Neutral Citation Number: [2006] EWHC 3083 (QB)

Case No: HQ06X03058

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/12/2006

Before :

THE HON. MR JUSTICE EADY

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Between :

CC	**Claimant**
- and -	
AB	**Defendant**

- -
- -

Mark Warby QC (instructed by Henri Brandman & Co) for the Claimant
Edward Bartley Jones QC (instructed by Jackson & Canter) for the Defendant

Hearing date: 15th November 2006

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. In this case the Claimant (CC) conducted an adulterous relationship for some months with the Defendant's wife, and now seeks the court's assistance in preventing him from telling anybody about it. There is no direct precedent for this, so far as I am aware, and it does not at first glance appear to be a very compelling case.

2. What is the cause of action? (Clearly, if reliance were placed on defamation, there would be no prospect of an injunction if the words the Defendant wishes to publish would be susceptible to a defence of justification: *Bonnard v Perryman* [1891] 2 Ch 269.) Since it is not yet recognised that English domestic law offers an enforceable right to privacy, as such, it has been put on the basis that any such communication would be a breach of confidence; alternatively, that the Defendant (AB) should be restrained from harassing the Claimant contrary to the provisions of the Protection from Harassment Act 1997. That is based primarily upon certain abusive communications which the Claimant has received from the Defendant by way of e-mail and telephone.

3. The first of the causes of action relied upon entails the striking proposition that a spouse whose partner has committed adultery owes a duty of confidence to the third party adulterer to keep quiet about it – even without any voluntary assumption of such an obligation.

4. Before proceeding further, however, it is appropriate to add in some further elements revealed by the evidence in this particular case.

5. First, the Defendant has made it clear in a number of threatening communications, and indeed in his evidence to the court, that he wishes to reveal the information partly out of revenge and partly to make money for himself by selling the story to the media.

6. Whether the Defendant's motive has anything to do with it is a matter for closer consideration. It may be thought that a citizen's right of free speech is not dependent on the motive or the motives governing its exercise: see e.g. the observations of Lord Nicholls, in the context of fair comment, in *Tse Wai Chun Paul v Albert* [2001] EMLR 31. On the other hand, it is a factor which Mr Warby QC for the Claimant argues is at least relevant to be taken into account when, if that stage is reached, it becomes necessary to weigh competing rights against one another. It is now recognised in Strasbourg and domestic jurisprudence that there are different categories of "speech" to which greater or lesser importance may be attached (e.g. what has been called "political speech" versus "vapid tittle-tattle"): see *Campbell v MGN Ltd* [2004] 2 AC 457 at [147]-[149]. The purpose for which the Defendant wishes to exercise his freedom of speech could be relevant in that context.

7. Secondly, the evidence at the moment appears to indicate that neither of the parties to the sexual relationship in question wishes either the fact of it, or any details about how it was conducted, to be made public. Certainly not the Claimant and, although there is nothing directly from the Defendant's wife (N), such evidence as is currently available suggests that she takes the same view.

8. There is a powerful argument that the conduct of an intimate or sexual relationship is a matter in respect of which there is "a reasonable or legitimate expectation of privacy". Accordingly, anyone who obtains such information would be expected to recognise that, either from the nature of the information itself or from the circumstances in which it was imparted. If that is so for journalists, or for scandal mongers in general, it is a matter for consideration whether, and to what extent, a "cuckolded" husband is under a lesser obligation.

9. Thirdly, the Claimant says that he is now seeking to reconstruct his family life and is concerned for the interests of his own wife and young children. Even if the Defendant is correct in attributing the blame for their problems to the Claimant himself, Mr Warby argues that there is no reason why the wife and children should suffer more than is necessary and, in particular, through the stresses and strains of press intrusion. He suggests that the court should have regard to their rights, especially in the context of Article 8 of the European Convention on Human Rights and Fundamental Freedoms, in determining the current dispute, even though they are not themselves parties.

10. Fourthly, there is an extra dimension to this aspect of the case which is perhaps even more troubling. The Claimant's wife is suffering stress and anxiety which requires medical attention (attested to by medical evidence) and which is quite likely to be made worse by press exposure. There is also (non-medical) evidence of self-harm and of threats to commit suicide. It is this factor, in particular, which has led editors so far to hold back from publication and has meant that the Defendant has hitherto been frustrated in his efforts to exploit the situation for gain. He himself has not been deterred by this at all. He says it is just "bullshit" and portrays himself as the victim, absolved from any responsibility for the consequences of his actions. His attitude is that he is entitled to his revenge on the Claimant, and if possible also to some financial gain; if his own wife, or the Claimant's wife or his children, suffer incidental fallout, then that is the Claimant's fault.

11. Fifthly, it is the Claimant's case (albeit contested) that at the time of the "affair" he did not know that N was married. She did not wear a wedding ring and made no mention of having a current partner.

12. Against this unhappy background, Mr Bartley Jones QC for the Defendant has argued strongly for a principle to the effect that "a party to an adulterous relationship can never, as a matter of law, obtain injunctive relief (interim or permanent) against the wronged party preventing him from disclosing the relationship".

13. If no such principle of law can be demonstrated from case law in the 19th or 20th centuries, it seems curious that it should now emerge fully formed in the 21st. So broadly stated, it cannot be correct. The approach now adopted by domestic courts, in the light of Strasbourg jurisprudence, is to determine particular conflicts between Convention rights, where they are shown to be engaged, by bringing to bear an "intense focus" on the facts of the individual case, rather than by purporting to create general principles of law judicially: see e.g. *Re S* [2005] 1 AC 593 at [17] and *Campbell v MGN Ltd* [2004] 2 AC 457.

14. It may be helpful to have in mind in this context the observations of Sir Mark Potter P in *A Local Authority v W* [2005] EWHC 1564 (Fam) at [53] on how the court is to

apply the new methodology once it is clear that conflicting Convention rights are engaged:

> "The exercise to be performed is one of parallel analysis in which the starting point is presumptive parity, in that neither Article has precedence over or 'trumps' the other. The exercise of parallel analysis requires the court to examine the justification for interfering with each right and the issue of proportionality is to be considered in respect of each. It is not a mechanical exercise to be decided upon the basis of rival generalities. An intense focus upon the comparative importance of the specific rights being claimed in the individual case is necessary before the ultimate balancing test in terms of proportionality is carried out".

15. Applying this language, is seems to me that the principle tentatively fashioned by Mr Bartley Jones could properly be characterised as a "generality", which would simply pre-empt the required " parallel analysis" and "intense focus" on the unique facts of the case. The approach of the House of Lords in the recent cases would appear to confirm the validity of a comment made by Sedley LJ, in *Douglas v Hello! Ltd* [2001] QB 967 at [137], to the effect that the outcome is likely to be determined by considerations of proportionality.

16. The starting point must be to determine whether relevant Convention rights are here engaged. There is no doubt that the Defendant's right of freedom of expression is indeed engaged. The whole object is to restrain him in this regard. The European Court of Human Rights has noted that "the dangers inherent in prior restraint are such that they call for the most careful scrutiny": *Observer Ltd and Guardian Newspapers Ltd v United Kingdom* (1991) 14 EHRR 153 at [60]. So too in *Wingrove v United Kingdom* (1996) 24 EHRR 1 at [58] it was said that where prior restraint is involved "special scrutiny by the court" is required.

17. "There cannot as yet be said to be a 'bright-line' rule against judicial prior restraint in ECHR law. However, it is clear that prior restraints are viewed as pernicious and that, to be upheld as justifiable, their use will have to be viewed as appropriate, proportionate, and absolutely necessary": C Munro, *Prior Restraint of the Media and Human Rights Law*, (2002) Juridical Review 1 at 23. This passage is, of course, consistent with the terms of Article 10 (2) itself.

18. The question would seem to be whether I come to the conclusion, having applied "careful scrutiny" and "an intense focus" to the facts disclosed in the evidence before me, that there is a countervailing requirement of public policy which renders it necessary and proportionate to restrain the Defendant from communicating certain information in order to protect the Convention rights of any other person(s).

19. It would be necessary as part of this process to pay close attention to what the Defendant is likely to say, and to whom, and to evaluate the type of speech involved on each scenario. For example, while it may conceivably right to restrain the sale of celebrity tittle-tattle in which there is no real public interest, on the other hand there would be no necessity or proportionate countervailing advantage in preventing him

from conversing with relatives, friends or (say) doctors or counsellors about the subject of his own marital breakdown and what may have contributed to it.

20. I need to consider next whether there is any countervailing Convention right against which those of the Defendant need to be balanced. Mr Bartley Jones submits quite simply that the stage of "balancing" should not even be reached in this case.

21. In personal and sexual relationships the courts have for some time recognised that there is what is now generally referred to as a reasonable or legitimate "expectation of privacy": see e.g. the terminology of Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457 at [20]-[21] and that of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1 at [51] and [69].

22. I was reminded, in particular, of the decision of Sir Nicolas Browne-Wilkinson V.-C. (as he then was) in *Stephens v Avery* [1988] 1 Ch. 449. It demonstrates two propositions relevant for present purposes. First that an intimate lesbian relationship could be within the scope of the law's protection as being confidential. This has been recognised more recently in the context of other sexual relationships, subsequently to the advent of the Human Rights Act, in such cases as *Theakston* v *MGN Ltd* [2002] EMLR 398 and in *A v B plc* [2003] QB 195, although it may be necessary to have regard to the nature of the relationship. It may yet be the case, for example, that a fleeting one night encounter will attract less protection, if any, than a long term relationship. This is an uncertain area, because it is by no means fully determined how appropriate it is for individual judges to apply moral evaluation to such encounters. But it is not an issue that I need to address too closely for present purposes.

23. I am certainly not prepared to accept Mr Bartley Jones' submission that there is, or should be, a general legal principle that "there is no legitimate expectation of privacy for a person who conducts a relationship with another person's wife".

24. The other proposition which Mr Warby sought to derive from *Stephens v Avery*, since one of the protagonists happened to have been a married woman, is that it is hardly likely that a modern court would regard an adulterer as beyond the pale when it comes to the protection of intimate personal relationships. Indeed, if the commission of a crime does not deprive a citizen of the opportunity to enforce his or her Article 8 rights (see e.g. *Polanski v Condé Nast Publications Ltd* [2005] 1 WLR 637), it is difficult to see how adultery could do so.

25. Judges need to be wary about giving the impression that they are ventilating, while affording or refusing legal redress, some personal moral or social views, and especially at a time when society is far less homogeneous than in the past. At one time, when there was, or was perceived to be, a commonly accepted standard in such matters as sexual morality, it may have been acceptable for the courts to give effect to that standard in exercising discretion or in interpreting legal rights and obligations. Now, however, there is a strong argument for not holding forth about adultery, or attaching greater inherent worth to a relationship which has been formalised by marriage than to any other relationship.

26. A judge, like any one else, is obviously entitled to hold personal moral views about the issues of the day, but it is important not to let them intrude when interpreting and applying the law. Such issues are best avoided – at least without some statutory

sanction. No doubt many people, especially those with a strong religious faith, will disapprove of adultery. Many others, on the other hand, will not give it a second thought, while moving easily through a series of medium or short term relationships as they feel it appropriate.

27. With such a wide range of differing views in society, perhaps more than for many generations, one must guard against allowing legal judgments to be coloured by personal attitudes. Even among judges, there is no doubt a wide range of opinion. It is all the more important, therefore, that the outcome of a particular case should not be determined by the judge's personal views or, as it used to be said, by "the length of Chancellor's foot". There is a risk that with greater emphasis on applying an "intense focus" to the particular facts, with the room this leaves for the making of individual judgments, differing outcomes on what may seem to be broadly comparable facts may be interpreted by onlookers as being explicable on the basis of arbitrary personal differences between the judges. That is plainly undesirable because it would undermine faith in the rule of law, but the danger has to be recognised as inherent in the "new methodology" of balancing Convention rights.

28. It is not for judges when applying the European Convention, which is a secular code applying to those of all religions and none, to give an appearance of sanctimony by damning adulterers or seeking, as I was invited to do by Mr Bartley Jones, to "vindicate" the state of matrimony. Indeed, if the Defendant is pretending that his desire to "spill the beans" to a tabloid newspaper has anything to do with "vindicating" the institution of marriage, that would be remarkable hypocrisy in the light of his own evidence. He wishes to expose and humiliate not only the Claimant but also incidentally his own wife and to do so, on his own ready admission, for revenge and for financial profit.

29. Both counsel referred, in the context of adultery, to *Tammer v Estonia* (2001) 29 EHRR CD 257. I am not sure that it assists greatly. A criminal sanction had been imposed over insults directed at someone for alleged adultery and poor parenting. It seems to have been concerned with the mode of expression rather than the substance of what was said.

30. I have come to the conclusion that there can be no rule of "generality" that an adulterer can *never* obtain an injunction to restrain the publication of matters relating to his adulterous relationship; or, to put it another way, even an adulterous relationship may attract, at least in certain respects, a legitimate expectation of privacy. That being so, there is no rule which exempts a "wronged" husband from restraint automatically, by virtue of his status, although in any given situation there may be particular respects in which his right to free speech should be accorded greater priority.

31. It follows that the Claimant's Article 8 rights are engaged once there is a threat to publish, to the world at large (whether for payment or otherwise), the fact of his sexual relationship and the details of how it was conducted.

32. So too, the Article 8 rights of the other party to that relationship (N) need to be taken into account. It is clear from *A v B plc* that the court will be less inclined to protect the rights of one party to a sexual relationship if the other party wishes to reveal what happened. Thus far, that does not appear to be so on the available evidence.

33. In these circumstances, what is required is an intense focus on the particular facts so as to achieve an appropriate balance between the competing rights, bearing in mind that freedom of speech should only be constrained if it is necessary to do so to protect the rights of other persons concerned; what is more, any such restraint should be limited to what is proportionate.

34. At this stage, what is sought is an interlocutory injunction and I need to take into account the requirements of s.12(3) of the Human Rights Act and its interpretation by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253. I should not grant an injunction unless I am satisfied that the Claimant is likely to obtain an order in similar terms following a trial. I can only decide that in the light of the evidence currently before me and should not speculate as to what further material may be available at that stage, or what might happen in cross-examination. Nevertheless, I have to make a preliminary assessment of the merits on what I have. It is not simply a question of deciding that there is a good arguable case. The task may not always be an easy one to carry out, but that it is necessary follows from the interpretation of s.12 by their Lordships.

35. I recognise straight away that the Claimant is unlikely to obtain at trial a blanket restraint on *any* communication about the fact of the adulterous relationship. It would not be proportionate to any reasonable expectation on the Claimant's part to prevent the Defendant, for example, discussing his wife's adultery with a close friend, or with members of the family, or (if he needed to do so) with a family doctor, counsellor or social worker, or with his lawyers. What is in contention is the Defendant's desire, directly or indirectly, to put the relationship into the public domain through the press, and to support it with detail.

36. The distinction I have just drawn can be analysed in terms of differing categories of "speech". Communication genuinely aimed at the persons, or for the purposes, I have suggested above would be accorded a relatively high priority, whereas selling the story to the tabloids (whether for revenge, money or any other reason) should be accorded lower priority. The analogy is with what has been described in the House of Lords as "the most vapid tittle-tattle about the activities of footballers' wives and girlfriends": *Jameel v Wall Street Journal (Europe)* [2006] UKHL 44 at [147]. That phrase was used in the context of what is or is not "in the public interest", in the true sense of the term, as contrasted with what is merely "interesting to the public". That is a contrast which has long been recognised: see e.g. the observations of Lord Wilberforce in *British Steel Corporation v Granada Television* [1981] AC 1096, 1168G. The point is of equal validity, however, in the context of assessing the relative value of different kinds of "speech". The communication of material to the world at large in which there is a genuine public interest is naturally to be rated more highly than the right to sell what is mere "tittle-tattle".

37. I have little doubt that sexual relationships involving those who are in the public eye, whether they merit the appellation "public figures" or not, are generally likely to be interesting to the public, but they will not necessarily be of genuine public interest. Sometimes, as for example long ago in the case of the "Profumo scandal", the information will fulfil both criteria. The fact that the then Minister for War had a mistress in common with a Russian diplomat or defence attaché, at the height of the cold war, would plainly be of legitimate public interest. I am quite satisfied, however,

that there is nothing remotely comparable about the present facts. I shall consider the arguments put forward in a little more detail.

