other words, an injunction may be granted to prevent the further publication of material that is already in the public domain if such an injunction would serve a useful purpose: *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 *per* Lord Mance at [25]-[32]).

21 It follows that the issues are:

(1) Should this application be entertained in the light of application before and decision of Heather Williams J on 31 December 2022?

(2) Are the claimants likely to succeed in showing that the photographs amount to private information, that is information in respect of which the claimants have a reasonable expectation of privacy? If the claimants succeed on this issue, then the defendant does not, at this stage, seek to argue that the resulting interference with the claimants' privacy was justified.

(3) Does the balance of convenience fall in favour of granting injunctive relief?

22 William Bennett KC, on behalf the claimants, accepts that this application seeks, in part, to relitigate issues that were before Heather Williams J. He submits that this is permissible because that hearing took place on an erroneous basis in respect of what it was the defendant

was threatening to publish. He says that if the defendant had disclosed the photographs that were in fact eventually published, then the claimants would have been able to give additional evidence, as they have done for this hearing, and that their case would have been stronger. Moreover, the case had to be prepared and heard on an urgent basis with very limited time available. He submits that the court must consider the application and the opposition to it afresh because that is the purpose of a return date, which is part of the procedural machinery that ensures meaningful access to justice.

- 23 As to the substantive application, Mr Bennett stresses that the claimants were engaged on what was essentially a private activity, namely attending a celebratory meal for their daughter's birthday, with invited family and friends. The material comprises photographs and the law is clear that special considerations apply to privacy cases involving photographs. He accepts that they were taken in a place where the public had access, but submits that it does not follow that the claimants did not have a reasonable expectation of privacy. There is, he says, a difference between, on the one hand, other beach users merely seeing the claimants and their party on the beach, and, on the other hand, the claimants and their party being targeted and followed and pursued by a photographer, and secretly photographed, with the ensuing photographs being published to the world at large in a national newspaper. A reasonable person would, he says, take offence and be concerned if he knew at the time, or found out later, that somebody who merely happened to be on the beach with them was behaving or had behaved in a "creepy" manner, particularly if those being pursued and photographed included children. He says that knowing that one and one's children have been covertly stalked in order to obtain photographs for mass publication is unnerving and destabilising and amounts to a particularly intrusive infringement into private life. He says it has a seriously detrimental effect on the claimants' well-being and their family life, including the knowledge that, absent the court's intervention, it may well happen in future when they are at their second home on holiday or elsewhere for as long as there is a market in paparazzi photographs.
- 24 Adam Wolanski KC, on behalf of the defendant, submits that the claimants had no reasonable expectation of privacy. They were in a public place. The photographs convey little information about the claimants beyond the fact that they were on a beach enjoying themselves and wearing the garments depicted. The photographs are, he says, in no way compromising. What is depicted is no more than any member of the public who happened to be present at the time would have observed. He submits that if the claimants had wished to maintain their privacy, then they could hardly have chosen a worse way of doing that than by taking a party of nineteen to a beach restaurant by jet ski.
- 25 He submits that the repeat application is an abuse of the court's process. He says there is no substantive difference between the material that was before Heather Williams J and the material that is deployed on this application. He says that Heather Williams J had the benefit of argument from counsel on both sides and was shown all relevant authorities and all relevant evidence. Accordingly, he submits that this application should not be entertained.

Issue 1: should the application be entertained in the light of application before Heather Williams J on 31 December 2022?

- 26 This application covers the same subject matter as the application that was before Heather Williams J. The relief that is sought now was at one stage slightly broader, but that is a function of events that have occurred since 31 December 2022. The claimants could not have known precisely what was going to be published, but they could have put the

application that was made on 31 December 2022 on a broader basis so that it would, in effect, have been equivalent to the application that is now made.

- 27 There is a public interest in finality in litigation. It is contrary to that public interest to permit the same issues to be relitigated: *Henderson v Henderson* (1843) 3 Hare 100 *per* Sir James Wigram VC:

“I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. And a plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time...”

- 28 Ordinarily, therefore, if a claimant fails to secure an injunction, her remedy is to appeal. There is no general right to make a repeat application for the same relief. The purpose of the return date is not to allow such an application. A return date is only set if the application is granted, or, as here, granted in part. The purpose of the return date is to enable the defendant to oppose the continuation of the injunction after being given sufficient notice. There is not, however, any absolute rule prohibiting a repeat application. As *Henderson* recognises, there are special cases where the court will allow a point to be relitigated. The court therefore has a discretion to grant a repeat application or to entertain a repeat application for an injunction where it considers that there is good reason to do so: *Laemthong International Lines Co Ltd v Artis & Ors* [2004] EWHC 2226 (Comm) *per* Colman J at [19]-[24].
- 29 Here, the application that was made before Heather Williams J was made using the urgent procedure at very short notice. The defendant had chosen not to give the claimants more than two days’ notice of the proposed application. The defendant then initially declined to provide copies of the photographs that were in its possession. The photographs were disclosed, but less than 24 hours before publication. They were disclosed in a way that naturally led the claimants to believe that they were what would be published by the defendant. That informed and framed the application that was made. The application was put before the court on the basis that it was those photographs that would be published. The defendant did not do or say anything to indicate that the disclosed photographs were cropped versions of the photographs that were to be published.
- 30 The question of whether the publication of a photograph amounts to the misuse of private information is highly fact-sensitive. It depends, in part, on what precisely is depicted in the photograph. There are, I accept, significant differences between the photographs that were disclosed to the claimants and the photographs that were published. If the claimants had been aware of the photographs that were in fact used, then the evidence that they put before the court would have been different because (as subsequent events have shown) they would have been able to say more about the circumstances in which the photographs were taken.

