FREE SPEECH v PRIVACY – THE BIG DEBATE

PREVENTING PUBLICATION OF PRIVATE INFORMATION – WHEN YOU CAN AND WHEN YOU CANNOT by Godwin Busuttil, 5RB

Good morning everyone. This break-out session is concerned with the topic of injunctions, specifically pre-trial, pre-publication interim injunctions. The ability of an individual to go to a court and obtain an injunction which prevents the press from publishing what it wants to publish – whether for the purpose of safeguarding privacy or for some other reason – is obviously a particularly important issue in the free speech context. It is important because, as Lord Northcliffe, that early pioneer of popular tabloid journalism and the founder of the *Daily Mail*, remarked when asked about the stock in trade of his newspapers: "News is what somebody somewhere wants to suppress."

By way of introduction, you may have noticed that there is currently a lively debate going on about freedom of expression in this country. There have, of course, been numerous other issues involved – forum shopping in libel cases, also known as 'libel tourism'; the high and disproportionate cost of libel litigation; the claimed 'chilling effect' of the availability of conditional fee agreements in litigation involving the media; the alleged stifling of scientific debate by libel proceedings; the fact that the creation of the current law of misuse of private information has largely been the work of judges rather than of Parliament, and so on.

But at the centre of the recent debate has been the subject of injunctions, specifically so-called 'super-injunctions', a term which has been used to conjure up the spectre of judicial censorship; Kafkaesque secret justice being administered behind closed doors; of the Court seeking to place a fetter on Parliamentary debate and the reporting by the press of that debate; of a conspiracy of silence and of the public being denied their right to know.

As Ian Hislop, the editor of *Private Eye*, observed in a piece for *The Guardian* on 13 October this year:

> "The injunction against the *Guardian* publishing questions to ministers tabled by the Labour MP Paul Farrelly is an example of a chill wind blowing more widely

> through the press. In increasing numbers, aggressive lawyers, who used to use libel law to protect their clients, are now using injunctions to secure privacy and confidentiality. They have found it is a legal technique which shuts down stories very quickly so that now it is not a question of publish and be damned, as it used to be: we are now finding that we can't even publish at all. One of our reporters made calls on a story involving the management of a lot of public money and we were immediately threatened with an injunction preventing publication…What is more, people have been taking out injunctions not only stating 'you can't print this', but saying 'you can't print the fact that you can't print this'. There is an emerging culture of anonymity in which justice is not even seen to be done, and that is an unfortunate, rather dangerous, trend".

Clearly it is no great leap from the articulation of concerns such as these to reflection upon the circumstances which led to the enactment of the Bill of Rights of 1689 and the historic battles fought and won in the 18th century for freedom of speech and press freedom.

As *The Guardian* put it in an editorial published the following day, on 14 October:

> "The Bill of Rights, passed 320 years ago, is clear: "Freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament"…So readers of *The Guardian* had good reason to be alarmed by a report that the 'Commons order paper contained a question to be answered by a minister later this week. *The Guardian* is prevented from identifying the MP who has asked the question, what the question is, which minister might answer it, or where the question is to be found'.
>
> That media organisations were unable to report a parliamentary question was due to a so-called 'super-injunction' obtained…on behalf of Trafigura, a large London-based trading company. A 'super-injunction' is one which not only prevents any publication, but which is itself secret. Search in vain for the case in the court lists of the High Court in London: it appears only as "RJW and SJW v The Guardian". Under its terms, the Guardian was prevented from publishing a certain document: it was also banned from revealing that Trafigura had been to court to obtain an injunction. When we became aware that the existence of this

order had been mentioned in a parliamentary question we sought to vary the terms of the injunction. We were advised by Carter-Ruck [Trafigura's solicitors] that publication would place us in contempt of court."

The *Guardian* editorial then went on to define what it saw as the main issues raised by 'super-injunctions':

"There are three separate legal issues at the heart of this case. The first is prior restraint, which casual readers may have thought had died a death after Thalidomide or the Pentagon papers. It has not. Trafigura had, on grounds of confidence, suppressed the Minton Report, which is connected to the dumping of toxic waste in Ivory Coast. The company has paid damages to 31,000 Africans in relation to this dumping. No newspaper can reveal the contents of this report, but at least we can now say that it exists and had been rendered secret. The option of 'publishing and be damned' is not available.

The second principle is that of open justice. There is no sound reason why the fact of the Trafigura hearing should not have been routinely recorded, and the wide-ranging injunction made a public document for all to see…

The final principle is the ability to report what goes on in parliament. It is scandalous that a law firm acting on behalf of a wealthy trading company should have thought, for a moment, that it could gag media organisations from reporting parliamentary business…

…It is rather shameful that British judges should have spared the company's blushes by handing down secret injunctions. But at least the principle for which John Wilkes fought and was imprisoned in the 1770s – the right to report Parliament – has not been clouded."

Putting to one side the bulk of *The Guardian*'s comments and complaints – with which one might agree in whole or in part or not at all – if anyone, casual reader of the *Guardian* or otherwise, had thought that the phenomenon of 'prior restraint' had "died a death" between the Thalidomide and Pentagon papers cases of the 1970s and the Trafigura case of 2009, he or she would clearly have been wrong. Prior restraint, notably in the form of pre-publication interim injunctions restraining the disclosure of trade secrets or other

similarly confidential or sensitive information, has been alive and well throughout this 30 year period, as a cursory glance at a relevant text book or the law reports will attest. Think *A-G v Guardian*, the *Spycatcher* case, for example.

What, I think, is new, however, is, firstly, a marked increase in the prevalence of applications for and the grant of interim injunctions to prevent the publication of confidential or private information by the media; and, secondly, the ancillary orders that make super-injunctions 'super': orders anonymising the parties, using letters of the alphabet instead of names, banning any report of the injunction hearing, preventing the publication of any information about the proceedings, including the fact that an injunction has been granted or that the proceedings have been brought at all, and so on.

As regards this first development, this appears to me to be in essence the product of the courts' adaptation of the law of confidentiality after the coming into force of the Human Rights Act 1998 to accommodate individuals' rights under Article 8 of the European Convention, a process which really started with the *Douglas v Hello!* case in 2001 and has developed apace ever since. This development has been driven by a will on the part of individuals, usually celebrities and other well-heeled persons, to take advantage of the new law to prevent the press from publishing information about them which they would rather not have published. As Ian Hislop put it, "…**lawyers, who used to use libel law to protect their clients, are now using injunctions to secure privacy and confidentiality**". And, of course, the rule in *Bonnard v Perryman* meant – and, as the law currently stands still means (subject to a current debate I shall look at in more detail later) – that in 99 cases out of a hundred it will not be possible for someone to obtain an interim injunction to prevent the publication of an alleged libel.

As for the second new development, the ancillary 'super' orders, this phenomenon appears to be a result of both, first, the general developments in the law governing alleged misuse of private information to which I have already referred, and, also, the coming into effect of the Civil Procedure Rules 1998. This had the effect of codifying, and thereby making more comprehensible and accessible a number of previously disparate common law and statutory powers enabling the court, where appropriate, to sit in private and to control the extent to which information about proceedings before the court might be made public, in the press in particular, as well as of introducing some new, additional powers: see, for example, CPR 5.4C(4): under the previous High Court rules, the RSC, the court

had no power (no express power at least) to order "on the application…of any person identified in a statement of case" that a "non-party may not obtain a copy of a statement of case" or restricting "the persons or classes of persons who may obtain a copy of a statement of case".