38. Mr Bartley Jones draws a distinction between certain documents, which evidence the relationship between N and the Claimant, in respect of which it is conceded that the test under s.12(3) has been satisfied, and the bare fact of the relationship itself. As to the latter, he submits that the Defendant is entitled to inform "whomsoever he wishes about the fact of the relationship and detail thereof as known to the Defendant derived otherwise than from the documents". The reason for this dichotomy is, presumably, that the personal documents (including a hotel receipt and a personal note) could by virtue of their nature be the subject of a duty of confidence, whereas if the information came from some other source it could not.

39. Sometimes, however, the court will recognise a legitimate expectation of privacy, not on the basis of the means by which the information was imparted, but rather because of the nature of the information itself. Quite often, for a variety of reasons, people prefer to conduct sexual relationships, at least temporarily, on a secret basis. They would appear to be entitled to do so and, until they choose to "go public", to enjoy a legitimate expectation of privacy *vis à vis* the world at large. That is to say, such information is capable of being regarded as confidential.

40. It is said here that the relationship was conducted in public, in the sense that the Claimant and N stayed in hotels together and were seen in various cities – not merely in England but in the United States and on the continent. They were not recognised, although it could be said that they "took the chance" of being spotted. I doubt whether that is the same as "going public", and especially since the decision of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1, where it was recognised that the law is capable of extending its protection to public places and also to a "social dimension"; that is to say, to the relationships which people conduct with others.

41. I would not accept, therefore, that nowadays such a clear distinction can be drawn, as a matter of "generality", between private documents and the bare fact of a relationship. It may depend on the circumstances, which have to be carefully scrutinised.

42. Here, the relationship is over and the respective parties no doubt wish to "move on". On the face of it, the Claimant and N ought to be able to keep their past indiscretion to themselves rather than suffer public humiliation and embarrassment – not only for themselves but for completely "innocent" third parties such as the Claimant's wife and children.

43. The Claimant's relationship with his wife is ongoing and he wishes to rebuild it. Exposure in the press could frustrate that project and, on the evidence, damage his wife's fragile mental state. I can hardly ignore that if the consequence of the order which Mr Bartley Jones seeks would have these effects. I need to act compatibly with the Convention and have regard to the impact on the Claimant's family life.

44. Thus, if I come to the conclusion that, in order to protect it, it is necessary to prevent the Defendant going directly or indirectly to the media for no better reason than spite, money-making or "tittle tattle", then I would be obliged to restrain him. The fact that

he may be, or may see himself as, an "injured party" does not accord him a special status, not given to others, which inherently raises the value of the communications he wishes to make to the tabloids on to some higher plane or renders them more valuable in Article 10 terms.

45. Nor is it an answer to Article 8 concerns to say, in Mr Bartley Jones' words, that "it is his own voluntary conduct which has put that marriage and family life in jeopardy". Mr Bartley Jones characterised the Claimant's reliance on the threat to his wife's health by saying that he is "bolstering his claim of confidence through the damage he has caused [her] by the very fact of having the relationship [with N]".

46. Quite simply, that factor does not absolve the court from having to take into account the impact on the Claimant's family life. Indeed, Mr Bartley Jones expressly acknowledges that her position becomes relevant if the Claimant is held to have a reasonable expectation of privacy in respect of the adulterous relationship (contrary to his primary submission). Nonetheless, he argues that it would be wrong for me to give very much weight to the Claimant's wife's rights under Article 8, or for that matter those under Articles 2 and 3, since she is not a party and has provided no evidence herself.

47. It is worth noting, however, that even before the Human Rights Act came into effect the courts always had an eye to the rights of any third party who might be adversely affected by the grant of an injunction. Now a judge is certainly required to ensure that court orders and determinations are compatible with the Convention, and thus to have regard to such rights in arriving at decisions.