31 I consider that the combination of all of these features, and taking account of the chronology of the application and that it was an interim application made on an urgent basis, amounts to a good reason to permit a repeat application. Having reached that conclusion, it follows that the application must be considered entirely afresh rather than by way of a review of the decision of Heather Williams J. In any event, I have not been provided with an approved transcript of the judgment of Heather Williams J.

Issue 2: are the claimants likely to succeed in showing that the photographs amount to private information?

32 I consider, first, therefore, the application so far as it relates to the photographs that were published by the defendant in early January 2023. The relevant facts are:

- (1) The claimants were in a public place, namely a beach. They were with seventeen others. They arrived by jet ski from a boat that was moored 150 metres out at sea. Multiple journeys were made by jet ski to ferry the party across. They were on their way to a restaurant. There were members of the public present. The claimants could see that other members of the public were in the vicinity. The first claimant says in her evidence that there were thirty people on the beach and around a further sixty in the restaurant.
- (2) The information conveyed in the photographs concerns the claimants' physical appearance, their clothing, jewellery and, in broad terms, their location. The physical appearance depicted in the photographs includes the appearances of their limbs, including their legs up to their upper thighs.
- (3) The photographs were taken from a distance, but nonetheless are in high resolution with a correspondingly high degree of definition. They convey a considerable amount of information about the matters they depict.
- (4) The claimants were targeted by the photographers. They were the intended subject of the photographs.
- (5) The photographs were taken in the context of concerted attempts over the previous two days to obtain photographs of the claimants. Those attempts involved the taking of photographs of the claimants' home and boat, and members of the claimants' party when they were on private land.
- (6) The claimants did not consent to the taking of photographs of them or the publication of the photographs.
- (7) Although they were in a public place, the claimants were engaging in a private activity, that is attending their daughter's birthday celebration.
- (8) The claimants had not sought any publicity about the activity in which they were engaging.
- (9) The claimants were not aware at the time that the photographs were being taken and were not, therefore, in a position to take immediate steps to restrict the amount of information that would be conveyed: for example, by covering their faces.

(10) The claimants were, however, aware that they had become the target of photographers. They made the trip to the restaurant and chose what to wear in that knowledge.

(11) The information that is captured in the two photographs of the claimants that are the subject of this application is capable, in principle, of amounting to private information. That is because everyone has a right to exercise personal autonomy over the extent to which they reveal aspects of their physical appearance.

(12) There is no evidence that the claimants had taken steps to exercise an autonomous choice to keep their physical appearance private. Photographs of them were already in the public domain before 28 December. They have appeared in public to give evidence before a Parliamentary Select Committee.

(13) The claimants are business people who run a successful company supplying PPE to the NHS and private hospitals. The company has made a considerable amount of money from public funds as a result of the demand for PPE during the Covid pandemic.

33 The fact that the claimants were in a public location at the time that the information about them was obtained does not, of itself, mean that they had no reasonable expectation of privacy in respect of that information. A person may retain a reasonable expectation of privacy in respect of information that is obtained about them when they are in a public place. So, for example, if a person touches a postbox when posting a letter and thereby leaves their DNA on the letterbox, they retain a right of privacy in respect of that material. If two people walking down the street have a whispered conversation with each other when there is nobody in the vicinity, they are likely to enjoy a right of privacy in respect of that conversation: *cf PG v United Kingdom* [2008] 46 EHRR 51 at [56]. If a person suffers a mental health crisis or physical ill-health whilst in public, then they may well retain a right to privacy in respect of that: *Peck v United Kingdom*. If a person is the subject of a lengthy and intrusive campaign by paparazzi photographers, that they may give rise to a reasonable expectation of privacy, even in respect of events that take place in a public place: *Van Hannover v Germany* [2005] 40 EHRR 1. If a person gets changed on a beach under cover of a towel and the towel momentarily slips, then they might reasonably expect not to be photographed. In each of these cases there is an additional element which renders information private even though it is obtained in a public place. It is that additional information that engages the “inner zone” that is recognised in *Peck* and *PG*. In the absence of that additional element, information that someone chooses to reveal in public is less likely to be recognised by the law as private. Public and private CCTV and the use of mobile phones to take photographs and record video is ubiquitous. Anyone venturing out in public may be captured by such cameras. The reasonable person knows that is the case. It follows that there is no general reasonable expectation of privacy in respect of information that is patent to anyone who happens to be in the same place at the same time.