One respect in which I agree entirely with what Ian Hislop has said – indeed I would go even further than he has – is that things have now reached a point whereby, in the field of misuse of private information, to put matters colloquially, pre-publication interim injunctions **are, by and large, where the action is**. This is not just so in terms of my experience as a lawyer (although it is), but also in two other particular senses:

- First and foremost, interim injunctive relief is the principal and most important remedy in this field of law. This is so, I think, in the following circumstances:

    - Sometimes, the intended victim of a press intrusion will not get wind of what is going on before the intrusion has taken place. But in cases where he or she does discover what is about to happen, the fight, if there is to be one, is much more likely to be at the pre-publication stage than at trial. This is because, as Mr Justice Eady put it in his judgment in the *Mosley* case last year, "Once the cat is out of the bag, and the intrusive publication has occurred, most people would think that there was little to gain" ([2008] EMLR 679, at [209]).

    - Furthermore, where an application for an interim injunction is made, the result of the application is liable to be determinative of the whole case. If, for example, the application is refused, and the relevant material is published, the claimant is unlikely to want to fight on to obtain damages (which won't, on any view, be enormous damages). A necessary concomitant of doing so would be a public trial at which not only every aspect of the intrusive information at issue but every aspect of the claimant's private life in general would be liable to be picked over in the full glare of publicity, inevitably exposing the claimant to an even greater degree of intrusion than was caused by the original intrusion complained of. And that is to say nothing of the inevitable mounting costs as the case progresses, costs out of all proportion to the damages that might

eventually be recovered or, indeed, what is sometimes euphemistically termed 'litigation risk', that is to say, the risk that the claim might fail! In short, in this regard (and perhaps in others) there are unlikely to be many Max Mosleys.

- Conversely, if an application is made and an interim injunction granted, experience suggests that media respondents tend not to want to fight to trial for the right to publish material whose moment has passed. Moreover, in most cases a judge will have already decided that the case against them will probably succeed. Unless there is perceived to be some serious point of principle at stake, the media tend to compromise such cases…and move on the next footballer or X Factor contestant…

- In passing, it may also be noted that the proposition that 'interim injunctive relief is the most important remedy in the field of misuse of private information' lies at the heart of Max Mosley's pending application against the UK government to the European Court of Human Rights in Strasbourg. Mr Mosley submits that the media should be under a legal obligation to notify the intended victim of a potential intrusion before it occurs. His complaint is that "the UK has violated its positive obligations under Article 8 of the Convention by failing to impose a legal duty on the *News of the World* to notify him in advance in order to allow him the opportunity to seek an interim injunction and thus prevent publication of the materials". In support of his complaint, Mr Mosley is arguing, under Article 13 [of the ECHR, which guarantees 'an effective remedy before a national authority'] "that there was no effective domestic remedy open to him. Although the court found a serious breach of his right to respect for privacy and he was awarded damages, this award was not able to restore his privacy to him. He contended that only the possibility to seek an interim injunction prior to publication could constitute an effective remedy in his case". Watch this space…

- 'Pre-publication interim injunctions are also 'where the action is' in the second sense that applications for such injunctions are apt to produce <u>the starkest of clashes between privacy and free speech</u>, that is to say, between conflicting,

indeed, irreconcilable rights and interests. As Lord Justice Hoffmann (as he then was) recognised in the 1994 case of *R v Central Independent Television plc* [1994] Fam 192 (a case which concerned the exercise of the court's inherent jurisdiction to protect children from harmful publicity and also, as it happens, the case in which Hoffmann LJ famously stated the view that freedom of expression was a 'trump card that always wins' – these conflicting rights and interests **are not readily commensurable**. As Hoffman LJ observed:

> "Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest….The interests of the individual litigant and the public interest in the freedom of the press are not easily commensurable. It is not surprising that in this case the misery of a five year old girl weighed more heavily with Kirkwood J. than the television company's freedom to publish material which would heighten the dramatic effect of its documentary. This is what one would expect of a sensitive and humane judge exercising the wardship jurisdiction."

In short, where an interim injunction is sought by an individual to prevent a newspaper from publishing material which, if published, would clearly be seriously intrusive, and the injunction <u>is granted</u>, the effect of this, in substance, is to prevent the newspaper from publishing its story at the point in time it wants to publish it. On the other hand, where an interim injunction is sought in such circumstances and the application <u>is refused</u>, this may entail untold, potentially devastating, damage and distress for the individual in question which is, in truth, irreversible and irremediable. In particular, if the newspaper proceeds to publish, the relevant private information cannot be taken back out of the public domain. As Mr Justice Eady stated at [236] in his judgment in the *Mosley* case in deciding to award the claimant compensation in the sum of £60,000:

> "It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he

> says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited."

Importing a test often considered in non-media injunction cases, the 'balance of injustice' test: which party, the applicant or the respondent, will suffer the greater injustice if it turns out that the judge got it wrong at the interlocutory injunction stage? Surely, in most cases where the claimant's Art 8 rights are engaged in some serious way, the answer is going to be the claimant?

In these circumstances, it would be a robust judge who dismissed an application for an interim injunction on the basis of an invocation of the public interest in free reporting, before the rights and wrongs of the case have been fully investigated, when refusal of an injunction might have potentially devastating consequences for the claimant. These days, Articles 8 and 10, when in conflict, are said to have – in theory at least – 'presumptive parity'; "neither…has *as such* precedence over the other", as Lord Steyn put it in *Re S*. The day of trump cards is supposed to be over. But is this the reality? On a Saturday afternoon? On the basis of incomplete evidence? When the court is faced with intractable and insoluble issues of fact, allegations of dishonesty and bad faith, appeals by both parties to the public interest? While the threshold test set for the grant of such injunctions by the House of Lords in *Cream Holdings v Banerjee*, namely that the claimant would 'probably succeed at trial', is said to be a "particularly high one", the court is not obliged to apply it in every case. As Lord Nicholls stated in the *Cream* case at [22]:

> "In general, that [i.e. 'more likely than not' to succeed at trial] should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on Article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include…where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the Court to hear and

> give proper consideration to an application for interim relief pending the trial or any relevant appeal."

> Or, as Mr Justice Eady put it in the recent case of *Martin v Channel Four Television* [2009] EWHC 2788 (QB) at [27]: "to hold the ring while the factual dispute was resolved…while the court took time to establish the facts".

> In reality, at the interim injunction stage at any rate, is Article 8 not now the 'trump card'?

So, going back to the title of my paper, '*When you can and When you cannot*', if only matters were that simple! Although if they were, I guess that many of us would be out of a job…

In short, as is so often the case in media litigation, 'it all depends'. Some claims, as anticipated by the Court of Appeal in the Gary Flitcroft (*A v B plc*) case, will be relatively clear: an obvious privacy interest coupled with no real countervailing public interest in disclosure. But these are *not* the ones likely to result in a contested injunction hearing.

Where matters are not quite so straightforward, predicting what the result of an application for an interim injunction might be is not assisted by the dearth in reported case law, which is almost certainly the result of the fact that so many privacy cases are conducted in private and made subject to stringent reporting restrictions. As I remark on p. 8 of my paper, in the section of the paper concerned with the topic of 'super-injunctions':

> "'Secret justice' is generally undesirable, not just in terms of the general policy and ideological problems associated with justice being administered in secret, but also, from a lawyer's point of view, because it places a fetter on the evolution of the corpus of precedent in an area where the law is in flux. One perceives that the reported cases represent only the very tip of the iceberg. This makes it more difficult to advise one's clients what might happen if they apply for an interim injunction; to adopt the title of this paper, "*when you can and when you cannot*". It is difficult to read the runes when there are so few runes to read. This cannot be in the public interest."

This is not just a lawyer's whinge – although it certainly is that – but is also, I believe, a serious point about legal certainty and predictability; it is surely in the public interest that lawyers should be in a position to advise their clients on as accurate and informed a basis as is possible; and that means, on the basis of authority and precedent. The principles have bedded down and are now tolerably clear. It is how the principles are to be applied to the facts of particular cases that is of interest and calls for close study. However, this, it would appear, is being frustrated by the restrictions imposed by the court to safeguard privacy in individual cases. Perhaps judges should consider routinely handing down their judgments in anonymised form. This, for example, was Mr Justice Munby's habit when he was sitting in the Family Division; see also Mr Justice Tugendhat's recent judgment in *RST v USW*, to which I shall return later.

Having made reference to my paper, you may be relieved and not entirely surprised to learn that I do not propose to speak to it in its entirely. It's really something for you to take away and read at your leisure.

What I do intend to do with the rest of this session is this: first, to focus in on one of the key current debates related to interim injunctions in this field, a debate which I would call "*the Bonnard question*" or "*problem*"; second, to get you to do something, to which end I have prepared a hypothetical case study for us to consider and discuss; and then, time permitting, to take questions on any of the points which I have raised this morning or have addressed in my paper (assuming you've had a chance to look at it).

But before moving on to the topic of "*the Bonnard question*", though, I have a couple of thoughts arising from the current debate about freedom of expression / speech that I would like to share with you.

1st: Given that the debate is about freedom of speech, isn't it just a little bit ironic that the debate is so one-sided? We may be hearing from the press and those who hold a brief for the press, *in the press*, that libel claimants should bear the burden of proving damage and falsity; that libel damages should be capped in any case, however serious, at £10,000; that companies should not be permitted to maintain a libel action unless they can prove malice; that there is "no robust public interest defence in libel law" notwithstanding *Reynolds* and *Jameel*, and so on. But where are the voices being heard of those who think, for example, that the current balance between freedom of expression and other

countervailing rights and considerations, including privacy and reputation, is being struck, give or take, correctly? And what of those who think that the press have simply too much power without enough responsibility? (Some such people must, I suppose, exist.) Reading recent press reports bearing upon this debate, one might be forgiven for concluding that no one had ever had reasonable cause for complaint about anything published in a newspaper; that the press had never unjustifiably invaded anyone's privacy or injured anyone's reputation.

2nd thought: I cannot help thinking that these clarion calls by the press for greater freedom of expression, that is to say, fewer legal restrictions upon what they can publish, are short-sighted and are not in the press's own best long-term interests – that is to say, at any rate, the *traditional newspaper press*'s best long-term interests.

I put it this way. We know that traditional newspaper readership is in decline. More and more people, the young in particular, are getting their news and other information from the internet – from favoured websites, specialised blogs, chat-rooms, and social networking sites like Facebook and the like – and not from newspapers, whether in print format or online.

The one thing, it strikes me, that distinguishes traditional newspapers from their upstart online rivals – the one thing newspapers *have* over their online rivals as sources of information – is the established bond of trust and loyalty between newspaper and reader.

You and I who buy traditional newspapers do so because at some level we believe and trust that the information they provide is, broadly speaking, going to be reliable. That efforts will have been made to ensure that the factual information they contain is accurate. That the commentary they comprise is honest and based upon facts. With blogs and the such-like, by contrast, one simply does not know what one is getting.

In my view, this bond of trust, in the long-term, is liable to be the traditional press's most valuable asset. It is the asset which, above anything else, is likely to enable the newspapers to hold on to their current readership and to attract new younger readers, readers who perhaps will become disenchanted with the relentless babble, white noise and anarchy which characterises much of the internet.

In these circumstances, it is this asset, this bond of trust, which the press should preserve and cultivate at all costs. Nothing should be done to undermine it. As the philosopher Professor Baroness O'Neill of Bengarve observed in her thought-provoking series of Reith Lectures for the BBC in 2002 entitled "*A Question of Trust*", if a greengrocer I frequent starts selling me rotten apples, it will only be a matter of time before I stop frequenting the greengrocer and go for my apples elsewhere.

Under the specific heading 'Press freedom in the 21st century', Baroness O'Neill makes the following salient observations (pp. 92 – 95):

> "…if we want to address the supposed 'crisis of trust' it will not be enough to discipline government, business or the professions – or all of them. We also will need to develop a more robust public culture, in which publishing misinformation and disinformation, and writing in ways that others cannot hope to check, are limited and penalised. Yet can we do so and keep a free press?
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> We may use 21st century communication technologies, but we cherish 19th century views of the freedom of the press, paradigmatically those of John Stuart Mill. When Mill wrote, the press in many countries was censored. The wonderful images of a free press speaking truth to power and of investigative journalists as tribunes of the people belong to those more dangerous and heroic times. In democracies the image is obsolescent: journalists face little danger (except on overseas assignments) and the press do not risk being closed down. On the contrary, the press has acquired unaccountable power that others cannot match.
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> Rather to my surprise and comfort, the classic arguments for press freedom do not endorse, let alone require, a press with unaccountable power. *A free press can be and should be an accountable press.*
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> Accountability does not mean censorship: it precludes censorship. Nobody should dictate what may be published, beyond narrowly drawn requirements to protect public safety, decency and personal privacy. But freedom of the press also does not require a licence to deceive. Like Mill we want the press to be free to speak truth and to challenge accepted views. But writing that seeks truth, or (more modestly) tries not to mislead, needs internal disciplines and standards to make it assessable and criticisable by its readers. There is no case for a licence to spread confusion or obscure the truth, to overwhelm the public with

> ‘information overload’, or even more dispiriting ‘misinformation overload’, let alone to peddle and rehearse disinformation…
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> Like Mill we may support freedom of discussion, think that it is fundamental to democracy, and so support the freedom of the press to foster what in the USA is charmingly called *wide-open, robust debate*. But for that very reason we cannot support freedom for media conglomerates to orchestrate public ‘discussion’ in which some or many voices are unrepresented or caricatured, in which misinformation may be peddled uncorrected and in which reputations may be selectively shredded or magnified.”

In short, to paraphrase Lord Hobhouse in the *Reynolds* case, “there is no public interest in misinformation”.

If a situation is allowed to develop – indeed, if the traditional press *encourage* a situation to develop – whereby there is less of an incentive to publish accurate, responsibly checked, information, whereby newspapers publish more misinformation, whereby reputations are more often selectively shredded and magnified than they are now, gradually, slowly but surely, this will erode the bond of trust. And if this bond of trust between newspaper and reader goes, what will be the point of buying a newspaper? Why not just surf the net and see what one finds?

In these circumstances, surely what is in the long term interests of the press is not more freedom, but more responsibility and accountability - precisely, as it happens, what the press demand of everyone else? The current legal framework tends in my view to promote and foster these values. Being responsible and accountable may be burdensome and expensive, sometimes irksome and inconvenient, but in terms of the traditional press securing its long-term survival, it may just be worthwhile.

FREE SPEECH v PRIVACY – THE BIG DEBATE (ASSESSING THE LATEST DEVELOPMENTS IN MEDIA LAW & HUMAN RIGHTS)

Preventing Publication of Private Information – When You Can and When You Cannot

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1. **Reading the runes: the principles governing interim injunctions and how they have been applied in recent case law**.

1.1 Cause of action - misuse of private information: two-stage test:

"Until very recently, the law of defamation was weighted in favour of claimants and the law of privacy weighted against them. True, but trivial intrusions into private life were safe. Reports of investigations by the newspapers into matters of public concern which could be construed as reflecting badly on public figures domestic or foreign were risky. The House attempted to redress the balance in favour of privacy in *Campbell v MGN Ltd* [2004] 2 AC 457 and in favour of greater freedom of the press to publish stories of genuine public interest in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127": *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, Lord Hoffmann at [38].

"…in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10?" (*McKennitt v Ash* [2008] QB 73, CA, Buxton LJ, at [11])

(i) Stage 1: does C have a reasonable expectation of privacy in the relevant information?

Key domestic case law:

- *Campbell v MGN Ltd* [2004] 2 AC 457, HL

  "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." (Lord Nicholls, at [21])

  "The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect: *A v B plc* [2003] QB 125, 206 para.11(vii). In some cases, as the CA said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual ('A') would give substantial offence to A, assuming A was placed in similar circumstances and was a person of ordinary sensibilities." (Lord Hope, at [91])

- *McKennitt v Ash* [2008] QB 73, CA

  The test of reasonable expectation of privacy propounded by the HL in *Campbell* needs to be structured with reference to Article 8 case law. "It thus remains for the national court to apply that case law, as it currently stands, to the facts before it." (Buxton LJ, at [40])

  "To find [the content of Articles 8 and 10], therefore, we have to look to *Von Hannover*." (Buxton LJ, at [64])

- *Murray v Big Pictures (UK) Ltd* [2008] 3 WLR 1360, CA

  "The question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the 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." (Sir Anthony Clarke MR, giving the judgment of the Court, at [36])

- *Wood v Commissioner of Police for the Metropolis* [2010] EMLR 1; [2009] HRLR 25, CA

  "…it is important that this core right protected by Article 8 [personal autonomy], however protean, should not be read so widely that its claims become unreal and unreasonable. For this purpose I think that there are [certain] safeguards, or qualifications. First, the alleged threat or assault to the individual's personal autonomy must (if Article 8 is to be engaged) attain 'a certain level of seriousness'." (Laws LJ at [22])

Key Strasbourg case law ('to find the content of Article 8' cf *McKennitt v Ash*):

- *Von Hannover v Germany* (2005) 40 EHRR 1, ECtHR
- *Sciacca v Italy* (2006) 43 EHRR 400, ECtHR [1]
- *Leempoel v Belgium* (64772/01), unrepd., 9 Nov 2006, ECtHR [2]
- *Reklos v Greece* [2009] EMLR 290, ECtHR (directed taking of photographs without consent of subject engages Article 8)

Recent domestic case law re Stage 1

- *In re BBC (In re AG's Ref (No.3 of 1999))* [2009] 3 WLR 142, HL (no reasonable expectation of privacy in information that one has been tried for and acquitted for rape)
- *Revenue & Customs Commissioners v Banerjee* [2009] EMLR 450 (Henderson J) (reasonable expectation of privacy in information related to financial or fiscal affairs)

[1] The effect of *Von Hannover* & *Sciacca* was summarised and explained for domestic purposes by Buxton LJ in *McKennitt v Ash* at [38] and [41]. Re *Von Hannover* see also *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, per Lord Rodger at [91]-[108].

[2] Referred to in *Mosley v News Group Newspapers Ltd* [2008] EMLR 679, at [133].

- *Imerman v Tchenguiz* [2009] EWHC 2024 (QB) (Eady J) (reasonable expectation of privacy in emails and documents attached thereto related to financial / business affairs, as "correspondence"[3])
- *Wood v Commissioner of Police for the Metropolis* [2010] EMLR 1; [2009] HRLR 25, CA (mere taking of photograph does not engage Article 8; nb *Reklos v Greece* not apparently cited to the court)

(ii) Stage 2: the 'parallel analysis' or 'ultimate balancing exercise': must C's right / interest yield to some other right / interest?

- *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, HL

  "First, neither Article [Article 8 and Article 10] has as such precedence over the other. Secondly, where the values under the two Articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual cases is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each." (Lord Steyn, at [17])

Recent domestic case law re Stage 2

- *Imerman v Tchenguiz* [2009] EWHC 2024 (QB) (Eady J) (summary judgment entered against Ds for delivery up of copy data and documents; not necessary to carry out 'parallel analysis')

1.2 Interim injunctions preventing publication of private information

(i) **General principles**:

- Section 12(3) HRA 1998:
  "No such relief [i.e. "any relief which, if granted, might affect the exercise of the Convention right to freedom of expression" (s.12(1))] is to 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."

  Section 12(4) HRA 1998:
  "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."

- *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, HL (construing s.12(3)) (see in particular Lord Nicholls at [20]-[23]):

[3] Article 8(1), ECHR: "Everyone has the right to respect for his private and family life, his home and his correspondence".

- S.12(3) sets a particularly high threshold for the grant of interlocutory relief in cases based upon alleged breach of confidence; a higher threshold than the pre-HRA 1998 test of a real prospect of succeeding at trial.

- The effect of s.12(3) is that the court should not make an interim restraining order unless it is satisfied that the applicant's prospects of success at trial are sufficiently favourable to justify the order being made in the light of all the other circumstances of the case.

- In general the **threshold** that the application has to cross before the court will embark on exercising its discretion is to satisfy the court **that he would probably (i.e. 'more likely than not') succeed at the trial**.

- However, to construe "likely" in s.12(3) as meaning "more likely than not" in all situations would be to set the test too high. There can be no single rigid standard governing all applications for interim restraint orders and some flexibility is essential. There could be cases where it was necessary for the court to depart from the general approach and dispense with the higher test where the particular circumstances make it necessary.

- "Circumstances where this may be so include…where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal." (at [22]) (or, as Eady J recently put it in *Martin v Channel Four Television* [2009] EWHC 2788 (QB) at [27]: "to hold the ring while the factual dispute was resolved…while the court took time to establish the facts")

- The weight to be given to the likelihood of success at trial when deciding whether to grant the application for an interim injunction depends on all the other circumstances of the case. This approach gives effect to the parliamentary intention that the courts should have particular regard to the importance of the right to freedom of expression and at the same time was sufficiently flexible to give effect to countervailing Convention rights.

- *Nb The fundamental difficulty involved in the court attempting to predict at an interim injunction hearing what the merits of the claim might be at trial, especially where: (a) there are / it is apparent that there are going to be serious factual / evidential disputes; or (b) where the evidence is obviously incomplete; and/or (c) where is very limited time available before the presses roll (e.g. on a Saturday afternoon); and/or (d) where there is a stark clash between the assertion by C of a privacy interest and an assertion by D of a serious public interest in disclosure.

- *Nb The fact that the court has construed s.12(4) so as to mean that extra weight should NOT be attached to the matters to which the subsection refers, i.e. the importance of freedom of expression and the public interest value of the material at issue. "It was submitted that the phrase '*must have particular regard to*' indicates that the court should place extra weight on the matters to which the subsection refers. I do not so read it. Rather it points to the need

for the court to consider the matters to which the subsection refers specifically and separately from other relevant considerations": *Ashdown v Telegraph Group Ltd* [2001] Ch 685, Sir Andrew Morritt V-C, at [34] (*Imutran v Uncaged Campaigns Ltd* [2001] 2 All ER 385, at [18]-[19] to like effect).

- This construction appears to fly in the face of the parliamentary intention behind s.12 generally and the very wording of the subsection ("must have particular regard to the importance…"). In *Re S*, HL, Lord Steyn at [16] referred in passing to the fact that, "[b]y section 12(4) HRA 1998 Parliament made special provision regarding freedom of expression", before holding at [17] that neither Article 8 nor 10 "has *as such* precedence over the other" and subsuming sections 12(3) and (4) HRA within the overall process of 'parallel analysis' which he was there setting forth. In this way, it is submitted, s.12(4) has been divested of its intended effect.

- As regards relevant privacy codes, note that Clause 3 (Privacy), Clause 4 (Harassment), and the Public Interest provisions of the PCC Code were amended significantly as recently as October 2009. In short: Clause 3 (Privacy) has been amended to clarify that the PCC will take into account any previous public disclosures of private information by the complainant; Clause 4 (Harassment) has been amended to require journalists in situations where harassment could become an issue to identify themselves if requested to do so; and the Public Interest section has been amended to make clear that, when the public interest is invoked, editors will be required to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest.

(ii) **<u>Recent case law re interim injunctions preventing publication of private information</u>**

- *Mosley v News Group Newspapers Ltd (No.1)* [2008] EWHC 687 (QB) (Eady J) (refusal to grant interim injunction; the 'Canute' principle: at [29] & [33]-[36])
- *WER v REW* [2009] EMLR 304 (Sir Charles Gray) (C declining to identify whether relevant private information true or false or in the public domain; interim injunction granted; procedural / notice requirements where C intends to serve interim injunction on media non-parties in reliance upon the *Spycatcher* principle)
- *Re Stedman & Patten (& Others)* [2009] EWHC 935 (Fam) (Eleanor King J) (more on the 'Canute' principle at [74]*ff*)
- *RST v UVW* [2009] EWHC 2448 (QB) (Tugendhat J) (where private information is also defamatory; the *Bonnard* question: see further below)

(iii) **<u>Current interim injunction issues</u>**

(a) "**<u>Super-injunctions"</u>**

(i) What's so 'super' about them?

"The new breed of super-injunctions is far more oppressive than the traditional court order under which a newspaper or TV channel is (perhaps temporarily) prevented from publishing a particular allegation. It usually includes an order that 'the publication of *all* information relating to the proceedings or of information describing them or the intended claim is

expressly prohibited'. (Our italics.) In other words, nobody can report that the order has been granted, or who applied for it. Even the identities of the judge and the newspaper remain secret, and anyone who even hints at them 'may be held to be in contempt of court and may be imprisoned, fined or have their assets seized'…In one recent application for a super-injunction, the QC for the claimants explained to the judge why a newspaper must not only be stopped from publishing its story but also banned from alluding to the gagging order: if it was allowed to report the injunction, it would probably run a piece accusing his clients of trying to muzzle the press. Which, of course, is precisely what they were doing. The super-injunction was duly granted." (*Private Eye*, 2 – 15 Oct 2009)

"**David Davis** (Haltemprice and Howden) (Con): "You, Mr Speaker, are the defender of our rights and privileges in this place. This is a new class of injunction, a so-called super-injunction, in which the press are not even allowed to report the injunction itself and the existence of the case…": *Hansard* (HC) Col.164, 13 Oct 2009

(ii) The court's powers to make such ancillary 'super-' orders – conducting the injunction hearing in private, banning any report of the hearing, anonymising the parties, preventing the publication of any information about the proceedings including the fact that an injunction has been granted – are derived from a rich panoply of sources:

- CPR 39.2(3) ("A hearing, or any part of it, may be in private if – (a) publicity would defeat the object of the hearing;…(c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;…(g) the court considers this to be necessary, in the interests of justice.")

- Administration of Justice Act 1960, s.12 ("(1) The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say – (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published. (2) Without prejudice to the foregoing subsection, the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits publication.")

- Contempt of Court Act, s.11 (confirmation of court's common law power to allow "a name or other matter to be withheld from the public".)

- CPR 39.2(4) ("The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.")

- CPR 31.22(2) ("The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public.")

- CPR 25 PD 9.2 ("Where such a person [a person other than the applicant or respondent, who did not attend the hearing at which the order was

made] served with the order requests – (1) a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or (2) a note of the hearing, the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise." As regards this particular provision, see *WER v REW* [2009] EMLR 304.)

- CPR 5.4C(4) ("The court may, on the application of a party or any person identified in a statement of case – (a) order that a non-party may not obtain a copy of a statement of case…; (b) restrict the persons or classes of persons who may obtain a copy of a statement of case; (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or (d) make such other order as it thinks fit.")

- Inherent jurisdiction / HRA 1998 (see *In re BBC* [2009] 3 WLR 142 and *Re S*: arguably, the court has an inherent power to make orders restraining or limiting publication where the 'ultimate balancing exercise' so requires it whether or not section 11 of the Contempt of Court Act can be relied on.)

(iii) The asserted justification for the adoption of such measures is that they are necessary to ensure that the injunction achieves its object: to maintain the confidentiality / privacy of the relevant information until the court has resolved the rights and the wrongs of the case at trial. Publicity in the meantime, it is contended, would defeat the purpose of the injunction.

(iv) The reality is that applications for such ancillary measures are not in general vigorously opposed by respondents, if they are contested at all. Furthermore, there is scarcely any case law on the topic; see *Lord Browne v Associated Newspapers Ltd* [2008] 1 QB 103, CA, at [3] for a rare exception to this rule ("granted that the judgment relates to some matters concerning the parties, there is no good reason why they should continue to be referred to anonymously, a course to be avoided unless justice requires it: *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966"). Anonymity orders will though be the subject of one of the first Supreme Court rulings in *A, K & M and Hay v HM Treasury* (the 'alphabet soup' case), hearing 22 October 2009 (see www.ukscblog.com), judgment pending.

(v) Nevertheless, it is submitted that it is important that the court itself does not allow such orders to become routine and insists upon such orders only being made where they are strictly necessary, and *to the extent* that they are strictly necessary. As has been recognised, it is precisely when the parties are content that information should be kept from the public that the court needs to be the most vigilant: *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966, 977. One can see that the "*X Gags The Sun*" story the morning after winning an interim injunction must be irritating for X, but one wonders if preventing such stories is really necessary to prevent the purpose of the injunction being defeated. Then again, bearing in mind what happened in the *Mosley* case once the video footage had been posted on the newspaper's website, and the propensity of recent technological phenomena such as 'Twitter' to permit information to be spread like wildfire, perhaps such extensive restrictions will often be necessary to ensure an applicant's injunction is effective. Certainly, where an interim injunction applicant has any intention to take advantage of the *Spycatcher* principle (and the court

should ask), it is submitted that it is not consistent for him to seek an anonymisation order. Informing non-parties who the claimants are is a necessary incident of taking advantage of the *Spycatcher* principle. Doing so in a letter after one has obtained an anonymisation order is to commit a contempt of court.

(vi) 'Secret justice' is generally undesirable, not just in terms of the general policy and ideological problems associated with justice being administered in secret [4], but also, from a lawyer's point of view, because it places a fetter on the evolution of the corpus of precedent in an area where the law is in flux. One perceives that the reported cases represent only the very tip of the iceberg. This makes it more difficult to advise one's clients what might happen if they apply for an interim injunction; to adopt the title of this paper, "*when you can and when you cannot*". It is difficult to read the runes when there are so few runes to read. This cannot be in the public interest.

(b) <u>Defamatory / false private information; the *Bonnard* question</u>

(i) The fact that some of the private information disclosure of which is sought to be restrained is false (or may be false) is not fatal to a claim for misuse of private information: *McKennitt v Ash*. Indeed Longmore LJ observed at [86] that: "The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry".

(ii) *But what if the private information at issue, if published, would also be <u>defamatory</u> of the claimant? (hardly unusual: think *Campbell* and the cases concerned with lap-dancers and prostitutes (e.g. *A v B plc*; *Theakston; RST v UVW*) and adulterous liaisons (e.g. *CC v AB*)).

(iii) In *Greene v Associated Newspapers Ltd* [2005] QB 972, the Court of Appeal endorsed the time-honoured rule in *Bonnard v Perryman*; in effect a bar on interim injunctive relief / prior restraint in defamation cases – no 'balancing exercise' – where D states that he will prove what he intends to publish is true (or that he will establish some other defence).

(iv) Furthermore, it is an abuse of process for a C to dress up a claim which is really for libel in the guise of a claim for breach of confidence, trespass, breach of copyright etc, in order to get round the rule in *Bonnard v Perryman*. Applications for interim injunctions have been dismissed on this basis e.g. in *Service Corp International plc v Channel Four* [1999] EMLR 83; *Tillery Valley Foods Ltd v Channel Four* [2004] EWHC 1075 (Ch). This principle was expressly endorsed by Buxton LJ in *McKennitt*:

> "<u>if it could be shown that a claim in breach of confidence was brought **where the nub of the case was a complaint of the falsity of the allegation** and that was done to avoid the rules of the tort of defamation</u>, then objection could be raised in terms of abuse of process. <u>That might be so at the interlocutory stage in an attempt to avoid the rule in *Bonnard v Perryman*</u>…".

[4] As to which see the summary in Tugendhat & Christie, *The Law of Privacy & The Media* (OUP, 2002), at 12-03 (p. 479) based upon the *Kaim Todner* case and *R v Secretary of State for Health, ex p Wagstaff* [2001] 1 WLR 320.

(v) It was the question of the compatibility of these two lines of authority – the older defamation line and the newer Article 8 misuse of private information line – in the interim injunction context that Tugendhat J raised in *RST v UVW*. Tugendhat J did not resolve the issue in that case; he did not have to. But what he said was this (at [33]):

"At some point, the court will have to grapple again with the question of where the principle of *Bonnard v Perryman* applies, and where it does not, when an application is made on the basis of privacy, but it is an application to restrain publication of material which is arguably defamatory. The court will have to decide how the rule in *Bonnard v Perryman* is to be applied in the light of such authorities as are then available as to the status of reputation as an Article 8 right and, if it is an Article 8 right, how the exercise of the ultimate balancing test referred to in *Re S* is to be applied on an interlocutory application. Whether that was this case or not remains to be seen".

(vi) My provisional attempt to grapple with this difficult question is as follows:

(a) As a matter of principle – in particular the principle that the ECHR is concerned with rights that are *effective* – if a C's Article 8 rights are engaged in respect of the information D threatens to publish, it is difficult to see why it should generally matter, for the purpose of Stage 1 of the *Re S* analysis at any rate, whether the information is also true, false or somewhere in between (as Buxton LJ has already observed) *or* defamatory of C. The issue must surely be, first and foremost, whether C's Article 8 rights are engaged in relation to the relevant information: will the information if published interfere with his right to respect for private and family life? [5]

(b) Second, if the rule in *Bonnard v Perryman* were to be applied in misuse of private information cases where the information in question also happened to be (arguably) defamatory, it would, it seems, produce some anomalous results. In particular, it seems paradoxical that a C, for the purpose of seeking interim injunctive relief, should be **fundamentally worse off** if he is seeking to prevent publication of information which engages his Article 8 rights but which also happens to be defamatory of him and/or false **than he would be** if he were seeking to prevent publication of information which engaged his Article 8 rights but which was NOT defamatory of him and/or true.

Thus:

X goes to court seeking an interim injunction to prevent publication in a newspaper of information that he has undergone

[5] I prefer to rest my argument on the nature of the relevant information. However, if indeed it comes to be accepted as a matter of English law that a right to reputation is among the rights protected by Article 8 – as the 'clear and (almost) constant' jurisprudence of the ECtHR would suggest (see most recently *Europress Holding v Croatia* (Appln. No. 25333/06, 22 Oct 2009), at [58] – any argument in favour of the retention of the rule in *Bonnard v Perryman*, in cases involving individuals (as opposed to corporate entities) at any rate, becomes even less tenable.

a particular medical procedure. It is factually true that he has had this operation.

*C's Art 8 rights engaged – information not defamatory – *Re S* applies – balancing exercise – interim injunction will be granted unless some compelling public interest justification – if injunction granted, distress / damage that would have resulted from publication is avoided.

By contrast, Y goes to court seeking an interim injunction to prevent publication in a newspaper of information that he has had an adulterous affair. Y maintains this allegation is false.

*C's Art 8 rights engaged – information defamatory – rule in *Bonnard v Perryman* applies – no interim injunction if (as is to be anticipated) D asserts information is true – for this purpose C's claim that the information is untrue makes no difference – no balancing exercise – whether or not proposed publication is in the public interest irrelevant – no interim injunction – information published to the world at large – C suffers distress / damage and is left to his remedies at trial (damages; a final injunction (*would there be any point in granting one?*)), if he chooses to pursue the matter to trial.[6]

(c) If the force of this point is recognised, it would appear to follow in consequence that it would be wrong for the *Bonnard* / *Greene* bar on interim injunctive relief to be applied in Article 8 cases where the information also happened to be defamatory of C. To do so would render C's Article 8 rights ineffective. If a C is to be precluded from obtaining interim injunctive relief in circumstances where he is threatened with publication of seriously intrusive material, just because that material happens to be defamatory of him, it is hard to see how it could sensibly be said that C's Article 8 rights had any meaningful content. In the Article 8 context, interim injunctive relief is by far the most important remedy[7]. C's Article 8 rights would only truly be **effective**[8] if it were possible for him to obtain an interim injunction, if the circumstances warranted it, subject to the *Re S* analysis. This is the issue of principle Tugendhat J was broaching in

[6] As to which prospect, "Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain": *Mosley v News Group Newspapers Ltd* [2008] EMLR 679, at [209].

[7] This proposition is at the heart of Max Mosley's application to the ECtHR against the UK (*Mosley v UK*, Appln. No. 48009/08, lodged 28 Sept 2008). Mr Mosley's complaint is that "the UK has violated its positive obligations under Article 8 of the Convention by failing to impose a legal duty on the *News of the World* to notify him in advance in order to allow him the opportunity to seek an interim injunction and thus prevent publication of the materials". In support of this complaint, Mr Mosley argues, "under Article 13 that there was no effective domestic remedy open to him. Although the court found a serious breach of his right to respect for privacy and he was awarded damages, this award was not able to restore his privacy to him. He contended that only the possibility to seek an interim injunction prior to publication could constitute an effective remedy in his case".

[8] Article 13 of the ECHR (Right to an effective remedy) provides that: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

RST v UVW; or, perhaps more accurately, the Pandora's Box that he was opening.

(c) The problem of the paparazzi

(i) The activities of the paparazzi pose a problem of serious public concern. In 1998, in the wake of the death of the Princess of Wales, the Parliamentary Assembly of the Council of Europe called upon member states to pass legislation which guaranteed the right to privacy: see Resolution 1165. This Resolution (which is quoted in full in *Von Hannover v Germany* (2005) 40 EHRR 1, at [42]) included at para.14 the following guideline: "…(v) following or chasing persons to photograph, film or record them, in such a manner that they are prevented from enjoying the normal peace and quiet they expect in their private lives or even such that they are caused actual physical harm, should be prohibited".

(ii) The problem of the paparazzi has also been recognised by the English court in *Jean Paul v Deputy Coroner of the Queen's Household* [2007] EWHC 408 (Admin), at [38]-[39] (a decision of the Divisional Court concerned with the question of whether or not the Rt Hon Lady Butler-Sloss had been right not to summon a jury for the purpose of the Inquest into the death of the Princess of Wales):

> "In our view, there is a real likelihood of people in the public eye being pursued by paparazzi in the future. It is well known that people in the public eye (including by way of a recent example, Miss Kate Middleton, Prince William's friend) are often stalked by photographers. During the hearing we were shown letters written to the press by Sir John Major and Sir Christopher Meyer, Chairman of the Press Complaints Commission, expressing concern about the harassment of Miss Middleton and pointing out the similarity between her treatment and that suffered by the Princess of Wales. They drew attention to the dangers of such behaviour and called for new sanctions against the paparazzi. It is likely that there will be a recurrence of the type of event in which the paparazzi on wheels pursued the Princess and Dodi Al Fayed. It is not only members of the Royal Family and their friends who receive this unwelcome attention; any celebrity is vulnerable."

(iii) Where the identities of the individual paparazzi causing the trouble or the particular agencies for which they work is known, the Protection from Harassment Act 1997 may furnish remedy: see e.g. Sienna Miller's successful action against the Big Pictures agency (http://www.5rb.co.uk/news/details.asp?newsid=445). But the more usual situation which presents itself is that the individual whose home is being staked out, or who is otherwise being harassed, does not know and has no means of finding out the identity of the individuals who are doing the harassing.

(iv) There thus remains a gap in the law. Is it a gap that only Parliament can fill by enacting new criminal (public order) offences, or might it be possible for the court to fashion an appropriate civil remedy to address the problem? For instance, if the circumstances so warranted

it, might it not be open to the court to draw upon the jurisdiction to grant injunctions against persons unknown (see *Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] 1 WLR 163; *X v Persons Unknown* [2007] EMLR 290) and the corpus of law related to injunctions against protestors based upon the Protection from Harassment Act 1997 (see *University of Oxford v Broughton* [2004] EWHC 2534 (QB); *Novartis Pharmaceuticals UK Ltd v SHAC* [2009] EWHC 2716 (QB)) to formulate an effective injunction preventing paparazzi from congregating in particular places (e.g. around celebrities' homes), taking photographs, pursuing, harassing etc? The benefits of such a remedy for an individual suffering at the hands paparazzi, if such were available, are obvious; for instance: (i) it would allow him / her to get on with life, particularly life at home, relatively undisturbed and unmolested; and (ii) it would cut off the supply of intrusive photographs at source.

2. When will judges determine that there is a 'public interest' in publication?

- The orthodox / traditional view of 'public interest': *Fraser v Evans* [1969] 1 QB 349, CA; *Beloff v Pressdram Ltd* [1973] 1 All ER 241 (per Ungoed-Thomas J at 260g: "Public interest, as a defence in law, operates to override the rights of the individual (including copyright) which would otherwise prevail and which the law is also concerned to protect…[the defence extends to] the disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity."); *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, CA; *Lion Laboratories Ltd v Evans* [1985] QB 526, CA; *Spycatcher*, at 282; (post-HRA 1998) *LRT v Mayor of London* [2003] EMLR 88, CA; *Jockey Club v Buffham* [2003] QB 462 (Gray J); nb in particular, the principle that disclosure is justified where it serves to protect people from being misled: *Initial Service Ltd v Putterill* [1968] 1 QB 396, CA; *Hyde Park Residences Ltd v Yelland* [2001] Ch 143; & (post-HRA 1998) *Campbell v MGN Ltd* [2004] 2 AC 457, HL.

- A more stringent test of 'public interest was set forth in *Von Hannover v Germany* (2005) 40 EHRR 1 at [63]-[67]: that even in cases concerning politicians and other public figures, publishing private information is only legitimate 'in certain special circumstances' namely where the publication contributes meaningfully to a political or general debate of public interest.

- For a review and application of the current law, see *Mosley v News Group Newspapers Ltd* [2008] EMLR 679. Is the *Von Hannover* test too exacting for UK purposes? See *Mosley*, at [131]: "Or was it [the interference with C's Article 8 rights] necessary because the information, in the words of the Strasbourg court in *Von Hannover* at [60] and [76], would make a contribution to 'a debate of general interest'. That is, of course, a very high test. It is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years".

3. How do judges approach issues relating to sexual activities within and outside marriage?

- *Mosley v News Group Newspapers Ltd* [2008] EMLR 679 (Eady J), in particular at [98]-[109] (The law of privacy's version of 'Everything You Always Wanted To Know About Sex (*But Were Afraid to Ask)'). "One is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults (paid or unpaid)" (at [98]); "It is important, in this new rights-based jurisprudence, to ensure that where breaches occur remedies are not refused because an individual journalist or judge finds the conduct distasteful or contrary to moral or religious teaching. Where the law is not breached…the private conduct of adults is essentially no one else's business. The fact that a particular relationship happens to be adulterous, or that someone's tastes are unconventional or 'perverted', does not give the media *carte blanche*" (at [128]).

- See also the observations of Ouseley J in *Theakston v MGN Ltd* [2002] EMLR 398, at [60] (subsequently approved by the CA in *A v B plc* [2003] QB 195, at [43]), referred to recently in *RST v UVW*:

  "Sexual relations within marriage at home would be at one end of the range or matrix of circumstances to be protected from most forms of disclosure; a one night stand with a recent acquaintance in a hotel bedroom might very well be protected from press publicity. A transitory engagement in a brothel is yet further away."

- Thus the marital status of the C will be a relevant factor, if at all, only at Stage 2 in the *Re S* analysis.

4. The particular position of parties to divorce and children

Parties to divorce

The reasonable expectation of divorcing couples is that some information about their divorce will enter the public domain, i.e. the very fact of the divorce upon the grant of the decree absolute (if not earlier in the divorce process). This does not mean that they cannot reasonably expect to keep any detail of the circumstances of or reasons for their divorce private; quite the contrary. Usually, most of such detail will be none of anyone's business except of the individuals involved and their immediate family. However, it is true to say that what divorcing couples may reasonably expect to keep private may be affected by the recent promulgation of new rules giving the press enhanced rights to attend at court hearings conducted in private, including hearings in divorce cases:

- Family Proceedings (Amendment) (No.2) Rules 2009 (SI 2009/857), in force on 27 April 2009, amending the Family Proceedings Rules 1991[9]

[9] As regards how the new rules have been working in practice, the Nov 2009 issue of *Counsel* magazine reported as follows: "Opening the family courts to the media has now settled 'into a kind of limbo of uncertainty' the President of the Family Division has said…Sir Mark Potter commented: 'Following the initial flurry of interest in the first few days, things have settled into a kind of limbo of uncertainty while the government works out the next step toward a coherent scheme in final form. Ministers have still to work out and give directions to their civil servants where their priorities lie

- *Spencer v Spencer* [2009] EMLR 469 (Munby J)
- *Re Child X (Residence & Contact – Rights of Media Attendance)* [2009] EMLR 489 (Sir Mark Potter P)

Children

"It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child…It is important to note that so to hold does not mean that the child will have…a guarantee of privacy. To hold that the child has a reasonable expectation of privacy is only the first step. Then comes the balance which must be struck between the child's rights to respect for his or her private life under Article 8 and the publisher's rights to freedom of expression under Article 10. This approach does not seem to us to be inconsistent with that in Campbell, which was not considering the case of a child": *Murray v Big Pictures (UK) Ltd* [2008] 3 WLR 1360, at [57]-[58]. For the reasoning which led to this conclusion, see [45]-[56].

Although the court's decision in *Murray* does not confer a 'guarantee of privacy', if someone who wishes to publish private information about a child is met with an application for an interim injunction to prevent such publication, it is submitted that he will need to identify a particularly compelling justification for wishing to do so if he is to resist the application.

5. The tactical and legal considerations involved in seeking to restrain publication

- The risk of scoring a 'fantastic PR own goal', i.e. (a) where an injunction is sought and refused or (b) where an injunction is sought and obtained, but the effect of obtaining an injunction and/or serving it on (media) non-parties is to draw attention – particularly in the 'blogosphere' and the 'Twitter'-ing community – to a story which might otherwise have passed unnoticed: listen to Alan Rusbridger re the Trafigura case at www.guardian.co.uk/world/audio/2009/oct/13/alan-rusbridger-injunction.

- Timing: the risk of going to court too soon (e.g. with unsatisfactory evidence of 'threat') or leaving it too late. The costs implications of doing either.

- Costs generally. If a C applies for an interim injunction and is awarded one, C is thereby committed to proceedings, possibly for a speedy trial. Costs will inevitably mount up quickly.

- The importance for a C of getting his evidence in order / getting his story straight at the beginning. Particular problems associated with 'material non-disclosure' if application made without notice.

- Financial exposure on the cross-undertaking as to damages.

- Does C intend to take advantage of *Spycatcher* principle? If so, is it consistent to seek an anonymisation order? (See para.1.2(iii)(a)(v) above.)

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between their professions of concern for the privacy and welfare of the child and their apparent desire to satisfy the demands of the press in relation to so-called transparency".

6. Dealing with the internet and international publications

(i) C may obtain an interim injunction to stop an English publisher publishing private information not just in England but elsewhere, provided that C can show that publication of the offending material in the relevant foreign country is actionable by the laws of that country (the 'double actionability' rule). This may not be straightforward.

(iii) C may obtain an interim injunction to stop a foreign publisher publishing private material in this jurisdiction only, provided that C can obtain permission to serve the proceedings on the publisher out of the jurisdiction. To this end, C will need to establish that a 'real and substantial tort' in this jurisdiction has been committed or is about to be committed: see *Jameel v Dow Jones & Co Inc* [2005] QB 946; *Lonzim plc v Sprague* [2009] EWHC 2838 (QB). If the medium of publication is the internet, C will need to establish a risk of publication in the jurisdiction: *Al Amoudi v Brisard* [2007] 1 WLR 113. (If C can establish such a risk, it is worth bearing in mind that 'geo-blocking' technology – i.e. software which permits an international publisher to block access to material it publishes on the internet from specified countries – is now relatively sophisticated.) But even if C does obtain permission to serve out and an interim injunction, there is the problem of enforceability. How in practical terms can an order preventing publication here be enforced if the D has no business or presence here?

(iv) However, if substantial publication in this jurisdiction has already taken place, the court may take the view that granting an injunction is pointless; that the dam has already burst: *Spycatcher*, at 289D-E; *Mosley v News Group Newspapers (No.1)* [2008] EWHC 687 (QB); *Re Stedman & Patten (& Others)* [2009] EWHC 935 (Fam). If substantial publication has occurred anywhere in the world via the internet, the court may *infer* that substantial publication has occurred here, with the same consequence. See in this regard the observations made by Sir Mark Potter P in *Re Child X (Residence & Contact – Rights of Media Attendance)* [2009] EMLR 489, at [67]: "…if the press are admitted to the proceedings at this stage at least, there is inevitably a danger of details of the case as explored and discussed in Court being published in a country beyond the reach of this Court so far as proceedings for contempt of court are concerned. If this happens, there is an obvious danger that the contents of the article may come to the attention of X via her own access to the internet or via her friends". Or, one might add, to the attention of internet users based in this jurisdiction generally.

(v) Unfortunately for those whose private information might be disseminated globally via the world wide web and web-based social networking applications such as 'Facebook' and 'Twitter' have a tendency to defy attempts – including the law's attempts – to control them.

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17 November 2009