PROTECTING THE MEDIA 2011

PROTECTING THE MEDIA IN THE DIGITAL AGE:

PRIVACY, DEFAMATION AND DATA PROTECTION IN AN ELECTRONIC ERA

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INTRODUCTION

1. The last 12 months have seen a series of extraordinary developments in the relationship between the law of privacy and the media. An intense battle between press freedom and personal privacy has raged on several fronts, dominating newspaper headlines and forcing the delicate constitutional relationship between Parliament and the courts into the spotlight. At the same time, a perfect storm of celebrity misdeeds and illegal phone-hacking saw public opinion tied up in knots over the proper balance between free expression and the protection of individuals' private lives. And against that backdrop, developments in communications technology have given rise to important practical questions about the scope and enforceability of defamation and privacy law in the electronic domain.

2. In these circumstances, it is appropriate to take stock of recent developments and to cast an eye to possible future changes in the law. With these aims in mind, this paper will consider the following topics:

    (i) The 'super-injunction' furore and the report of the Neuberger Committee.

    (ii) Defamation and privacy in the digital age – is the law fit for purpose?

    (iii) A round-up of the cascade of significant privacy cases – particularly those dealing with procedural issues - decided during the last year or so. Many of the procedural issues considered in the cases are now

covered by the Practice Guidance issued by the Master of the Rolls in August.

PART A - THE 'SUPER-INJUNCTION' FURORE

Early 2011: the gathering storm

3. The court has always had the power to include a provision in an injunction restraining those served with the order from revealing the existence of the proceedings or the fact that an order has been made. In commercial cases such a provision is referred to as a gagging order. Such a provision is exceptional, requires clear evidence of need, and must only last for a short time. See the discussion in Gee on Commercial Injunctions, 5th edn (2004) at 17-014 to 17-016.

4. In the Spring of 2011 a number of celebrities and other high profile individuals successfully applied for anonymous injunctions which restrained the media from publishing information about their private lives. These injunctions proved highly controversial, resulting in a fierce backlash across the media, the blogosphere and in Parliament. A vocal media campaign subsequently denounced the orders as a form of secret justice and an undemocratic attempt by the courts to stifle a free press. In the weeks that followed, several injunctions were thwarted by a combination of anonymous internet users openly defying court orders, Members of Parliament speaking under the protection of parliamentary privilege, and foreign news outlets operating beyond the reach of the English courts.

Flouting of injunctions online and in Parliament

5. In March 2011 Sharp J made an order prohibiting the publication of information about a sexual relationship between the former Chief Executive of the Royal Bank of Scotland, Sir Fred Goodwin, and a female colleague at the bank. The order also prohibited publication of the claimant's identity, including a term prohibiting the publication of the fact that the individual applying for the order was a banker.

6. In May 2011 Lord Stoneham (on behalf of Lord Oakeshott) asked a question in Parliament identifying Sir Fred as the person who had obtained the injunction. He stated that the order covered the details of an alleged affair that Sir Fred had had with a former colleague. If true, said Lord Stoneham, this would represent '*a serious breach of corporate governance and not even the Financial Services Authority would be allowed to know about it*'. Lord Stoneham's statement was protected by parliamentary privilege and was subsequently widely reported in the media.

7. On 8 May 2011 an anonymous Twitter user published details (including the names of the applicants) of various privacy injunctions that had been obtained by high profile individuals. Mainstream news outlets reported that this information was now widely available on Twitter; however they held back from identifying the specific Twitter account for fear that doing so might amount to a contempt of court. Nevertheless, the information was viewed by tens of thousands of individuals over the following days.

8. Two weeks later, on 22 May 2011 a Scottish newspaper, the Sunday Herald, published a front page photo of Ryan Giggs under the caption '*CENSORED*'. During a Parliamentary debate the following day, John Hemming MP then identified Ryan Giggs as the individual who had obtained an anonymous privacy injunction.[1] He also divulged the name of a journalist who had allegedly breached the terms of another injunction in a Twitter post several days previously. The MP's statement was widely reported by the press and broadcast media.

9. On 5 June 2011 the Sunday World, an Irish tabloid newspaper, published a front page story disclosing the identities of the claimants in *ETK v News Group Newspapers*. The fact that an Irish newspaper had published these identities was reported in England; however the English press refrained from naming the newspaper, again for fear that doing so might amount to a contempt of court.

[1] The Speaker called John Hemming to order mid-way through the question, stating that 'occasions such as this are for raising the issues and principles involved, not seeking to flout for whatever purpose.' However Hemming was permitted to finish the question and no disciplinary action was taken against him by the Speaker.

10. The widespread flouting and circumvention of injunctions illustrated the limits of the courts' powers to make effective orders controlling the internet. While newspapers and broadcasters largely abided by the terms of the court orders, injunctions were flouted with impunity in the electronic domain. The divergence of standards between mainstream media and the blogosphere has led to serious questions about whether the law of privacy is fit for purpose in a digital age.

Judicial responses to misreporting of privacy cases

11. In addition to the extensive defiance of court orders, many media reports on individual privacy cases were incorrect or misleading. Some of those inaccuracies attracted judicial ire in later judgments. In the Sir Fred Goodwin case, for example, Tugendhat J was highly critical of the numerous factual inaccuracies in reports about the proceedings. He made specific reference to Lord Stoneham's parliamentary statement, saying that: *'If the words attributed to Lord Oakeshott and Lord Stoneham are correct, then these reports disclose a fundamental misunderstanding on the part of them, and on the part of many other commentators, of the facts of the present case.'*

12. He also singled out an article published in the Daily Telegraph for particular criticism. The judge said that the article contained numerous '*inaccuracies*' and '*misleading statements*'. For example, it erroneously stated that an injunction had been made which was '*so strict that it prevents Sir Fred Goodwin from being identified as a banker*'. This was not the case. The order actually prohibited anyone from stating that '*a banker*' had obtained an injunction to restrain publication of details of an affair with a work colleague. This prohibition was necessary since if the claimant was anonymously described as '*a banker*' there was a risk that many people would have identified Sir Fred as the claimant, thereby defeating the purpose of the anonymity order.

13. Eady J also responded to ill-informed media criticism of decisions in privacy cases. In *CTB v News Group Newspapers Ltd and Imogen Thomas*[2] Eady J began his analysis of the law by emphasising that the government had '*always overtly acknowledged*' that the

[2] [2011] EWHC 1232 (QB)

European Convention on Human Rights required the courts to carry out a balancing exercise between competing Convention rights. The Human Rights Act meant that the judiciary were now '*explicitly required*' to take into account the Strasbourg case law when balancing the interests protected by Article 8 and Article 10. However he complained that:

> *'Despite this long history, it has for several years been repeatedly claimed in media reports that courts are "introducing a law of privacy by the back door". Yet the principles have long been open to scrutiny. They are readily apparent from the terms of the Human Rights Act, and indeed from the content of the European Convention itself. Furthermore, they were clearly expounded seven years ago in two decisions of the House of Lords which was, of course, at that time the highest court in this jurisdiction: Campbell v MGN Ltd [2004] 2 AC 457 and Re S (A Child) [2005] 1 AC 593.'*

14. Eady J went on to point out that in the years since *Campbell* and *Re S* were decided, '*the law has been loyally applied by the courts in a wide variety of circumstances and exhaustively explained in numerous appellate judgments.*' He cited four privacy cases - *McKennitt v Ash,*[3] *HRH Prince of Wales v Associated Newspapers Ltd*[4], *Lord Browne of Madingley v Associated Newspapers Ltd*[5], and *Murray v Express Newspapers*[6] – where the House of Lords had refused to grant permission to appeal against the judgment of the Court of Appeal. The fact that permission was refused in each case indicated that it was now widely recognised that the legal principles were firmly established. The appellate cases thus '*establish beyond doubt the legal framework within which the courts are required to operate on applications of this kind*'. He concluded by emphasising that the courts had no choice but to apply the law as it currently stands: *'The courts will have to apply this methodology unless and until Parliament decides to legislate to different effect.'*

[3] [2008] QB 73

[4] [2008] Ch 57

[5] [2008] QB 103

[6] [2009] Ch 481

The report of the Neuberger Committee on Super-Injunctions

i. Overview

15. The Committee on Super-Injunctions was set up by the Master of the Rolls in April 2010 in order to examine several issues of concern that had arisen following the *Trafigura*[7] and *John Terry*[8] cases.

16. The Committee's terms of reference were: (a) to examine the practice and procedure concerning the use of interim injunctions, including super-injunctions and anonymised proceedings, and their impact on principles of open justice; (b) to provide a clear definition of the term 'super-injunction' and (c) where appropriate, to make proposals for reform. The Committee was not concerned with issues of substantive law reform.

17. With felicitous timing, the Committee delivered its report on 20 May 2011 – just one day after Tugendhat J's reasoned judgment in the Sir Fred Goodwin case and right at the height of the 'super-injunction' controversy.

ii. Open justice

18. The Committee's report began by examining the relationship between open justice and privacy injunctions. It identified issues of concern regarding CPR 39.2 (which regulates the circumstances in which proceedings may take place in private and the circumstances in which parties' identities can be anonymised). The report stated that:

> *'in assessing whether to direct that an exception to the general principle should be made under CPR 39.2(3)(g), or under any other part of CPR 39.2, the court is not exercising a 'wide discretion', as is suggested by the current edition of the White Book (2011) Vol. 1 at 39.2.7. A grant of such an exception is not a question of discretion: it is a 'matter of obligation' if it is satisfied. Once the court has applied the relevant test,*

[7] *RJW & SJW v The Guardian Newspaper and Person or Persons Unknown* (Claim no. HQ09)

[8] [2010] EWHC 119 (QB)

it is, as Tugendhat J stated at first instance in AMM v HXW [2010] EWHC 2457 (QB) at [34], under a duty to either grant the derogation or refuse it.'[9] *[Emphasis added]*

19. Moreover:

> *'Procedural law ought not however replicate, let alone conflict with, substantive law; and the approach of the [Civil Procedure Rules Committee] is not to replicate the substantive law in the CPR. As it is presently drafted CPR 39.2 might be said to breach that principle in that it mirrors Article 6. It also fails to make appropriate reference to strict necessity in all places where that is the applicable test. It further appears to be internally inconsistent. These drawbacks may provide an opportunity for the confusion that is exemplified by the White Book's gloss on CPR 39.2 to arise: a wide discretion under CPR 39.2 is substituted for the obligation which Article 6 imposes.'*[10] *[Emphasis added]*

iii. Definition of 'super-injunction'

20. The Committee noted that the term super-injunction '*has not been used with precision*'. The Committee summarised the distinguishing feature of a super-injunction as follows: '*The super element is a prohibition on the disclosure or communication of the existence of the order and the proceedings*.' This feature was identified by the Court of Appeal in *Ntuli v Donald* as being the feature which elevates a standard interim injunction into a super-injunction. *Ntuli* also confirmed that anonymity by itself does not render an injunction a super-injunction. Accordingly, the Committee defined a super-injunction as:

> *'an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and (ii) publicising or informing others of the existence of the order and the proceedings (the 'super' element of the order).'*[11]

21. This is to be contrasted with an anonymised injunction, which is:

[9] Para 1.33

[10] Para 1.35

[11] Para 2.14, referring to *Ntuli v Donald* [2010] EWCA Civ 1276 at [43]ff

> *'an interim injunction which restrains a person from publishing information which concerns the applicant and is said to be confidential or private where the names of either or both of the parties to the proceedings are not stated.'*[12]

iv. The prevalence of super injunctions

22. The Committee observed that inaccurate use of the term to refer to anonymised injunctions has given rise to '*a false view that super-injunctions are commonplace*' and leads to '*misconceptions as to how long super-injunctions endure*'. A claim that a super-injunction has been in place for a number of years '*adds credibility to the fear that a new form of permanently secret justice has arisen'*.[13]

23. Analysis of the recent case law shows that '*far from being common place super-injunctions are rarely applied for and rarely granted*'. Since the *Terry* case there has only been one known privacy case where a super-injunction was granted and not challenged.[14] And in the one case where a super-injunction was granted and challenged, it was set aside on appeal as being unnecessary.[15] According to the Committee, these statistics show that '*a real change has occurred in respect of super-injunctions since the Terry case*'.[16]

v. Procedural issues regarding interim injunctions

24. The Committee stated that one of the fundamental causes of the problems which have arisen in respect of super-injunctions and anonymised injunctions is the lack of clarity regarding the proper approach.[17] Accordingly, the Committee recommended that Guidance similar to that issued by the President of the Family Division should be issued. The Guidance should[18]:

[12] Para 2.14

[13] Para 2.16

[14] Para 2.28, referring to *DFT v TFD* [2010] EWHC 2335

[15] Para 2.28, referring to *Ntuli v Donald* [2010] EWCA Civ 1276

[16] Para 2.31

[17] Para 3.3

[18] Para 3.7

(a) define such orders as 'Interim Non-Disclosure Orders', in order to bring clarity to the area and to emphasise that they are temporary in nature;

(b) clarify the proper approach to applications for interim injunctions which seek to restrain the publication of information alleged to be capable of legal protection;

(c) contain a clear reminder that derogations from open justice can only be justified on grounds of strict necessity;

(d) summarise the principles to be defined from the current state of the case law; and

(e) be supplemented by a Draft Model Order.