34 In this case, the claimants were in a public place, namely a public beach, that they crossed in order to reach a restaurant. They arrived by jet ski. There was a demonstrative and performative element to their arrival. Members of the public were present at the restaurant and the beach and the method of the claimants’ arrival is likely to have drawn attention to them. The information that is captured in the photographs corresponds to how the claimants chose to appear in public. There is no additional element of inherently private information. The information that is contained in the photographs is simply what any person present at that place and at that time would have seen. The fact that they show more of their bodies than were shown in the cropped photographs that were before the court on 31 December 2022 does not, in my judgment, ultimately make a material difference. The fact that the

claimants did not consent to the photographs and that they were taken from a distance using highly magnified telescopic lenses and the context of the pursuit of the claimants over a period of two or three days is relevant to the question of whether they had a reasonable expectation of privacy. I do not, however, consider that these factors are present to a degree or extent which make it likely that the court at trial would conclude that they had a relevant reasonable expectation of privacy. The degree of intrusion is far less than was present, for example, in the Princess Caroline of Monaco case: *Van Hannover v Germany* [2005] 40 EHR 1 at [44], *John v Associated Newspapers Ltd* [2006] EWHC 1611 QB; [2006] EMLR 27 *per Eady J* at [16].

- 35 It follows that I do not consider that the claimants are more likely than not at trial to establish that the photographs amount to private information; nor do I think that they are sufficiently likely to do so to justify the grant of injunctive relief. It follows, by application of section 12 of the Human Rights Act, that the application must be dismissed. The same conclusion necessarily follows in respect of the cropped photographs that were before the court on 31 December 2022.
- 36 The claimants' broader application to restrain publication of any similar photographs was not ultimately pursued.
- 37 This does not mean that the defendants or others may publish any pictures of the claimants with impunity. It just means that the claimants have not established their case in respect of the application for an injunction that they have made. It is entirely possible that there are pictures in the possession of the defendant or others which would, if published, amount to an actionable tort.

Issue 3: Does the balance of convenience fall in favour of granting injunctive relief?

- 38 In case I am wrong on the question of reasonable expectation of privacy, I turn to consider whether an injunction should be granted on the assumption, contrary to the finding I have made, that the claimants are likely to succeed at trial. Mr Wolanski points out that the defendant has not stated that it intends to publish further photographs and that, in the absence of a specific threat to do so, there is no basis for an injunction. It might, however, equally be said that the defendant has not given an undertaking not to publish further photographs, nor has it given any indication short of an undertaking that it has no intention of doing so. Public expenditure on personal protective equipment during the Covid pandemic remains a newsworthy issue. I consider that there is a real prospect that, if it is not restrained, the defendant will publish the material that the claimants seek to restrain.
- 39 The losses that the claimants sustain as a result of intrusion into their privacy cannot be directly remedied by an amount of monetary compensation. Damages are not an adequate remedy. That is why, subject to satisfying the *American Cyanamid* test, an injunction would be granted to protect a claimant's right to privacy.
- 40 Here, however, the photographs have already been published. Damage has already been sustained by the claimants which cannot be fully remedied by a monetary award. Whether the publication was unlawful will be determined at trial. If the claimants are right, then they will, in principle, be entitled to damages and, potentially, a permanent injunction. If I do not grant an injunction now and it turns out that the publication was unlawful, then the claimants are likely to suffer further damage between now and trial, but that can be taken into account when the award of damages is assessed. If, on the other hand, I do grant an injunction now and at trial the court finds that the publication was lawful, then that will

mean there has been a significant and unjustified interference with the defendant's right to freedom of expression. On this hypothesis, the defendant would have been entitled to publish the photographs throughout the period between 1 January 2023 and trial, but would have been prevented from doing so by an order of this court.

- 41 I accept the claimants' submission that an injunction can be granted to restrain further misuse of private information even if the information is already in the public domain. In the particular circumstances of this case, however, I consider that, even if the claimants could show that they had a reasonable expectation of privacy, the balance now falls against the grant of injunctive relief and in favour of maintaining the status quo until trial.
- 42 Accordingly, I conclude that the application made by the claimants on 13 January 2023 is not an abuse of the court's process and may properly be entertained. I have, however, concluded that the claimants are not likely to succeed at trial in showing that the publication of the two photographs involved a breach of a reasonable expectation of privacy. In any event, I have concluded that the balance of convenience falls against the granting of injunctive relief.
- 43 It follows that the application is dismissed.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge