

PRIVACY – THE SWINGING PENDULUM

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Misuse of private information

In **A v B plc [2003] QB 195**, Lord Woolf CJ explained that the court, as a public authority, was able to fulfil its duty under section 6 of the Human Rights Act 1998 Act “by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence” [4]. He went on to say “There is a tension between the two articles which requires the court to hold the balance between the conflicting interests they are designed to protect. This is not an easy task but it can be achieved by the courts if, when holding the balance, they attach proper weight to the important rights both articles are designed to protect. Each article is qualified expressly in a way which allows the interests under the other article to be taken into account” [6].

In **Campbell v MGN Ltd [2004] AC 457** Lord Nicholls said “The time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence ... and are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority” [17]. Also, on the basis that information about an individual's private life is more naturally described as “private” rather than “confidential” Lord Nicholls said that “The essence of the tort is better encapsulated now as misuse of private information” [14].

In keeping with sections 2, 3, 6 and 12 of the Human Rights Act 1998: “The Court should, in so far as it can, develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights. In considering the nature of those rights, account should be taken of the Strasbourg jurisprudence. In particular, when considering what information should be protected as private pursuant to Article 8, it is right to have regard to the decisions of the European Court of Human Rights” (**Douglas v Hello! Ltd (No 3) [2006] QB 125**, Lord Phillips MR at [53]).

Thus, Articles 8 and 10 are now “the very content of the domestic tort that the English court has to enforce” (**McKennitt v Ash [2008] QB 73**, Buxton LJ at [11]).

However, (see **Douglas v Hello! Ltd (No 3) [2006] QB 125**, Lord Phillips MR at [53]), implementation of Article 8 rights has been achieved by the less than satisfactory means of requiring the Court to “shoehorn” within the cause of action of breach of confidence claims for misuse of private information (in that case, claims concerning publication of unauthorised photographs of a private occasion).

Numerous commentators – both academics and judges speaking or writing in an extra-judicial capacity - have expressed varying degrees of criticism and concern about the efficacy of judicial attempts to expand and distort the cause of action for

breach of confidence in order to provide a basis for privacy claims. In part, these views focus on the inadequacy of the incremental (case by case) evolution of an existing cause of action to cater for what would otherwise be the failure of the law to provide protection against invasions of privacy in a host of different factual situations; and in part on the suggested desirability of maintaining a distinction between breach of confidence on the one hand and privacy on the other.

The incremental approach plainly tends to result in uncertainty, delay and costs. As Buxton LJ observed when comparing **Campbell v MGN Ltd [2004] AC 457** and **Von Hannover v Germany [2005] 40 EHRR 1**, “Had the House had the benefit of *Von Hannover’s* case a shorter course might have been taken” (McKennitt at [39]).

This is particularly so because “Put shortly, the precedential rules of English domestic law apply to interpretations of Convention jurisprudence”: **McKennitt v Ash [2008] QB 73**, Buxton LJ at [62]; **Kay v Lambeth LBC [2007] 2 AC 465**. Therefore, even where it seems clear that a decision of a higher English court has been superseded by a later decision in Strasbourg, it is for the Supreme Court and not the lower courts to give effect to that later decision. This is in spite of the fact that (see **R (S) v Chief Constable of South Yorkshire Police [2004] 1 WLR 2196**, Lord Steyn at [27]): “... [on] the question of objective justification under Article 8(2) the cultural traditions in the United Kingdom are material ... the same is not true under article 8(1). Expressing the unanimous view of the House in *R (Ullah) v Special Adjudicator [2004] 3 WLR 23*, 39-40, para 20 Lord Bingham of Cornhill observed that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. He added: ‘It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’ The question whether the retention of fingerprints and samples engages Article 8(1) should receive a uniform interpretation throughout member states, unaffected by different cultural traditions. And the current Strasbourg view, as reflected in decisions of the Commission, ought to be taken into account”.

Accordingly, when, in **Murray v Big Pictures Ltd [2008] 3 WLR 1360**, the Court of Appeal was asked to rule on whether there was a tension between the decision of the House of Lords in **Campbell v MGN Ltd [2004] AC 457** and that of the European Court of Human Rights in **Von Hannover v Germany [2005] 40 EHRR 1**, the Court focussed on providing an exegesis of the decision in **Campbell** (see [21]-[35]), which it then applied to the presumed facts of that case. The Court did not consider it necessary to analyse **Von Hannover** in any detail: “Suffice it to say that, in our opinion, the view we have expressed is consistent with that in *Von Hannover* ... we have little doubt that, if the assumed facts of this case were to be considered by the ECtHR, the court would hold that David had a reasonable expectation of privacy and it seems to us to be more likely than not that, on the assumed facts, it would hold that the article 8/10 balance would come down in favour of David” [59]-[60].