25. The Committee's report contained proposed forms of Practice Guidance and Model Order.[19] In August 2011 Master of the Rolls published the Practice Guidance and Model Order. The Master of the Rolls anticipated that this Practice Guidance may lead to a "sea change". It contains detailed and important changes of practice, particularly in relation to the obligation to notify in advance the proposed Defendant and any media party on whom an injunction is to be served, anonymisation of Orders, and super injunctions. In addition, a 12 month pilot scheme under which data will be collected in relation to any application in the High Court or Court of Appeal for an injunction restraining publication of private or confidential information, and any derogation from the principle of open justice sought or granted, was brought into force as Practice Direction 51F, and has been effective since 1 August 2011.

26. The Culture Media and Sport Select Committee had previously recommended the introduction of a fast-track appeals process. The Committee on Super Injunctions rejected this proposal, observing that a form of fast track appeals process already exists in practice and is applied pragmatically on a case-by-case basis.[20] Furthermore,

[19] See Annex A and Annex B

[20] Para 3.40

while there was a '*superficial attraction*' in the proposal that the present system be modified to introduce a rebuttable presumption favouring expedition of appeals, such a system would do little more than replicate the existing system and would cause unnecessary expense and delay.[21] The Committee also rejected the introduction of a compulsory appeals process, which it said would involve a disproportionate infringement of the right of a party to autonomy in the conduct of proceedings.[22]

27. The Committee recommended the introduction of a data recording system to enable public, Parliamentary and judicial scrutiny of the frequency with which super-injunctions, and injunctions containing publicity restrictions, are applied for and granted.[23] Accordingly, the Committee recommended that the Ministry of Justice's Chief Statistician should collect and publish annually the following data[24]:

    (i) The number of applications made in the High Court for interim injunctive relief which (a) engage s. 12 of the Human Rights Act; and (b) contain any derogations from the principle of open justice;

    (ii) Whether those orders were made with or without notice to the persons affected by the order;

    (iii) The outcome of any such application (including any appeal); and

    (iv) The outcome of the substantive proceedings in which those interim applications are made i.e., trial or appeal.

vi. Parliamentary privilege and reporting statements in Parliament

28. The Committee confirmed that there is '*no question that a super-injunction, or for that matter any court order, could extend to Parliament, or restrict or prohibit Parliamentary debate or proceedings*'.[25]

[21] Para 3.42

[22] Paras 3.46 – 3.48

[23] Para 4.6

[24] Para 4.11(i)

[25] Para 6.8

29. The Report then went on to consider an issue of particular interest to media parties, namely the question whether a media organisation could be in contempt of court if, having had notice of an injunction, it published matters subject to that order by means of a report of Parliamentary proceedings.

30. The Parliamentary Papers Act 1840 grants absolute privilege in respect of any civil or criminal proceedings for any individual who publishes Parliamentary reports, papers, votes or proceedings by Order of Parliament (or any copy thereof). Section 3 of the 1840 Act also provides qualified privilege to individuals in civil or criminal proceedings who publish '*any extract from or abstract of*' material published in Hansard. In order to benefit from this protection, the individual claiming the privilege/immunity must prove that she acted in good faith and without malice.

31. Where media reports go beyond the scope of what is protected by s. 3 of the 1840 Act, it is the common law which determines whether there is any protection from contempt proceedings for breach of court orders. The Committee noted that there were differing views regarding the scope of any such privilege. Thus, the 1999 Joint Committee stated that: '*in such circumstances [i.e. where an injunction barring publicity is in force] reporting a matter divulged in parliamentary proceedings is strictly a contempt of court.*'[26] By contrast, in *Attorney General v Times Newspapers*[27] Lord Denning MR stated that Parliamentary proceedings could be published in the media without fear of contempt of court proceedings.

32. In the light of these divergent views, the Neuberger Committee concluded:

> *'It therefore appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection provided by the 1840 Act. <u>What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right.</u>'*[28] *[Emphasis added]*

[26] 1999 Joint Committee Report at para 204

[27] [1973] QB 710

[28] Para 6.33

The Government's Joint Committee on Privacy and Injunctions

33. In May 2011 the Government announced the establishment of a Joint Committee on Privacy and Injunctions, to be chaired by John Whittingdale MP. The Committee is due to begin hearing evidence in October 2011. The Committee has so far invited evidence on the following issues:

    (i) How the statutory and common law on privacy and the use of anonymity injunctions and super-injunctions has operated in practice;

    (ii) How to best strike the balance between privacy and freedom of expression, in particular how best to determine whether there is a public interest in material concerning people's private and family life;

    (iii) Issues relating to the enforceability of anonymity injunctions and super-injunctions, including the internet, cross-border jurisdiction within the UK, Parliamentary privilege and the rule of law; and

    (iv) Issues relating to media regulation in this context, including the role of the Press Complaints Commission (PCC) and the Office of Communications (OFCOM).

PART B - THE ENGLISH LAW OF DEFAMATION AND PRIVACY IN THE DIGITAL AGE – IS IT FIT FOR PURPOSE?

34. The advent of the digital age has given rise to novel legal questions concerning the application of the law of privacy and defamation in the context of information that is stored, processed and published electronically. Part B of this paper will examine two particular issues:

    (i) The application of the law of defamation in cases where defamatory material is posted online; and

    (ii) Privacy in computerised information

Defamation and the internet

i. Online defamation – responsibility for publication and the defence of innocent dissemination

35. Section 1 of the Defamation Act 1996 establishes a defence of innocent dissemination:

> *'(1) In defamation proceedings a person has a defence if he shows that –*
>
> *(a) he was not the author, editor or publisher of the statement complained of,*
>
> *(b) he took reasonable care in relation to its publication, and*
>
> *(c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.'*

36. Section 17 explains that the term '*publisher*' has a special definition for the purposes of the 1996 Act:

> *''Publication' and 'publish', in relation to a statement, have the meaning they have for the purposes of the law of defamation generally, but 'publisher' is specially defined for the purposes of section 1.'*

37. Section 1(2) accordingly defines '*publisher*' as '*a commercial publisher, that is, a person whose business is in issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business*.'

38. Section 1(3) provides:

> *'(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved –*
>
> *(a) In printing, producing, distributing or selling printed material containing the statement;*
>
> *…*
>
> *(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;*
>
> *…*
>
> *(e) as the operator of or provider of access to a communication system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.*
>
> *In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.'*

39. Section 1(5) provides:

> *'(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to –*
>
> *(a) the extent of his responsibility for the content of the statement or the decision to publish it,*
>
> *(b) the nature or circumstances of the publication, and*
>
> *(c) the previous conduct or character of the author, editor or publisher.'*

40. The application of the law of defamation to internet service providers (ISPs) was considered by the High Court in *Godfrey v Demon Internet Company*.[29] In that case the defendant ISP stored information posted by other web users and transmitted it on to subscribers. The claimant sued the defendant in libel in respect of defamatory postings made by a third party on a website hosted by the defendant. The defendant had knowledge that the words complained of were defamatory of the claimant and also had the ability to take the defamatory posts down from the web (but chose not to do so). In response to the libel claim, the defendant sought to invoke the statutory defence of innocent dissemination.

41. Morland J held that the defendant was not the '*publisher*' of the defamatory material within the special meaning of s. 1(1)(a).[30] However, on the facts of the case the defendant could properly be regarded as responsible for the publication of the defamatory statements at common law and would therefore be liable in defamation unless protected by a specific defence:

> *'In my judgment the Defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting.'*[31]

[29] [2001] QB 201

[30] Para 19

[31] Para 33

42. Morland J ruled that the fact that the defendant had chosen not to exercise its power to remove the defamatory posts once it had been informed of their existence meant that it was unable to rely on the s. 1 innocent dissemination defence.[32]

43. By contrast, in *Bunt v Tilley*[33] Eady J held that an Internet intermediary, if undertaking no more than the role of a passive medium of communication, could not be characterised as a publisher at common law. In determining responsibility for publication, Eady J explained that '*it is important to focus on what the person did, or failed to do, in the chain of communication*'. The state of a defendant's knowledge can be an '*important factor*'.[34] In order to impose legal responsibility for the publication of defamatory words, '*it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility*'.[35] However this does not mean that it is necessary for the defendant to be aware of the publication's defamatory content or its legal significance. Rather, it is necessary to show '*knowing involvement in the process of publication of the relevant words'*. It is not enough that a person plays a '*passive instrumental role*' in the process.[36]

44. A slightly different issue arose for consideration in *Metropolitan International Schools Limited v Desigtechnia Corporation and Google*[37]. The claimant contended that Google was liable for defamatory web 'snippets' (i.e. short extracts of text from websites) which were generated whenever particular search terms were entered into the Google search engine. Under the Google search process, snippets are thrown up automatically by web-crawling 'robots', which trawl through an automatically compiled index of web pages for the pages that are most relevant to the inputted search terms.

[32] Para 20

[33] [2007] 1 WLR 1243

[34] Para 21

[35] Para 22

[36] Para 23

[37] [2009] EWHC 1765 (QB)

45. Eady J said that the central point in the case was whether Google was to be regarded as a publisher of the words complained of at all.[38] In order to be liable for publishing defamatory words there needs to be present a mental element.[39] The appropriate question was whether Google should be regarded as a '*mere facilitator*' of the publication of the snippets.[40] In this regard, Eady J said that it was fundamentally important that Google had no role to play in formulating or inputting the search terms. Accordingly, '*it has not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely by the provision of its search service, played the role of a facilitator.*'[41]

46. In reaching this conclusion, Eady J drew a distinction with a search carried out in a large conventional library:

> *'whereas a compiler of a conventional library will consciously at some point have chosen the wording of any 'snippet or summary included, that is not so in the case of a search engine. There will have been no intervention on the part of any human agent. It has all been done by web-crawling 'robots'.'*[42]

47. The next question was whether the legal position was any different once Google had been informed of the defamatory content of a 'snippet' generated by the search engine. On this point Eady J again suggested that an intense focus on what the defendant had actually done was required. It might be appropriate to draw a distinction between a website host and a search engine. While '*someone hosting a website will generally be able to remove material that is legally objectionable*', a search engine is '*a different kind of Internet intermediary*'.[43] One cannot simply press a button to ensure that offending words will never reappear on a Google search snippet: Google has no control over the search terms that are typed in by future users of the service. In the present case, Google had taken some steps to '*take down*' the

[38] Para 48

[39] Para 49

[40] Para 42

[41] Para 51

[42] Para 53

[43] Para 55

defamatory material. Eady J held that while such efforts were being made '*it is hardly possible to fix [Google] with liability on the basis of authorisation, approval or acquiescence*'.[44] In these circumstances, Google was not a publisher at common law of the defamatory postings contained in the automatically generated snippets.

48. Judgment is awaited in the case of *Davison v Google Inc*, where HHJ Parkes QC will decide whether Google as the operator of a blog platform, blogger.com, is a publisher of words included in blogs over which it exercises no control.

ii. The Electronic Commerce (EC Directive) Regulations 2002

49. The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002 No 2013) regulate '*information society services*' within the EU internal market. They are derived from and designed to implement EC Directive 2000/31/EC ('The E-Commerce Directive'). The Regulations provide protection from liability for the providers of information society services in certain circumstances.

50. 'Information society services' is defined in the Regulations as having the meaning set out in Article 2(a) of the E-Commerce Directive, as summarised in Recital 17. Recital 17 provides that the definition of 'information society services' covers '*…any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and the individual request of a recipient of a service*'.

51. Article 2 of the E-Commerce Directive provides the following definitions:

> *'For the purpose of the Directive, the following terms shall bear the following meaning:*
>
> *(b) 'service provider': any natural or legal person providing an information society service…*
>
> *(d) 'recipient of the service': any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible…'*

[44] Para 58

52. Regulations 17, 18 and 19 reflect Articles 12, 13 and 14 respectively of the E-Commerce Directive. They exclude liability in certain circumstances resulting from respectively mere conduits, caching and hosting services.

53. Regulation 17 is concerned with '*mere conduit*':

> *'(1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the service provider –*
>
> *(a) did not initiate the transmission;*
>
> *(b) did not select the receiver of the transmission; and*
>
> *(c) did not select or modify the information contained in the transmission*
>
> *(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the data transmitted where:*
>
> *(a) this takes place for the sole purpose of carrying out the transmission in the communication network, and*
>
> *(b) the information is not stored for any period longer than is reasonably necessary for the transmission.'*

54. Regulation 18 is concerned with caching:

> *'Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where –*
>
> *(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and*
>
> *(b) the service –*
>
> *(i) does not modify the information;*

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by the industry;

(iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.'

55. Regulation 19 concerns hosting:

'Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where –

(a) the service provider –

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.'

The applicability of the 2002 Regulations to internet search engines and other information society service providers

56. The question whether the 2002 Regulations apply to internet search engines was considered in *Metropolitan International Schools*[45]. Eady J said that it was difficult to

[45] [2009] EWHC 1765 (QB)

see how the Google search engine could be described as '*for remuneration*' in circumstances where the user of the Web does not pay for the service. While Google obtains remuneration through advertising revenue, it would be '*a distortion of language*' to describe the service as being '*for remuneration*' purely for that reason.[46] However, Eady J also noted that Recital 18 to the E-Commerce Directive states:

> *'Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods online; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications or those providing tools allowing for search, access and retrieval of data;…'*

57. Eady J stated that under this extended definition, it would appear that search engines would be embraced.[47] On balance, Eady J therefore concluded that the 2002 Regulations are apt to cover the providers of search engine services. The same point has arisen in *Davison v Google* where judgment is awaited.

Regulation 19 – Information Society Service 'which consists of the storage of information provided by a recipient of the service'

58. In *Kaschke v Gray and Hilton*[48] the claimant brought a claim in libel in respect of defamatory statements that had been posted on *Labourhome.org*, a website controlled and operated by the second defendant, Mr Hilton. Hilton was personally involved in the promotion of posts (i.e. he was involved in placing posts in a more prominent position than they would otherwise be in on the website) and also had power to edit and remove posts from the website. In response to the claimant's defamation claim, Hilton sought to rely on a defence under Reg. 19 of the 2002 Regulations.

[46] Para 82

[47] Para 83

[48] [2011] 1 WLR 452

59. Stadlen J held that it was clear that Hilton was providing an '*information society service*' within the meaning of the 2002 Regulations. The judge also held that there was no reason in principle why the operation of an internet chat room should be incapable of falling within the definition of the provision of an information society service consisting of the storage of information. There was therefore no reason why it should not be an activity that was intended to be protected by Article 14 of the E-Commerce Directive, and hence eligible for the protection from liability conferred by Regulation 19.

60. Stadlen J then held that fact that the provider of a protected service is also engaged in another activity on other parts of the same website which is not an information society service (or, if it is, does not consist of the storage of information) should not bar entitlement to the protection of Reg. 19 to the part of the website complained of. In other words, the fact that Hilton's website provided other services in addition to the provision of an '*information society service…which consists of the storage of information*' did not deprive him of a potential defence under Reg. 19 in relation to the particular webpage on which the words complained of appeared.

61. On the facts, Stadlen J held that it was arguable that the defendant had exercised sufficient editorial control over the website page in question to make the case unsuitable for summary judgment.

<u>*Outstanding questions regarding the 2002 Regulations*</u>

62. Some important questions under the 2002 Regulations remain unresolved:

    (a) What exactly does it mean for an individual to have '*actual knowledge of unlawful activity or information*' for the purposes of Reg. 19(a)(i)? In *Bunt v Tilley*[49] Eady J said that, '*in order to be able to characterise something as 'unlawful' a person would need to know something of the strength or weakness of the available defences*'.[50] The editors of *Gatley on Libel and Slander* (11th Edn.) suggest that a Reg. 19 defence might be much wider than the defence

[49] [2007] 1 WLR 1243

[50] Para 72

under s. 1 of the Defamation Act 1996. Section 1 refers to the defendant's means of knowledge that he is contributing to the publication of a '*defamatory statement*', whereas Regulation 19(1)(a) refers to the defendant's means of knowledge that the statement is '*unlawful*'. A statement may be '*defamatory*' even if there is a perfectly valid defence to a libel action. However where there is a valid defence to a libel claim (e.g. qualified privilege) it would be very difficult to characterise the defamatory statement in question as '*unlawful*'. In *Kaschke v Gray & Hilton* Stadlen J considered it unnecessary to decide the exact meaning of Reg. 19(a)(i).[51] This key point arises for decision in *Davison v Google Inc*.

(b) What is intended to be covered by Reg. 19(b) ('*the recipient of the service was not acting under the authority or the control of the service provider')*? Is the focus of the inquiry upon the service provider's control of the *recipient of the service* or their control of the *content of the information* in question?

Privacy in computerised information

63. Businesses and individuals increasingly conduct their affairs electronically. The existence of privacy and confidence rights in computerised information is therefore becoming increasingly important. In recent years, the common law principles of privacy and breach of confidence have been applied to cover information stored and communicated electronically. In addition, there are now a number of discrete statutory regimes which regulate the circumstances in which persons may or may not access, intercept and copy electronic data. These overlapping regimes require careful navigation in order to ensure that media parties remain on the right side of the civil and criminal law.

Privacy in electronic information: Tchenguiz v Imerman

[51] Para 100 and 101

64. The question of privacy and confidence rights in electronic data recently came to the fore in the Court of Appeal's judgment in *Tchenguiz v Imerman*[52]. The case arose out of ancillary relief proceedings between the claimant and his estranged wife, the first defendant. Fearing that the claimant might seek to conceal some of his assets, one of the wife's brothers accessed a computer server in an office which he shared with the claimant. He then proceeded to copy a vast amount of information and documents which the claimant had stored there. The defendants subsequently printed out seven files of copied material and handed them to the first defendant's solicitor.

65. The claimant brought an application for an injunction ordering the return of the seven files (and any copies made of them) and an order prohibiting the first defendant and her lawyers from using any information obtained from those documents. Eady J granted summary judgment and the Court of Appeal ruled in favour of the claimant and upheld the order made by Eady J. In so doing, the court found that the defendants' actions had breached the obligation of confidence that was owed to the claimant in respect of the computerised material.

66. Lord Neuberger MR giving the judgment of the court stated that there were dangers in conflating the developing law of privacy under article 8 and the traditional law of confidence. Nevertheless, he held that the touchstone suggested in *Campbell v MGN* – namely whether the claimant had a '*reasonable expectation of privacy*'[53] – was '*a good test to apply when considering whether a claim for confidence is well founded*'[54]. Since '*privacy is still classified as part of the confidentiality genus*', Lord Neuberger held that '*the law should be developed and applied consistently and coherently in both privacy and 'old fashioned confidence' cases*'.[55]

67. The Court of Appeal went on to explain that if obligations of confidentiality apply to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of

[52] [2011] 2 WLR 592

[53] [2004] UKHL 21; [2004] 2 AC 457

[54] *Tchenguiz v Imerman* at para 66

[55] Para 67

privacy, it must, *a fortiori*, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information.[56] Thus the Court held that:

> *'In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of confidence. It seems to us, as a matter of principle, that, again in the absence of any defence on the particular facts, a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return or destruction of any such document or copy.'*[57]

68. In the present case, there was no doubt that the claimant had an expectation of privacy in respect of the majority of the documents stored on the server. The fact that the claimant knew that the first defendant's brother enjoyed physically unrestricted access to the server did not deprive the claimant of a reasonable expectation of privacy:

> *'The fact that a defendant has a means of access to get into a claimant's room or even into his desk does not by any means necessarily lead to the conclusion that he has a right to look at, let alone to copy, or even disseminate, the contents of the claimant's private or confidential documents contained therein…<u>Confidentiality is not dependent upon locks and keys or their electronic equivalents</u>.'*[58] *[Emphasis added]*

69. *Tchenguiz v Imerman* highlights the potential scope of obligations of confidentiality in respect of computerised information. It also suggests that the courts will apply similar principles in breach of confidence cases to those applied in privacy cases.

<u>*Other possible forms of criminal and civil liability for accessing electronic data without authorisation*</u>

[56] Para 68

[57] Para 69

[58] Para 79

70. In addition to the possibility of a claim for breach of privacy and/or confidence, media parties should also be aware of the various statutory regimes that regulate the accessing and processing of other people's private computerised data.

i. Computer Misuse Act 1990

71. Section 1(1) of the Computer Misuse Act 1990 provides that it is an offence for a person to '*cause…a computer to perform any function with intent to secure access to any program or data held in any computer*', where '*the access…is unauthorised' and 'he knows at the time…that that is the case*'. Section 17(2) states that securing access includes taking copies of any data, or moving any data '*to any storage medium*' or using such data. Section 17(8) provides that an act is '*unauthorised, if the person doing [it] … is not [and does not have the authority of] a person who has responsibility for the computer and is entitled to determine whether the act may be done.*'

72. In *Tchenguiz v Imerman* the court held that there was a real possibility that the defendants who had accessed the claimant's computer records stored on the server were guilty of an offence under the 1990 Act.[59]

ii. Data Protection Act 1998

73. Section 4(4) of the Data Protection Act 1998 ('DPA') imposes a duty on a '*data controller*' to comply with '*the data protection principles*' set out in Schedule 1 to the Act. This duty applies in relation to '*all personal data [of] which he is data controller*'. Section 1 of the DPA defines a data controller as '*a person who … determines the purposes for which and the manner in which any personal data … are processed*'. The term '*personal data*' is defined as meaning '*data which relate to a living individual who can be identified … from those data*'.

74. Paragraph 1 of Part 1 of Schedule 1 to the DPA states that '*data shall be processed fairly and lawfully*', and only if '*one of the conditions in Schedule 2 is met*'.

[59] Para 93

75. In *Tchenguiz v Imerman* the Court of Appeal said that it was arguable that the defendants' actions failed all three of those requirements. A breach of the Computer Misuse Act 1990 in obtaining the data would arguably render the subsequent data processing unlawful. Moreover, the '*secret and indiscriminate*' means of accessing the data was arguably not '*fair*'. In addition, the processing was arguably not in accordance with Schedule 2 to the DPA, since it was not '*necessary…for the administration of justice*' nor was it '*necessary for the purposes of the legitimate interests pursued by the data controller*' (these being the two primary grounds advanced by the defendants).[60] On this point, the Court of Appeal said that there was a compelling attraction to the argument that the data processing was not '*necessary*' because the defendant could have applied to the court for a search and seizure order or a preservation order rather than taking the law into her own hands.[61]

76. Section 55(1),(3) of the DPA makes it a criminal offence for a person to '*knowingly or recklessly*' and '*without the consent of the data controller*' '*obtain or disclose personal data*'. Section 55(2) exempts from the ambit of that prohibition cases where (a) the obtaining or disclosing was '*necessary for the purpose of preventing or detecting a crime' or 'required…by any rule of law*', (c) the person reasonably believed that he had the consent of the data controller, or (d) the action was '*justified as being in the public interest*'.

77. In *Tchenguiz v Imerman* Lord Neuberger MR commented that '*the fact that accessing the documents can be said to have been to protect [the first defendant's] rights can scarcely be said to render it 'in the public interest', even if it was done with a view to exposing, or preventing, [the claimant's] anticipated wrongful concealment of assets*.'[62]

iii. Regulation of Investigatory Powers Act 2000

78. The Regulation of Investigatory Powers Act 2000 makes the unauthorised interception of communications in the course of transmission a criminal offence.

[60] Para 97

[61] Para 99

[62] Para 104

Section 1(1) makes it an offence to intentionally and without lawful authority intercept '*any communication in the course of transmission*' by means of '*a public postal service*' or '*a public telecommunications system*'. Section 1(2) makes similar provision for criminal liability in respect of the unauthorised interception of communications in the course of transmission on a private telecommunications system. Section 1 therefore covers the unauthorised interception of telephone, post, email and other electronic communications. A breach of section 1 is punishable by up to two years' imprisonment and/or an unlimited fine.

79. Media organisations will appreciate that the RIPA regime and the consequences that it can have for investigative journalism will come under scrutiny in the Leveson Inquiry.

PART C - SIGNIFICANT PRIVACY CASES FROM THE LAST TWO YEARS

80. The following section of this paper provides an overview of some of the most significant privacy cases decided during the last year or so. Many of these deal with procedural issues which have now been taken into account in the new Practice Guidance published by the master of the rolls in August.

i. Interim injunctions and the Human Rights Act 1998, s. 12(3)

81. Section 12 of the Human Rights Act 1998 applies to any application for an injunction restraining publication of private information.[63] As is well known, section 12(3) provides that no relief 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. In *Hutcheson (formally known as KGM) v News Group Newspapers* the Court of Appeal reiterated that the burden rests on the claimant to satisfy the requirements of s. 12(3).[64]

[63] Section 12 applies 'if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression' (s. 12(1)).

[64] [2011] EWCA Civ 808, at para 31

82. Much potentially turns on the precise meaning of '*likely*' in s. 12(3). In *Cream Holdings v Banerjee*, Lord Nicholls stated that:

> '*the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at trial.*'[65]

83. However Lord Nicholls added that *'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*'. The circumstances where this lower threshold may apply include cases 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*.'[66]

84. The s. 12(3) test was considered by the Court of Appeal in *ASG v GSA*[67]. Waller LJ noted that, '*there will be cases where it may be necessary to grant an injunction ex parte to hold the ring until a proper inter partes hearing can be held and in which it can be finally explored as to whether the claimant will succeed at trial*'. In such cases, while the claimant must still show a '*sufficient likelihood that he will succeed at the inter partes hearing*', a '*more flexible approach*' will be appropriate at the *ex parte* hearing.

85. Waller LJ explained that the question that the courts must ask is: '*is there a sufficient degree of likelihood that the claimant will succeed at trial to justify an ex parte injunction for a short period at an inter partes hearing?*'[68] He added that if there is evidence before the court of a blackmail element, the correct course is to grant the injunction until the *inter partes* hearing.[69]

86. In *Terry (previously 'LNS') v Persons Unknown*[70] Tugendhat J applied the lower threshold at the initial *ex parte* hearing. On that basis, he granted an interim

[65] [2005] 1 AC 253 at para 22

[66] Para 22

[67] [2009] EWCA Civ 1574 – the judgment only became available last year.

[68] Para 5

[69] Para 26

[70] [2010] EWHC 119 (QB)

injunction to last until the return date the following week. However at the return date hearing Tugendhat J applied the general principle laid down in *Cream Holdings*, namely whether the applicant is more likely than not to succeed at trial. Applying that more demanding standard, he refused to continue the injunction.[71]

87. *ASG* and *Terry* indicate that in urgent cases a claimant will have good prospects of obtaining an interim injunction pending an *inter partes* hearing of the application for interim relief. At the *ex parte* hearing the court will be more inclined to apply a less exacting test of likelihood. However once the application reaches the *inter partes* hearing the court will probably revert to the general approach, meaning that if an applicant is to obtain an interim injunction he or she will generally have to establish that the claim is more likely than not to succeed at the final hearing.

ii. Privacy injunctions – General principles: Ntuli v Donald and the John Terry case

88. According to Maurice Kay LJ in *Ntuli v Donald*, the '*basic principles of substantive law*' that the courts will apply when deciding whether or not to grant a final injunction following a trial are now '*well-settled*'.[72] As is well known, the relevant principles established by *Campbell v MGN*[73] were helpfully distilled by Lord Steyn in *Re S (a child) (Identification: Restrictions on Publication)*[74] and summarised in the following terms:

> *'First, neither Article [8 or 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 case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience, I will call this the ultimate balancing test.' [Emphasis added]*

89. In *McKennitt v Ash*[75] Buxton LJ reviewed the authorities and stated:

[71] Para 122

[72] [2010] EWCA Civ 1276 at para 10

[73] [2004] 2 AC 457

[74] [2005] 1 AC 593

[75] [2008] QB 73; [2006] EWCA Civ 1714

> *'…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? The latter inquiry is commonly referred to as the balancing exercise.'*[76] *[Emphasis added]*

90. Over the last two years these basic principles have been applied and further developed by the courts. In *Terry (previously 'LNS') v Persons Unknown*[77] a well known sportsman sought an interim injunction preventing publication of information about a relationship between him and another person. At the return date hearing Tugendhat J refused to grant the injunction. The primary basis for the refusal was the judge's conclusion that the claimant was seeking to protect his reputation rather than his private life (a point discussed in more detail below). However Tugendhat J's judgment also contains a valuable discussion of the principles that the courts will apply when conducting the ultimate balancing test.

91. Several points call for particular comment. First, Tugendhat J distinguished between various types of information when considering whether to grant an injunction. He noted that there was a threat to publish the fact of the claimant's relationship; however there did not appear to be a threat to publish details about that relationship. The threatened publication was of a '*low level*' of intrusiveness; a factor which militated against granting an injunction. (However the judge was also clear that a threat to publish intrusive details or photographs would '*undoubtedly*' have warranted the granting of an injunction.)[78]

92. As is discussed below, the distinction between publication of the bare fact of a relationship and publication of details about that relationship has since been explored further in later cases.

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[76] Para 11

[77] [2010] EMLR 16

[78] Para 11

93. Secondly, Tugendhat J stated that '*the attributes of the claimant*' were a relevant feature when conducting the balancing exercise. Accordingly:

> '*the less sensitive the information is considered by the applicant to be, and the more robust the personality of the applicant, and the wider the information has already spread in the world in which the applicant lives and works, the less the court may need to find a need to interfere with the freedom of expression of others by means of an injunction.*'[79]

94. This point is likely to be of particular interest to media parties who wish to publish private information about high profile public figures. The judgment in *Terry* makes it clear that the stronger and more resilient the personality of the claimant, the easier it will be to justify publishing the information in question.

95. Thirdly, Tugendhat J made reference to the fact that, although the private information was not actually in the public domain, it had already been widely circulated within the claimant's sporting community. The fact that the information had already become widely available to so many people meant that an injunction was less necessary or proportionate than would otherwise have been the case.[80]

96. Fourthly, the judge held that there was an arguable public interest defence.[81] However since the application had been brought without notice the court had not had the benefit of submissions from the media on this question or the specific issue of the '*social utility*' of the information in question.[82] In these circumstances, the court could not be satisfied that the claimant was likely to succeed at trial. In the judge's words: '*If the judge is not permitted to hear from the other side, there is a danger that by default he will give more weight than he would wish to the views of the applicant or himself*'[83] Tugendhat J's judgment therefore serves as a salutary reminder of the potential disadvantages of applying for an injunction without giving notice to potentially interested parties.

[79] Para 127

[80] Para 130

[81] Para 8

[82] Para 102

[83] Para 101

97. Fifthly, when considering a possible public interest defence, Tugendhat J rejected the claimant's argument that in order to permit one person to disclose information about another's private life, the information must relate to unlawful activity: '*The fact that conduct is private and lawful is not, of itself, conclusive of the question whether or not it is in the public interest to be discouraged*'.[84] The judge noted that there was no suggestion that in the present case the conduct in question was unlawful; however '*in a plural society there will be some who would suggest that it should be discouraged*'. One of the most valuable freedoms is '*the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong*'.[85] The judgment thus makes it clear that a claimant cannot disable a public interest argument simply by arguing that he has done nothing illegal. Again, this theme has been explored in greater detail in subsequent cases.

98. Sixthly, Tugendhat J held that the real concern underlying the claimant's application for an injunction was the effect of any publication upon his commercial business interests. In these circumstances, he concluded that damages would be a suitable remedy if the claimant succeeded at trial.[86]

iii. Establishing a reasonable expectation of privacy

99. In the Sir Fred Goodwin case Tugendhat J identified two discrete elements inherent in the right to respect for private life: '*confidentiality*' and '*intrusion*'.[87]

100. As regards confidentiality, the judge explained that the bare fact of a relationship may attract a reasonable expectation of privacy in particular circumstances. However in the present case neither Sir Fred Goodwin nor VBN (the female colleague with whom he had had an affair) were likely to establish that they had a reasonable expectation of privacy in respect of the bare fact of their relationship.

[84] Para 104

[85] Para 104

[86] Para 131

[87] [2011] EWHC 1437 (QB) at para 85

101. Tugendhat J gave several reasons why this was so. First, '*it is obvious that if an employee has a sexual relationship with a more senior person in the company there are any number of possible misunderstandings and grievances (whether well found or unfounded) that can arise if the fact of the relationship is not known, at least to the work colleagues of the more junior of the two partners to the relationship*'. According to the judge, '*it is rarely realistic for partners in a relationship to expect that the bare fact of their relationship will remain confidential between the two of them for a long or indefinite period*'.[88] Secondly, '*the extent to which men in position of power benefit from that power in forming relationships with sexual partners who are less senior within the same organisation is also a matter which is of concern to an audience much wider than the work colleagues of either partner in the relationship*'.[89]

102. Tugendhat J also added that whatever limits there may be to the legal concept of a '*public figure*', Sir Fred Goodwin fell within the definition. This fact distinguished him from '*sportsmen and celebrities in the world of entertainment, who do not come within that definition*'.[90] Thus, it would appear that Sir Fred Goodwin's status as a public figure apparently militated against a finding that he had a reasonable expectation of privacy in the fact of his relationship with VBN.

103. However, having reached that conclusion, Tugendhat J then proceeded to consider the second limb of the right to respect for private life: '*intrusion*'. On this issue the judge did not focus on whether either of the parties enjoyed a '*reasonable expectation of privacy*'. Instead, he focussed upon the effects of intrusion into VBN's private life that would arise from publication of her identity in the media. Tugendhat J drew upon the Protection from Harassment Act 1997, stating: '*Intrusion which the court could prohibit under the Human Rights Act 1998 does not necessarily have to amount to harassment within the meaning of the 1997 Act. But the test will otherwise be substantially the same.*'[91] He held that VBN's fears of intrusion were well-founded and that VBN

[88] Para 102

[89] Para 103

[90] Ibid.

[91] Para 116

would be likely to establish that publication of her name in the media would be '*a significant intrusion into her private and family life from which she is entitled to be protected*'. She was likely to establish at trial that the interference with News Group Newspapers' Art. 10 right would be '*necessary and proportionate for the protection of that right of hers*'.[92] Accordingly, the court would grant an injunction prohibiting publication of her name.

iv. Establishing a public interest in publishing private information

104. The question of how the courts should decide whether there is a public interest in the publication of private information continues to cause controversy. Over the last year several cases have touched upon this issue.

105. In *CTB v MGN Ltd*[93] Eady J made it clear that that the interest in publishing celebrity gossip will rarely trump the right to respect for the private lives of the individuals involved:

> *'It will rarely be the case that the privacy rights of an individual or of his family will have to yield in priority to another's right to publish what has been described in the House of Lords as "tittle-tattle about the activities of footballers' wives and girlfriends": see e.g. Jameel v Wall Street Journal Europe SPRL [2007] 1 AC 359 at [147]'*

106. In this connection the judge made reference to the recent decision of the European Court of Human Rights in *Mosley v UK*:

> *'It has recently been re-emphasised by the Court in Strasbourg that the reporting of 'tawdry allegations about an individual's private life' does not attract the robust protection under Article 10 afforded to more serious journalism. In such cases, 'freedom of expression requires a more narrow interpretation': Mosley v UK (App. No. 48009/08), 10 May 2011, BAILII: [2011] ECHR 774, at [114].'*[94]

[92] Para 120

[93] [2011] EWHC 1232 (QB) at para 33

[94] Ibid.

107. By contrast, in the Sir Fred Goodwin case Tugendhat J made it clear that the public interest was not limited to discussion of matters that are considered to be improper by prevailing contemporary standards:

> *'…in my judgment it is in the public interest that there should be a public discussion of the circumstances in which it is proper for a chief executive (or other person holding public office or exercising official functions) should be able to carry on a sexual relationship with an employee in the same organisation. It is in the public interest that newspapers should be able to report upon cases which raise a question as to what should or should not be a standard in public life. The law, and standards in public life, must develop to meet changing needs. The public interest cannot be confined to exposing matters which are improper only by existing standards and laws, and not by standards as they ought to be, or which people can reasonably contend that they ought to be.'*[95] *[Emphasis added]*

108. However at the same time Tugendhat J was dismissive of the newspaper's argument that there was a public interest in publicising details of the relationship on the basis that the relationship may have distracted Sir Fred Goodwin from performing his job properly:

> *'As a matter of principle, the right to respect for private life of persons holding responsible positions cannot be overridden in the interests of freedom of expression simply because a newspaper alleges that they might have a worry that might distract them from doing their jobs. If there really is a distraction, and the newspaper can put the evidence for it before the court, then it may be that the fact of the distraction can be reported. Such evidence might [be] that the person falls asleep at meetings, or misses them altogether. It may be possible to report that without interfering with the person's private life.*
>
> *It cannot be right that the press should be free to interfere with a person's private and family life by exposing confidential information, and then seek to justify that by speculating that the information might have distracted him from doing his job. '*[96] *[Emphasis added]*

109. It is now well-established that the commercial imperative to sell newspapers is a relevant factor to be taken into account when conducting the Art. 8 'balancing

[95] [2011] EWHC 1437 (QB) at para 133

[96] Para 136-7

exercise'. In *Hutcheson v News Group Newspapers*[97] Gross LJ said that developments in privacy law may give rise to '*real commercial concerns*' in some sections of the media. These concerns are a '*relevant factor for the court to take into account*', at least insofar as they engage '*the public interest in having a thriving and vigorous newspaper industry, representing all legitimate opinions*'.[98] Similarly, in *ETK v News Group Newspapers*[99] Wall LJ stated:

> *'To restrict publication simply to save the blushes of the famous, fame invariably being ephemeral, could have the wholly undesirable chilling effect on the necessary ability of publishers to sell their newspapers. We have to enable sales if we want to keep our newspapers. Unduly to fetter their freedom to report as editors judge to be responsible is to undermine the pre-eminence of the deserved place of the press as a powerful pillar of democracy. These considerations require the court to tread warily before granting this kind of injunction.'*

v. Relevance of reasonable belief in the public interest in publication

110. One unresolved issue regarding the balancing test is the relevance (if any) of a prospective publisher's *belief* that it would be in the public interest for them to publish the information that the claimant wants to keep private. Should it matter whether the person intending to publish private information genuinely believes that the public interest will be served by their doing so? And if belief is a relevant factor, must that belief be reasonably held in order to carry any weight before the court?

111. In *Mosley v Mirror Group Newspapers Ltd*[100] Eady J was clear that '*it is for the court to decide whether a particular publication was in the public interest*'.[101] However in *Terry* Tugendhat J highlighted the continuing uncertainty surrounding this issue.[102] He noted that paragraph 3 of the Public Interest provisions in the PCC Code makes a journalist's reasonable belief relevant to any public interest defence invoked under the Code. (The PCC Code is potentially relevant to privacy claims since s. 12(4) HRA

[97] [2011] EWCA Civ 808

[98] Para 34

[99] [2011] EWCA Civ 439

[100] [2008] EWHC 1777 (QB); [2008] EMLR 679 (QB)

[101] Para 135

[102] *Terry* at para 71

requires the court to have regard to '*any relevant privacy code*' whenever the proceedings relate to material of a '*journalistic*' nature.) Tugendhat J also noted that for the purposes of claims brought under the Data Protection Act, the reasonable belief of the data controller is a relevant factor when considering the public interest defence established by s. 32(1). Since the Data Protection Act might well apply to some newspaper publications (in particular online publications) it would be anomalous if the statutory public interest defence required the court to have regard to the reasonable belief of the journalists, but that the same defence under the general law did not[103]. However because he had not heard argument on this point, Tugendhat J said that he was unable to rule on the matter. The question therefore remains unresolved. The need for further judicial consideration of this issue has also been noted by Sir David Eady, speaking extra-judicially.

v. Extent to which information is already in the public domain

112. Another recurrent issue is the circumstances in which an injunction should be refused as a result of the fact that information is already in the public domain. In *CTB*[104] Eady J explained that the extent to which private information was already in the public domain was a relevant factor to be taken into account by the court when deciding whether to grant injunctive relief:

> *'There may well be, in any given case, room for argument as to what truly is or is not in the public domain; but the principle is clear, namely that the court will not attempt to prevent publication or discussion of material that is genuinely in the public domain since, where that is so, there will no longer be any confidentiality or privacy to protect.'*[105]

113. In addressing this issue, Eady J referred to *Attorney-General v Guardian Newspapers (No 2)*[106], where the House of Lords drew a distinction between state secrets and confidential information relating to an individual's private life. He commented that:

[103] Para 73

[104] [2011] EWHC 1232 (QB)

[105] Para 27

[106] [1990] 1 AC 109

> *'It is more difficult to establish that confidentiality or a reasonable expectation of privacy has gone for all purposes, in the context of personal information, by reason of its having come to the attention of only certain categories of readers: see also R v Broadcasting Complaints Commission ex parte Granada TV [1995] EMLR 16.'*[107]

114. Eady J then explained that:

> *'It is not a black and white distinction between public and private in such circumstances, but rather a matter of looking at the particular facts and deciding whether, notwithstanding some publication, there remains a reasonable expectation of some privacy. It is regarded as a question of degree: a distinction has sometimes been drawn, for example, in respect of private information between that which has been published in the national media and that which is only available on a more limited scale… Each case has to be assessed on its own facts.'*[108]

115. The fact that information has reached the public domain through a breach of a court order is also a relevant factor to be taken into consideration. In *NEJ v Helen Wood*[109] King J said that he would not attach significant weight to the information that had entered the public domain as a result of an apparent breach of a court order by the Daily Mail:

> *'If it were the case that a publication in breach or apparent breach of an existing court order would of necessity compel a court on the return date of the order, to the conclusion that because the dam has been breached there is nothing the court can do to repair the breach, this would be a sad day for the rule of law. The court should not readily condone such breaches of court orders…'*[110]

116. In *CTB v News Group Newspapers and Imogen Thomas*[111] Tugendhat J refused to remove an anonymity order despite the fact that (a) the claimant's identity was widely publicised on the internet and (b) John Hemming MP had mentioned the name of the person who had obtained the order during a parliamentary question in the House of Commons. Tugendhat J explained his reasons for retaining the anonymity order as follows:

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[107] Para 28

[108] Ibid.

[109] [2011] EWHC 1972 (QB)

[110] Para 21

[111] [2011] EWHC 1334 (QB)

> *'As the public now know, anyone who wanted to find out the name of the claimant could have learnt it many days ago. The reason is that it is has been repeated thousands of times on the internet. NGN now want to join in.*
>
> *It is obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed. The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media.'*[112] *[Emphasis added]*

117. In *ETK v News Group Newspapers*[113] the defendant argued that the claimant and had conducted an affair with a work colleague in such a way that the affair had become widely known amongst their other colleagues, including senior managers. This meant that the relationship was '*naturally accessible to outsiders*' and therefore there was no reasonable expectation of privacy. The Court of Appeal disagreed. It held that the sexual relationship was essentially a private matter and the fact that work colleagues knew of the relationship did not put the information into the public domain. Thus Ward LJ explained:

> *'In my judgment the appellant was reasonably entitled to expect that his colleagues would treat as confidential the information they had acquired whether from their own observation of the behaviour of the appellant and X or from the tittle-tattle and gossip which larded the office conversation or from a confidential confession to a colleague. A reasonable person of ordinary sensibilities would certainly find the disclosure offensive.'*[114]

118. This issue was also touched upon in *Hutcheson v News Group Newspapers*[115]. The claimant sought an injunction prohibiting publication of the fact that he had a second family, the existence of which he had concealed from his first family for a number of

[112] Para 2 and 3

[113] [2011] EWCA Civ 439

[114] Para 11

[115] [2011] EWCA Civ 808

years. In refusing the application, Gross LJ stated that *'[t]he reality is that there was a public dimension to the existence of the second family which could not be gainsaid*'. This did not of itself mean that the defendant was free to publish the fact of the second family; however it was a factor that to be weighed in the balance.[116]

vi. 'Super-injunctions'

119. Several recent cases have considered the appropriateness of super-injunctions. In *DFT v TFD*[117] Sharp J was faced with an *ex parte* application for an injunction against a blackmailer who was threatening to publish private and confidential information about a sexual relationship with the claimant. At the first hearing Sharp J granted the injunction sought. In addition, she made an anonymity order and an order prohibiting reporting of the fact that the injunction had been made. The judge held that a super-injunction was necessary since there was a real risk that if the respondent learnt of the application before service of the injunction she might avoid service and/or frustrate any order made before it was served on her.

120. On the return date the claimant's application for continuation of the super-injunction was resisted by several media parties. Sharp J began her reasoning by stating that '*the expression rights of blackmailers are extremely weak (if they are engaged at all)*'[118] and that '*the blackmail element of this case brings extremely strong public interest considerations into play*'.[119] For these reasons, the fact that the claimant had been blackmailed should not be published.

121. As regards the super-injunction, Sharp J began by observing that, '*Whether and in what circumstances the court should prohibit the fact that an order has been made at all is in*

[116] Para 47(iv)

[117] [2010] EWHC 2335 (QB)

[118] Para 23

[119] Para 35

itself a matter of public interest, and indeed particular controversy at the moment.'[120] She then asked whether the effective protection of the claimant's Article 8 rights required the substantial derogation from the Article 10 and Article 6 rights occasioned by a super-injunction. Sharp J held that on the facts of the present case it did not, provided that the other parts of the order imposed at the first hearing remained in place. There was a risk of jigsaw identification through the '*drip drip*' effects of partial revelations in different newspapers. However this could be met by an order which '*itself clearly delineates the information which should be released as to the fact of an order*'. (This type of an order has since become standard, and is known as a '*DFT* order'). With these protections in place, the risk of jigsaw identification should be minimal and therefore a super-injunction was unnecessary. Importantly, Sharp J added that the basic fact that there is always a possibility of an anonymous leak does not of itself make it necessary to prohibit publication of the fact that the order has been made.