48. I do not accept the analogy which Mr Bartley Jones draws with the brothel in respect of which Ouseley J declined to grant protection in *Theakston v MGN Ltd* (cited above).

49. One of Mr Bartley Jones' arguments is that "once the wronged party is entitled to tell some people, the information cannot as such be protected in any meaningful way". I do not believe this to be correct as a matter of law. Exceptions are regularly incorporated in the terms of court orders to enable limited communications to take place, the most typical example being to facilitate discussions with lawyers or expert witnesses. If the Defendant were restricted from communicating with the press, but chose to do so through a friend or family member, he would be on risk of imprisonment for contempt of court. That would be "meaningful".

50. Another point was that it would be wrong to restrain the Defendant when the Claimant, his wife and N are not so restrained. I see no logic in this at all. An injunction is granted because there is evidence that, otherwise, the party to be enjoined will commit a wrong. There is obviously no point in granting restrictions against other people in respect of whom no such risk is perceived to arise.

51. Mr Bartley Jones has put forward the proposition that the Claimant has a "public persona" and also that "the fact that the relationship goes to inform that public persona": *ergo*, he submits, "there is a public interest in the disclosure of information about the relationship". He says that the Claimant "cannot complain if his public persona is negated".

52. I need to bear in mind that, as Lord Woolf emphasised in *A v B plc*, even a public figure is entitled to a private life. Moreover, this is not a case (such as e.g. *Campbell v MGN Ltd*) where the Claimant has misled the public by false denials; nor has he moralised publicly on family life, or his own continence in sexual matters. I cannot accept that there is any genuine interest so far as the public is concerned in the disclosure of this information.

53. It is important to have regard to the Defendant's attitude demonstrated in an e-mail of 24 September 2006. Having described the Claimant's wife's suicide threat as "bullshit", he went on to threaten:

> "… as you know the internet is a huge uncensored world so wat ive decided to do is put u in the shit no matter wat! … cause I think you're a twat an I reckon the stress is getting to u …"

This was explained in terms of publishing to the world at large, or as he put it "every fuckin person in the world".

54. There was also a telephone call made by the Defendant to the Claimant on the evening of 4 November 2006, which was tape-recorded and contained the following (apparently drunken) remarks by way of explaining that the Claimant could not possibly succeed in his litigation:

> "Listen mate. You're going to be fucked. You're fucked, I'm just telling you when this goes to court. You can't even afford the House of Lords. This is going to go to the House of Lords, and you can't even afford it. I'm on legal aid. I'm on legal aid. It's all paid for me. Because I'm a good guy. I'm a good guy. I've done nothing …"

55. Reference has also been made to what has been called the "the divorce ruse". The Defendant has threatened to use divorce proceedings as a means of bringing the Claimant's name to the attention of the press. The proposal is that he would, unnecessarily, join him as a co-respondent. That strongly suggests that he intends to abuse the court's process for a collateral purpose. No one has the right to do that. Nor do professional advisers. But that threat appears to have subsided for the time being.

56. All in all, the Defendant's behaviour so far demonstrates the need for an interim order under the Protection from Harassment Act 1997 (which indeed Mr Bartley Jones does not oppose). More than that, these documents lay a clear foundation for reasonable apprehension that, unless restrained by a court order, the Defendant will publish as many details as he knows about the Claimant's relationship, whatever the consequences likely to flow for the Claimant and his family.

57. There were communications by the Defendant on the internet about the relationship, but the stage has not yet been reached, in my judgment, where it could be said, in the words of Lord Goff's first "limiting principle" in *Att.-Gen. v Guardian Newspapers (No. 2)* [1990] 1 AC 189, 282 that the information is so generally accessible that, in all the circumstances, it cannot be regarded as confidential.

58. For the reasons I have outlined above, I am satisfied that the Claimant is also likely to obtain a permanent injunction in similar terms to that which I now propose to grant. Accordingly, the test under s.12(3) is fulfilled. Subject to any further submissions as to its terms, I would propose to grant an injunction restraining the Defendant from communicating, directly or indirectly, with the media or on the internet on the subject of the Claimant's former relationship with N. That is in addition to an order under the Protection from Harassment Act and to restricting the use of the private documents (neither of which is at present opposed).