122. Maurice Kay LJ also discussed the highly controversial nature of super-injunctions in *Ntuli v Donald*. He explained that the general approach to derogations from open justice was that summarised in Lord Woolf MR's judgment in *ex. p. Kaim Todner*: '*Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it.*'[121] In *Ntuli* the Court of Appeal in rejected an argument that this test of necessity should be relaxed since the Human Rights Act demanded a more nuanced approach. Maurice Kay LJ considered it significant that Article 6 itself prescribes a test of strict necessity. He referred to the Supreme Court's decision in *Home Secretary v AP (No. 2)* [122] and accordingly summarised the correct approach as follows:

> *'This is an essentially case-sensitive subject. Plainly [the claimant] is entitled to expect that the court will adopt procedures which ensure that any ultimate vindication of his Article 8 case is not undermined by the way in which the court has processed the interim applications and the trial itself. On the other hand, the principle*

[120] Para 36

[121] [1999] QB 966

[122] [2010] 1 WLR 1652; [2010] UKSC 26, at para 7

> *of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which [the claimant] is entitled.'*[123]

123. On the facts of *Ntuli*, the Court of Appeal held that a super-injunction was unnecessary and that the appropriate restriction on publicity was one that limited reporting and publicity to what was contained in the court's judgment. In so holding, the court clearly endorsed the approach of the '*DFT* order'.

124. The duration of any super-injunction is also an important issue. In *Terry* Tugendhat J stated that if a super-injunction is granted in order to avoid the risk of tipping off, and if the order provides for a return date, then the prohibition on disclosure '*may normally be expected to expire once the alleged wrongdoer has been served with an injunction, or at the return date (whichever is earlier)*'[124]. Tugendhat J did not know of any case where a super-injunction had continued to run after service on a defendant and without a return date. However if an applicant does seek such an order, then he must put forward evidence demonstrating the need for it[125].

vii. Rights of children in privacy cases

125. In *ETK v News Group Newspapers*[126] the Court of Appeal held that the rights of any children affected by publication of private information should be given '*particular weight*' and '*must rank higher than any other*' factor in the Art. 8/Art. 10 balancing exercise. Ward LJ explained that:

> *'The purpose of the injunction is both to preserve the stability of the family while the appellant and his wife pursue a reconciliation and to save them the ordeal of playground ridicule when that would inevitably follow publicity. They are bound to be harmed by immediate publicity, both because it would undermine the family as a whole and because the playground is a cruel place where the bullies feed on personal discomfort and embarrassment.'*[127]

[123] Para 54

[124] Para 139

[125] Para 140

[126] [2011] EWCA Civ 439

[127] Para 17

126. Ward LJ disagreed with the judge's view that the harmful effect on the children could not tip the balance since the adverse publicity had arisen as a result of their father's errant behaviour. On this point Ward LJ referred to the decision in *Neulinger v Switzerland*[128], where the European Court of Human Rights stated that: '*there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount.*' In addition, Ward LJ referred to several international instruments – the UN Declaration on the Rights of the Child 1959, the Convention on the Rights of the Child 1989 and the EU Charter of Fundamental Rights – in support of this proposition.[129]

127. Ward LJ also drew guidance from the Supreme Court's judgment in *ZH (Tanzania) v Secretary of State for the Home Department*[130]. The question in *ZH* was whether it would be permissible to deport a non-citizen parent (who had an '*appalling*' immigration history) if the effect of deportation would be that a child with British citizenship would also be forced to leave the country. In ruling that it would not, Baroness Hale stated that '*the court's earlier approach to immigration cases is tempered by a much clearer acknowledgment of the importance of the best interests of a child caught up in a dilemma which is of her parents' and not of her own making*'.[131]

128. In *ETK* Ward LJ explained that a similar approach must now be applied in cases concerning privacy injunctions. On this point he adopted the following summary from Lord Kerr's judgment in *ZH*:

> *'It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed, unless countervailing reasons of considerable force displace*

[128] (2010) 48 EHRC 706

[129] Para 18

[130] [2011] UKSC 4

[131] Para 20

them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result.'[132] *[Emphasis added]*

129. However Ward LJ was careful to emphasise that these principles could not be transplanted directly without a consideration of the media/privacy context:

> *'However this learning must, with respect, be read and understood in the context in which it is sought to be applied. It is clear that the interests of children do not automatically take precedence over the Convention rights of others. It is clear also that, when in a case such as this the court is deciding where the balance lies between the article 10 rights of the media and the Article 8 rights of those whose privacy would be invaded by publication, it should accord particular weight to the Article 8 rights of any children likely to be affected by the publication, if that would be likely to harm their interests. Where a tangible and objective public interest tends to favour publication, the balance may be difficult to strike. The force of the public interest will be highly material, and the interests of affected children cannot be treated as a trump card.'*[133] *[Emphasis added]*

viii. Anonymisation of parties

130. A flurry of high profile cases has focussed attention on one issue more than any other during the last 12 months: the appropriate role of anonymity orders in the context of privacy injunctions. At the outset it should be noted that court's decision whether or not to grant anonymity to a party or witness to proceedings is not a discretionary exercise but a matter of obligation (*AMM v HXW*[134]). The principles expounded in the case law are therefore important. However the extremely fact-sensitive nature of each case, and the somewhat nebulous balancing exercise that the courts must undertake, inevitably mean that there is considerable leeway for judicial flexibility.

[132] [2011] UKSC 4, at para 46

[133] [2011] EWCA Civ, at para 19

[134] [2010] EWHC 2457 (QB) at para 35

131. The question of anonymity was examined by Tugendhat J in *Gray v UVW*[135]. In that case both parties had submitted that the judge should grant an anonymity order in respect of both the claimant and the defendant. Tugendhat J began by emphasising that '*an order providing for anonymity and reporting restrictions cannot be made by the consent of the parties*'.[136] He subsequently repeated this observation in *JIH v News Group Newspapers*[137] and his dicta were expressly approved by Lord Neuberger MR in the Court of Appeal:

> *'I agree both with the principle there identified, and with the consequent right, indeed obligation, of a Judge to take the course which Tugendhat J took in this case on being presented with the draft order, namely to call for argument to persuade him to approve any part of an order which restricts or prevents publication of any aspect of the proceedings, and about which he has any doubts or worries'*.[138]

132. In *Gray* Tugendhat J explained that the question he had to ask was whether there is '*sufficient general, public interest in publishing a report of proceedings which identifies either or both parties to justify any resulting curtailment of the right of the party (and members of that party's family) to respect for their private lives?'*[139]

133. In respect of the defendant, Tugendhat J held that disclosure of his identity would represent an unjustifiable interference with that party's private life. There were two reasons for this. First, the allegations against the defendant were very serious. Secondly, it was plain that the defendant was very distressed by the proceedings brought against them by the claimant. If it later transpired that the allegations were unfounded then publication would cause considerable anxiety and potentially irreparable damage to the defendant's reputation. In the present case, the defendant's Article 8 right therefore outweighed the rights of the public under Article 10.

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[135] [2010] EWHC 2367 (QB)

[136] Para 33

[137] [2010] EWHC 2818 (QB)

[138] [2011] EWCA Civ 42 at para 12

[139] Para 44

134. Tugendhat J then turned to consider the claimant's position. In support of his application for anonymity, the claimant had argued that the public would often infer from the identity of the litigant the nature of the information which the claimant is seeking to protect. This will, at least to an extent, defeat the purpose of an injunction. However Tugendhat J was unreceptive to this argument. He rejected any suggestion that disclosure of the general nature of the information in question always engages a claimant's private life:

> *'Almost everyone has information about their health, financial affairs, sex life and other matters, the details of which are private and confidential. The fact that a claimant has obtained an injunction to prevent disclosure of one or other of such categories of information is not in itself necessarily a matter which should not be published.'*[140]

135. Echoes of this approach can be found in *POI v The person known as 'Lina'*[141], which involved an attempt to blackmail the claimant with a threat to publish private photographs. Tugendhat J granted an interim injunction at an *ex parte* hearing. However he added that:

> *'In other circumstances I would not have expected to make an order for anonymity, where the form of the injunction identifies (as my order does) the nature of the private information as being photographic images, and where the evidence is that they were taken without consent in private.'*[142]

136. In *Gray* Tugendhat J held that the reason advanced by the claimant why *his* identity should not be disclosed was a weak one. The claimant had argued that there was a possibility that the media would speculate as to what the information was if his identity was revealed. In response, Tugendhat J referred to the Supreme Court's judgment in *Guardian News and Media* where Lord Rodger had said that, '*the possibility of some sectors of the press abusing their freedom to report cannot, of itself, be a sufficient reason for curtailing that freedom for all members of the press.*'[143] Tugendhat J also held that the possibility that the media might publish articles critical of the

[140] Para 55

[141] [2011] EWHC 25 (QB)

[142] Para 7

[143] Para 57

applicant could not normally be a reason why the applicant's identity should not be disclosed.[144] While there are exceptional cases where media reporting will be so critical as to violate the applicant's Convention rights (including their rights under Articles 2 and 3 where reporting would be likely to lead to violence against the applicant) this was not such a case.[145] Nor was this a case involving a potential contempt of court or interference with the course of justice.[146] For these reasons, the claimant's request for anonymity was refused.[147]

137. In *AMM v HXW*[148] Tugendhat J considered the relevance of blackmail threats when deciding whether to grant a claimant anonymity. The judge quoted from Sharp J's judgment in *DFT* and stated:

> *'where a claimant alleges he is being blackmailed, the court may be faced with limited choices. One choice is to refuse an anonymity order. But in that case, if the blackmailer's threat is to be thwarted, the court will restrict publication of the information which is the subject matter of the action. The alternative is for the court to grant the anonymity order. The court can then permit publication of some of the facts about the action, including the allegation of blackmail. If the court adopts that course, then the anonymity order should suffice to prevent publication of the fact that it is the applicant who has been blackmailed.'*[149]

138. Tugendhat J then explained that '*the need to have regard to the Art 8 rights of the Claimant, and to promote the public interest in preventing and punishing blackmail are both factors which weigh strongly in favour of the grant of an anonymity order*.'[150] In *AMM v HXW* an article published in a national newspaper had already disclosed some of the important items of information that were the subject of the claim. It therefore

[144] Para 59

[145] Para 60

[146] Para 62

[147] Para 63

[148] [2010] EWHC 2457 (QB)

[149] Para 21

[150] Para 39

followed that if the court was to prevent publication of the identity of the complainant then the only option open to the court was an anonymity order.[151]

139. The issue of blackmail was considered again by Sharp J in *KJH v HGF*[152]. In her judgment Sharp J referred to the strong public policy considerations in cases of this nature: victims of blackmail '*should not be deterred from seeking the protection of the courts for fear that the information which the blackmailer has threatened to reveal will be exposed or their identity as the victim of blackmail will be known*'. While a final determination of the matter must await trial, granting anonymity has the effect not only of protecting the applicants Article 8 rights but also '*the public interest…in promoting the prevention and punishment of blackmail*'.[153]

140. The most significant decision on anonymity is the Court of Appeal's recent judgment in *JIH v News Group Newspapers*[154]. In *JIH* Lord Neuberger MR provided an authoritative summary of the principles that will be applied whenever a court is faced with an application for anonymity:

> (1) The general rule is that the names of the parties to an action are included in orders and judgments of the court.
>
> (2) There is no general exception for cases where private matters are in issue.
>
> (3) An order for anonymity or any other order restraining the publication of the normally reportable details of a case is a derogation from the principle of open justice and an interference with the Article 10 rights of the public at large.
>
> (4) Accordingly, where the court is asked to make any such order, it should only do so after closely scrutinising the application, and considering whether a degree of restraint on publication is necessary, and, if it is, whether there is any less restrictive or more acceptable alternative than that which is sought.

[151] Para 22

[152] [2010] EWHC 3064 (QB)

[153] Para 11

[154] [2011] EWCA Civ 42

(5) Where the court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim, on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.

(6) On any such application, no special treatment should be accorded to public figures or celebrities: in principle, they are entitled to the same protection as others, no more and no less.

(7) An order for anonymity or for reporting restrictions should not be made simply because the parties consent: parties cannot waive the rights of the public.

(8) An anonymity order or any other order restraining publication made by a Judge at an interlocutory stage of an injunction application does not last for the duration of the proceedings but must be reviewed at the return date.

(9) Whether or not an anonymity order or an order restraining publication of normally reportable details is made, then, at least where a judgment is or would normally be given, a publicly available judgment should normally be given, and a copy of the consequential court order should also be publicly available, although some editing of the judgment or order may be necessary.

(10) Notice of any hearing should be given to the defendant unless there is a good reason not to do so, in which case the court should be told of the absence of notice and the reason for it, and should be satisfied that the reason is a good one.[155]

141. Lord Neuberger MR also emphasised that '*the determination of the precise extent of what can be reported about the proceedings themselves is every bit as fact-sensitive as the anterior*

[155] Para 21

exercise of deciding whether to make an order restraining publication of the private information in the first place.'[156]

142. There is an obvious tension between the amount of detail that can be provided about the identity of the parties and the amount of detail that can be disclosed regarding the information that is subject the subject of an injunction. At first instance Tugendhat J accepted a submission from counsel that a court had to proceed in one of two alternative ways. The court could either (a) directly or indirectly disclose the nature of the information in question but anonymise the claimant; or (b) name the claimant but provide no direct or indirect identification of the information subject to the injunction. On appeal Lord Neuberger MR was slightly more circumspect, explaining that in some cases the position will be '*a little less stark*'. Nevertheless, it is plainly correct that where the court orders the identity of the party to be revealed, '*it is hard to envisage circumstances where that would not mean that significantly less other information about the proceedings could be published than if the proceedings were anonymised*'. The converse was equally true: '*if the claimant is accorded anonymisation, it will be almost always appropriate to permit more details of the proceedings to be published than if the claimant is identified*'.[157]

143. Whilst the *JIH* judgment emphasises the fact-sensitive nature of the issue, it appears to favour disclosure of the nature of the information itself rather than disclosure of the parties' names. This is evident in the following passage from Lord Neuberger's judgment:

> *'At least on the face of it, there is obvious force in the contention that the public interest would be better served by publication of the fact that the court has granted an injunction to a anonymous well known person not in public service…than by being told that it has granted an injunction to an identified person to restrain publication of unspecified information of an allegedly private nature.'*[158]

144. His Lordship continued:

[156] Para 5

[157] Para 25

[158] Para 33

> *'More particularly, there is much in the point that the media will generally be better able to discover, and report on, what the courts are doing if they can publish (a) details of the type of case (for instance, as in this case, an unidentified, sexual liaison between an alleged prostitute and an unidentified well known person not in public service in an apparently monogamous relationship) rather than (b) the name of the individual who is seeking to project an unspecified aspect of his or her alleged private life by means of an injunction. As Mr Tomlinson puts it, the former information would normally enable the public to have a much better idea of why the court acted as it did than the latter information.'*[159]

145. However it must also be noted that the Court of Appeal emphasised that '*each case will turn on its own facts*' and that it was wrong to suggest that there was any general rule that anonymisation should always be the preferred option.[160]

ix. Anonymisation of non-parties

146. In *CDE & FGH v MGN Ltd*[161] Eady J took the unusual course of granting anonymity orders in respect of several individuals who were not parties to the claim. The case concerned an application to prevent the disclosure of private information concerning the claimants' private lives. The judge granted an interim injunction and ordered that the parties' names be anonymised. In light of some observations made by the judge in his draft judgment, an application was then made to extend the anonymity order to cover several non-parties who were the object of some critical remarks in the judgment. Those non-parties were a tabloid journalist, the second defendant's solicitor and the second defendant's public relations adviser. The reason for this request was the fact that, as Eady J himself noted, '*my conclusions do not reflect very well on those people*'.

147. In response to the application Eady J emphasised that his conclusions were not judicial findings; all that he had done was to decide on incomplete and untested evidence what the 'likely' outcome of any trial would be. However despite the fact

[159] Para 35

[160] Para 39

[161] [2010] EWHC 3308 (QB)

that there were no judicial findings in his judgment, he nevertheless decided to grant the extension of anonymity sought by the non-parties:

> *'Meanwhile, says [counsel], it might give rise to unfairness if casual observers interpret my observations as though they were the ultimate findings. It is true that much of what I have said is based on recordings and facts which are incontrovertible but, even so, upon closer examination facts sometimes emerge in a different light. That is why I was prepared to go along with counsel's suggestion for the time being. I was reminded of the decision in R v Legal Aid Board, ex parte Kaim Todner [1999] QB 966 and I bear in mind the important policy considerations addressed in that case but, for the reasons canvassed by [counsel], I will grant the anonymity to the non-parties on a temporary basis.'*[162] *[Emphasis added]*

148. A notable aspect of the judgment is the contrast between Eady J's rationale for granting anonymity to the non-parties and his rationale for granting anonymity to the parties themselves. In relation to the non-parties, Eady J's driving concern is the possibility that '*casual observers*' may inappropriately conclude that the court's provisional views represent concrete factual findings. However this invites a number of possible responses. Most importantly, it raises the question whether the courts *should* alter their practices in response to a perceived danger that individuals who have not taken the effort to fully engage with the court's reasoning may misunderstand some of the comments contained in the judgment. It is noteworthy that in *In re Guardian News and Media Ltd* the Supreme Court rejected an argument to the effect that '*the press must be prevented from printing what is true as a matter of fact, for fear that some of those reading the reports may misinterpret them and act inappropriately*.' This was so even though Lord Rodger acknowledged that: '*Doubtless, some may well indeed draw the unjustified inference that [the respondent] fears.*'[163]

x. Privacy claims aimed at protecting a claimant's reputation

149. The relationship between privacy and defamation claims remains in some respects unclear. The issued was raised by the court in *RST v UVW*[164] and recently came to the

[162] Para 89

[163] Para 60

[164] [2009] EWHC 2448

fore in the *Terry* case. In *Terry* Tugendhat J observed that the words which the media were threatening to publish were likely to bear a defamatory meaning; however the claimant had chosen to sue in privacy rather than defamation. This was because any person intending to publish the information would be likely to do so in words for which he would be able to advance a defence to a defamation claim. In those circumstances, the court would apply the rule in *Bonnard v Perryman*[165] (the continued validity of which was confirmed by the court of Appeal in *Greene v Associated Newspapers*[166]) and no interim injunction would be granted by the court.[167]

150. In *Terry* it was argued that the claimant should not be able to escape the strictures of the *Bonnard v Perryman* rule by bringing his claim in privacy. In response, Tugendhat J noted that the relationship between defamation and the new cause of action of misuse of private information '*is not yet clear*'.[168] He surveyed the existing authorities, quoting from *Fraser v Evans*[169] and *Gulf Oil (GB) Ltd v Page*[170], and then concluded that '*it is a matter for the court to decide whether the principle of free speech prevails or not, and that it does not depend solely upon the choice of the claimant as to his cause of action.*'[171] Tugendhat J's judgment thus makes it clear that the court will look behind the way that the claim has been pleaded to the substance of the underlying issues.

151. In *McKennitt v Ash*[172] Buxton LJ said that if a claim for breach of confidence had been brought in order to avoid the rules of defamation '*objections could be raised in terms of abuse of process*'.[173] In *Terry* Tugendhat J held that it was very likely that the nub of the applicant's complaint was '*the protection of reputation*' as opposed to any other aspect of his private life. The claim was '*essentially a business matter*' and the real basis of the applicant's concern was '*the likely impact of any adverse publicity upon the business of*

[165] (1891) 2 Ch 269

[166] [2005] QB 972

[167] *Terry* at para 77

[168] Para 78

[169] [1969] 1 QB 349

[170] [1987] Ch 237

[171] *Terry* at para 88

[172] [2006] EWCA Civ 1714; [2008] QB 73

[173] Para 79

earning sponsorship and similar income'.[174] It followed that, in accordance with *Bonnard v Perryman*, an injunction would not be granted an the interlocutory stage.[175]

152. Tugendhat J then observed that it would only be in limited classes of cases that the law of privacy would give rise to an overlap with the law of defamation. In his view, four classes of case could be identified:

a. Category one: cases where there is no overlap – This category encompasses all cases where the information cannot be said to be defamatory (e.g. *Douglas v Hello Ltd (No. 3)* QB 125 CA, *Murrary v Express Newspapers*[176]). These cases will be governed by the law of confidence, privacy and harassment.

b. Category two: cases where there is an overlap, but where it is unlikely that the protection of reputation is the nub of the claim – This category would cover cases where the information would in the past have been said to be defamatory even though it related to matters that were involuntary (e.g. disease).

c. Category three: cases where there is an overlap but no inconsistency – This category covers cases where he information relates to voluntary personal conduct which is alleged to be seriously unlawful, even if it is personal (e.g. sexual or financial). In these cases, the claimant is unlikely to succeed in either defamation or privacy at an interim application or at trial.

d. Category four: cases where the information relates to conduct which is '*voluntary, discreditable, and personal (e.g. sexual or financial) but not unlawful (or not seriously so)*'. In these cases, it may make a difference whether the claim is governed by the law of defamation or the law of misuse of private information. In defamation, if the defendant can prove one of the libel defences, he will not have to establish any public interest (except in the case of *Reynolds* privilege). However if the claim is governed by the law of misuse of

[174] *Terry* at para 95

[175] Para 123

[176] [2009] Ch 281

private information, then the defendant cannot succeed unless he establishes that it comes within the public interest exception.[177]

153. In *Gray v UVW* the defamation/privacy issue arose again. However on the facts of the case, the court held that it was not actually required to consider whether the claim was in substance a claim for protection of the claimant's private information or for protection of his reputation. The reason for this was that the defendant had not asserted any right to publish the information in question. Tugendhat J explained that in a defamation action the court will not refuse to grant an injunction simply because the action is one for defamation. It will only refuse the application if and when the defendant actually raises an issue or a defence. *Gray* therefore shows that it is incumbent upon the defendant to assert a right to publish the information in question – the court will not address the issue if they do not.

154. The complex relationship between privacy and defamation is likely to receive further consideration in future cases. The approach taken in *Terry* may be controversial. The usual approach in private law is to allow the claimant to select from the available causes of action the one that is most favourable to his circumstances. Tugendhat J's judgment in *Terry* sits uneasily with this general approach. Moreover, the status of the rule in *Bonnard v Perryman* may itself be vulnerable. In an extra-judicial speech in 2010, Eady J asked: '*Is it justifiable to have one test for interlocutory injunctions in a privacy context, governed by s. 12(3) of the Human Rights Act, and another for libel cases, governed by Bonnard v Perryman?*' After all, he observed, '*each of these rules is concerned to afford the appropriate degree of recognition for a right now regarded, apparently, as being under the protection of art. 8 – privacy in the one case and reputation in the other*.'

xi. Procedural issues

a. Injunctions issued before the claim form is issued

[177] *Terry* at para 96

155. When an application for an injunction is made before a claim form has been issued then the applicant will be required to undertake to the court to issue a claim form immediately: CPR 25 and PD25A, paragraph 3.3(1).

156. In *Gray v UVW* Tugendhat J considered several issues that arise from this requirement. The claimant failed to honour the undertaking it had given regarding the issuing of the claim form. Tugendhat J was highly critical of this failure. He stated that wherever an undertaking to the court is not complied with, the court must conduct an enquiry as to why that has happened and what, if any, sanction or order should be imposed as a result.[178]

157. Tugendhat J then stated that under no circumstances would it be acceptable to serve on third parties an order made in proceedings which have not been commenced, unless the applicant has undertaken to the court to issue a claim form immediately (or as the judge may direct) and the applicant intends to comply with that undertaking.[179] The judge explained that if the parties to a dispute subsequently reach an agreement then the claimant must either discontinue the action of proceed with it. For a claimant there is no third option.[180] At the end of his judgment Tugendhat J reiterated that undertakings to the court must be honoured and cautioned that: '*Those advising clients on the making of applications for injunctions have a responsibility to read the Practice Direction 25A and to comply with it.*'[181]

158. Tugendhat J returned to this issue in *Goldsmith v BCD*.[182] The claimants had obtained interim injunctions in 2008. In accordance with the practice prevailing at the time, no return date was listed by the court; however the claimants undertook to serve claim forms as soon as practicable. The claimants subsequently failed to honour this undertaking. Tugendhat J described this as '*a very serious matter*'. The failure meant that it was necessary for the court to hold an oral hearing, because such a breach

[178] Para 35

[179] Para 36

[180] Para 37

[181] Para 65

[182] [2011] EWHC 674 (QB)

'*must be fully explained to the court, and the court must consider what to do in response to it*'.[183]

159. Tugendhat J emphasised that failures to comply with undertakings to the court must be dealt with in a way that is so far as possible '*consistent with justice and with the need to mark the seriousness of such breaches of an undertaking*'.[184] One possible course for the court would have been to discharge the 2008 orders and strike out the actions.[185] However on the exceptional facts of *Goldsmith*, Tugendhat J was prepared to dispense with service of the Claim Forms.

160. The judgments in *Gray* and *Goldsmith* therefore serve as a timely reminder of the professional duties of legal advisers in cases of this nature.

b. The need for a return date

161. CPR Part 25 Practice Direction para 5.1 sets out the provisions which any injunction must contain, unless the court orders otherwise. This includes a requirement that the injunction should include a return date:

> *'5.1 Any order for an injunction, unless the court orders otherwise, must contain… (3) if made without notice to any other party, a return date for a further hearing at which the other party can be present.'*

162. In *Terry* Tugendhat J observed that a return date would serve two important functions if an injunction was granted. First, it would enable the evidence of the applicant and any other witness to be put before the court in a statement which was personally made (no such statements had yet been provided to the court). Secondly, it would enable the courts to monitor the progress of any attempts to find a Respondent and to serve the application on him/her.[186]

[183] Para 8

[184] Para 40

[185] Para 41

[186] *Terry* at Para 33

163. In *G & G v Wikimedia Foundation Inc*[187] Tugendhat J stated that as a general rule the Practice Direction should be complied with. Otherwise, orders may last longer than is required, with detrimental consequences for the public's confidence in the administration of justice. Accordingly, advocates applying for a departure from the Practice Direction should draw to the attention of the judge that that is what the draft order provides, and they should explain the evidence or in their submissions why the departure is sought.[188]

164. In *Goldsmith v BCD*[189] Tugendhat J stated that the inclusion of a return date need not always involve claimants in substantial unnecessary legal costs. Where at the return date the only relief that the claimant seeks is agreed with all the parties concerned, or where it is an extension of time for service of the claim form, or an extension of an anonymity order, or some other ancillary provision, this can generally be done on paper.[190] Tugendhat J emphasised that the Claimant's solicitors can write to the court setting out what has happened since the grant of the original injunction and why it is that an extension of the injunction to a new return date is now required.[191]

c. Prior notification of an application for an injunction

165. An important question that arises whenever a person intends to apply for an injunction to restrain publication of private information is who should be notified of that application. Section 12(2) of the Human Rights Act provides:

> *'(2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied –*
>
> *(a) that the applicant has taken all practicable steps to notify the respondent; or*
>
> *(b) there are compelling reasons why the respondent should not be notified.'*

[187] [2009] EWHC 3148 (QB), para 26

[188] Para 25

[189] [2011] EWHC 674 (QB)

[190] Para 60

[191] Para 61

166. To similar effect CPR PD 25 paragraph 4(3) provides:

> *'(3) except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.'*

167. The nature of the respondent is obviously important. In *Terry* Tugendhat J commented that whilst '*secrecy may be essential in the case of a respondent who, if tipped off, is likely to defeat the purposes of an application by publishing the material before it can be shown to have had notice of the injunction, or before it can be granted*' it was far more difficult to establish that secrecy was necessary where the target of the application was a national newspaper.[192]

168. In *X & Y v Persons Unknown*[193] Eady J discussed the scope of the duty to notify:

> *'where a litigant intends to serve a prohibitory injunction upon one or more [media publishers], in reliance on the Spycatcher principle, those individual publishers should be given a realistic opportunity to be heard on the appropriateness or otherwise of granting the injunction, and upon the scope of its terms.*'

169. This requirement was refined in *WER v REW*[194] where Sir Charles Gray stated:

> *'…Eady J cannot have been contemplating an obligation being imposed on individual claimants, who may be of limited means, to arrange through their legal advisers to serve what might be a substantial body of evidence on a large number of media non-parties. It seems to me that the obligation to serve them must, as a matter of common sense and economy, be confined to those media organisations whom the claimant has reason to believe have displayed an interest in publishing the story which the claimant is seeking to injunct.'*[195] *[Emphasis added]*

170. In *TUV* it was argued that there should not be a blanket obligation to give prior notification to all non-parties whom the applicant would, if successful, intend to serve with the court's order. According to the claimant, such a requirement would be disproportionate and would discourage legitimate attempts to protect Article 8

[192] Para 109

[193] [2007] EMLR 290

[194] [2009] EMLR 304

[195] Para 19

rights. Eady J said that to answer this it was necessary to have in mind the court's objective in these cases: namely, to provide a fair and practical balance between the potentially competing Convention rights of all relevant players. The applicant's rights under Articles 6 and 8 must be considered, as must the Article 10 rights of the media publishers. Applying these principles, Eady J held that:

> *'a sensible balance of competing rights would generally be achieved by requiring them only to serve those whom they have reason to believe will have an interest in the story. They should not be required to speculate or guess, but if there are solid grounds in the light of the available evidence to think that a particular media group has shown an interest in the material, it is right that they should be notified.'*[196] *[Emphasis added]*

171. In view of the other protections that are available to the media, Eady J did not think that it was proportionate to impose an even heavier general burden on applicants. On this point he referred to the protection afforded by the applicant's obligation of free and frank disclosure and by the standard provision included in such injunctions to the effect that an application can be made at very short notice to vary or discharge the order.[197] Against this background, Eady J said that the need for prior notification should be addressed according to the facts of each case. It was not right that an applicant's lawyers should have to give prior notification to each and every media group simply on the basis that they might be interested in the story or private information if they hear about it. Instead, '*the law should only impose an obligation to notify those who are already believed to have shown some interest in publishing*.'[198]

d. Evidence in support of application for interim injunction

172. In *Terry* the evidence presented to the court in support of the application for an interim injunction consisted of a statement by provided on the claimant's behalf by the claimant's business partners to his solicitors. Tugendhat J considered this '*a matter of concern*' since the business partners who produced the statement were not solicitors. He explained:

[196] Para 25

[197] Ibid.

[198] Para 26

> *'The significance of this is that solicitors owe duties to the court and are skilled in taking statements from witnesses. It is very important that information from witnesses should be what the witness truly believes, and that words should not be put into the mouth of a witness: see White Book (2010) note 32.8.1. An applicant for interim relief owes duties of full and frank disclosure to the court. No one but a solicitor will be in a position to assess what that duty requires in the context of an application such as this. When the evidence before the court is not verified by the person who is the source for the information, there is not the assurance that that person feels at risk of sanctions if the information is untrue.'*[199] *[Emphasis added]*

173. Tugendhat J inferred from the circumstances that the business partners had a commercial interest in protecting the claimant's reputation. This left the judge in serious doubt as to whether the information sourced through the business partners was full and frank.[200] The judgment therefore highlights the importance of ensuring that evidence adduced in support of an application is provided in the requisite form and is compiled under the oversight of a competent solicitor.

e. Duty to provide third party's legal advisers with certain documents

174. CPR 25A PD 9.2 provides that where a person served with an order requests a copy of the materials read by the judge and a note of the hearing, the applicant must promptly comply with that request, unless the court orders otherwise. In *TUV v Persons Unknown* the claimant sought a modification of this requirement to the effect that any third party must provide a written undertaking only to use those documents for the purposes of the present proceedings. Eady J acceded to this request. The standard collateral undertakings owed in respect of documents disclosed during the course of proceedings did not offer the claimant adequate protection in respect of documents passed to a third party pursuant to CPR 25A PD 9.2. Eady J therefore held that:

> *'It will often be reasonable to include it as a protection for the relevant claimant's Article 8 rights. It is difficult to imagine circumstances (and certainly there are none*

[199] Para 32

[200] Para 33

in the present case) where such a restriction upon the relevant third party would constitute a disproportionate interference with his or her rights.'[201]

f. The Spycatcher principle and injunctions contra mundum

175. Under the so-called '*Spycatcher*' principle (see *Attorney-General v Times Newspapers Ltd*[202]) an interim injunction is binding on third parties who have notice of the injunction. For this reason, it is common practice for a claimant to serve an interim injunction on any media outlet or individual whom he suspects may wish to publicise the information that is the subject of the injunction. However in *Jockey Club v Buffham*[203] Gray J referred to the Court of Appeal's analysis in *Attorney-General v Punch Ltd*[204] and held that, in contrast to interim injunctions, a final injunction is not binding on third parties. From a claimant's perspective, therefore, interim injunctions have obvious benefits compared to final injunctions.

176. In *X and Y v Persons Unknown*[205] Eady J explained the reasons for the distinction between interim and final injunctions:

> *'The Spycatcher doctrine, as a matter of logic, has no application to a permanent injunction since, obviously, there is no longer any need to preserve the status quo pending a trial. The doctrine is directed at preventing a third party from frustrating the court's purpose of holding the ring: see e.g. the discussion in Att.-Gen. v Punch [2003] 1 AC 1046 at [87] – [88] in the Court of Appeal and at [95] in the House of Lords; and Jockey Club v Buffham [2003] QB 462 (Gray J).'*

177. In *Gray* the claimant applied for an order that all further proceedings be stayed except for the purpose of carrying into effect the order of the court (an interim injunction together with a partial anonymity order). This application was granted by Tugendhat J.[206] In making this order the judge noted that an alternative would have been to enter final judgment (which can be done where the parties both consent or

[201] Para 16

[202] [1992] 1 AC 191

[203] [2003] QB 462

[204] [2001] QB 1028

[205] [2006] EWHC 2783 (QB); [2007] EMLR 290

[206] Para 43

where the requirements of CPR Part 24 are satisfied). However he noted that this would be disadvantageous a claimant's point of view, since a final injunction is not binding on third parties.[207]

178. *Gray* represents an interesting development on this issue. The claimant was able to take advantage of the *Spycatcher* principle notwithstanding the fact that the order of the court was effectively a final order. Whilst Tugendhat J emphasised that his decision to order a stay in the present case should not be taken as authority for the proposition that that is the right course to take, it demonstrates that the courts may be amenable to such requests. It remains to be seen what approach would be taken after the issue has been fully argued.

179. The recent decision in *OPQ v BJM* & CJM[208] is another important development in this area. In that case Eady J issued a final injunction *contra mundum* (i.e. an injunction that is binding against all the world). He explained that the jurisdiction to issue injunctions *contra mundum* had evolved in the aftermath of the Human Rights Act. For a long time the courts had an undisputed power to issue *contra mundum* in wardship proceedings, in exercise of the court's *parens patriae* jurisdiction. In *Venables and Thompson v News Group Newspapers Ltd*[209] Dame Elizabeth Butler-Sloss P then held that the court had jurisdiction to grant an injunction enforceable against all the world to protect the new identities of the two claimants. The power to order this remedy derived from the need to protect the claimants' rights under Articles 2 and 3. Similarly in *X (formerly Bell) v O'Brien*[210], Dame Elizabeth Butler-Sloss P held granted *contra mundum* relief to protect the claimant's Article 8 rights. In the light of these authorities, Eady J concluded that:

> *'…the court's power to grant an injunction contra mundum is not confined to the wardship jurisdiction; nor to children; nor to "individuals who cannot take care of*

[207] Para 42

[208] [2011] EWHC 1059 (QB)

[209] [2001] Fam 430

[210] [2003] EWHC 1101 (QB)

themselves". The remedy is available, wherever necessary and proportionate, for the protection of Convention rights whether of children or adults.'[211]

CONCLUSION

180. The law of privacy and the media is at an interesting stage in its development. On the one hand the fundamental principles relating to the balance which must be struck between Articles 8 and 10 of the Convention have been settled. On the other hand, the developing law must now be made to work in the digital age. The boundaries of liability in relation to internet publication are coming into focus. The court's procedures are being adapted. As media lawyers we are living in interesting times.

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September 2011.

[211] *OPQ v BJM & CJM* at para 18