Reasonable expectation of privacy – the concept

Campbell v MGN Ltd [2004] AC 457, Lord Nicholls: “Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy” [21]. Lord Hope: “The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed was private and not public. There must be some interest of a private nature that the claimant wishes to protect: *A v B plc* [2003] QB 195, 206 paragraph 11(vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual (“A”) would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities” [91].

In accordance with the detailed analysis contained in **Murray v Big Pictures Ltd [2008] 3 WLR 1360**, the relevant principles to be derived from *Campbell* can be summarised as follows: “The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]: “The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.” We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee” [35].

In **Von Hannover v Germany [2005] 40 EHRR 1**, the European Court of Human Rights did not have to consider publication of any of photographs showing Princess Caroline with her children, because the Constitutional Court in Germany allowed her appeal in respect of those photographs on the grounds that they infringed her rights under the Basic Law and referred the case to the Federal Court on that point ([25], [48]).¹ These included a photograph of her “with her children Peter and Andrea” and a photograph which showed “her son Andrea with a bunch of flowers in his arms” ([13]). Leaving aside photographs of the children, the photographs in respect of which the European Court of Human Rights held that Princess Caroline’s Article 8 rights had been violated included photographs which showed her “doing shopping with a bag slung over her shoulder”, “alone on a bicycle”, “doing her shopping at the market, accompanied by her bodyguard”, and “leaving her house in Paris” ([13], [15], [49]). The Court said with regard to all of these photographs that “In the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the ambit of her private life” [53]. In reaching this conclusion, the Court reasoned that private life “includes a person’s physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended

¹ After which Princess Caroline’s claim in respect of these photographs was compromised on the basis of undertakings given by the publishers.

to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. ... There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'" [50]. Moreover:

- (1) At [59], the Court observed that, "The present case does not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual."
- (2) At [61], at the start of its application of the principles to the facts of the case, the Court made the following remarks about the photographs in issue: "The Court points out at the outset that in the present case the photos of the applicant in the various German magazines show her in scenes from her daily life, thus engaged in activities of a purely private nature such as practising sport, out walking, leaving a restaurant or on holiday. The photos, in which the applicant appears sometimes alone and sometimes in company, illustrate a series of articles with such anodyne titles as 'Pure happiness', 'Caroline...a woman returning to life', 'Out and about with Princess Caroline in Paris' and 'The kiss. Or: they are not hiding anymore...'"
- (3) At [64], the Court observed: "...the published photos and accompanying commentaries relate exclusively to details of the applicant's private life."
- (4) At [77], the Court summarised the informational content of the photographs as follows: "where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded".

Following *Von Hannover*, in **McKennitt v Ash [2008] QB 73**, Buxton LJ said at [40]: "As it is put in a work shown to us by the media parties, *Fenwick & Phillipson, Media Freedom Under the Human Rights Act* (2006), p 764, "the test propounded - of a reasonable expectation of privacy, of whether the information is obviously private - is to be structured by reference to the Article 8 case law". It thus remains for the national court to apply that case law, as it currently stands, to the facts before it."

In **Murray v Big Pictures Ltd [2008] 3 WLR 1360**, Sir Anthony Clarke MR summed the matter up at [36]: "As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

S and Marper v UK (Nos 30562/04 and 30566/04) [2009] 48 EHRR 50 at [66]-[67]:

“The Court recalls that the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002 III, [35 EHRR 1](#), and *Y.F. v. Turkey*, no. 24209/94, § 33, ECHR 2003 IX, [39 EHRR 34](#)). It can therefore embrace multiple aspects of the person's physical and social identity (see *Mikulić v. Croatia*, no. 53176/99, § 53, ECHR 2002-I, BAILII: [\[2002\] ECHR 27](#)). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (see, among other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001, [33 EHRR 10](#), I with further references, and *Peck v. the United Kingdom*, no. 44647/98, § 57, ECHR 2003 I, [36 EHRR 41](#)). Beyond a person's name, his or her private and family life may include other means of personal identification and of linking to a family (see *mutatis mutandis Burghartz v. Switzerland*, 22 February 1994, § 24, Series A no. 280 B; and *Ünal Tekeli v. Turkey*, no. 29865/96, § 42, ECHR 2004 X (extracts), [42 EHRR 53](#)). Information about the person's health is an important element of private life (see *Z. v. Finland*, 25 February 1997, § 71, *Reports of Judgments and Decisions* 1997 I, [25 EHRR 371](#)). The Court furthermore considers that an individual's ethnic identity must be regarded as another such element (see in particular Article 6 of the Data Protection Convention quoted in paragraph 41 above, which lists personal data revealing racial origin as a special category of data along with other sensitive information about an individual). Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20, § 45, [21 EHRR 83](#)). The concept of private life moreover includes elements relating to a person's right to their image (*Sciacca v. Italy*, no. 50774/99, § 29, ECHR 2005-I, [43 EHRR 20](#)).

The mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8 (see *Leander v. Sweden*, 26 March 1987, § 48, Series A no. 116, [9 EHRR 433](#)). The subsequent use of the stored information has no bearing on that finding (*Amann v. Switzerland* [GC], no. 27798/95, § 69, ECHR 2000-II, [30 EHRR 843](#)). However, in determining whether the personal information retained by the authorities involves any of the private-life aspects mentioned above, the Court will have due regard to the specific context in which the information at issue has been recorded and retained, the nature of the records, the way in which these records are used and processed and the results that may be obtained (see, *mutatis mutandis*, *Friedl*, cited above, §§49-51, and *Peck v. the United Kingdom*, cited above, § 59).”

Reklos & Davourlis v Greece (No. 1234/05) [2009] EMLR 290, [2009] ECHR 200: “A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control use of

that image. Whilst in most cases the right to control such use involves the possibility of an individual to refuse publication of his or her image, it also covers the individual's right to object to recording, conservation and reproduction of an image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of that image" [40]. The Court observed that, since he was a minor, the child's right to protection of his image had been in the hands of his parents. Their consent had not been sought at any point, not even with regard to the keeping of the negatives, to which they objected. The Court noted that the negatives could have been used at a later date against the wishes of those concerned. The Court concluded that the Greek courts had not taken sufficient steps to guarantee the child's right to protection of his private life, in breach of Article 8.

No confidence in iniquity - and no reasonable expectation of privacy either?

The ambit of the public interest defence to claims for breach of confidence was summed up in **Attorney-General v Guardian Newspapers (No 2)** [1990] 1 AC 109 ("*Spycatcher*") by Lord Goff of Chieveley at 282: "The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure. Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made "the confidant of a crime or a fraud": see *Gartside v Outram* [1857] 26 LJ Ch 113, 114, *per* Sir William Page Wood V-C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 260, *per* Ungood-Thomas J, and *Lion Laboratories Ltd v Evans* [1985] QB 526, 550, *per* Griffiths LJ. It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892. A classic example of a case where limited disclosure is required is a case of alleged iniquity in the Security Service."

Although citation of pre-HRA authorities was deprecated in **A v B plc** [2003] QB 195, examples of a cases in which disclosure to the world at large has been held to be justified in the public interest, include, in addition to **Lion Laboratories Ltd v Evans** [1985] QB 526, **Initial Services Ltd v Putterill** [1968] 1 QB 396, where the Court of

Appeal held that the exceptions to the implied obligation of an employee not to disclose information or documents received in confidence extended to any misconduct of such a nature that it ought in the public interest to be disclosed to one who had a proper interest to receive it, which might include the press. Lord Denning MR at 405 (citing **Annersley v Anglesea (Earl)** [1743] LR 5 QB 317n; **17 State Tr. 1139**) explained that exposure of wrongdoing should not be prevented, even if it is in breach of confidence, because “no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of the society to destroy the public welfare”.

In **Cream Holdings Ltd v Banerjee** [2006] 1 AC 253 the principal events related to tax evasion. Although the case involved a commercial confidence – arguably a “societal interest” rather than a Convention right for the purposes of Article 10(2) – there is no indication that the Courts approached this any differently from an Article 8 right. The House of Lords, reversing the majority decision of the Court of Appeal, agreed with the dissenting judgment of Sedley LJ that these events were clearly matters of serious public interest such that restraint by interim injunction was inappropriate.

Reasonable expectation of privacy – examples of factual considerations

In **Woodward v Hutchins** [1977] 1 WLR 760 the Court of Appeal discharged an interim injunction obtained by some popular musicians against their former press relations agent:

(1) Bridge LJ expressed the principle in wide terms (at 765):
“It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light.”

(2) Lord Denning MR adopted a stricter approach (at 763-764), placing the emphasis on the public interest in correcting a false image if it had been fostered:
“If a group of this kind seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a question of balancing the public interest in maintaining the confidence against the public interest in knowing the truth..... In this case the balance comes down in favour of the truth being told, even if it should involve some breach of confidential information. As there should be “truth in advertising”, so there should be truth in publicity. The public should not be misled.”

In **Theakston v MGN Ltd** [2002] EMLR 398 Ouseley J (at [68]) considered that the comments of Lord Denning MR and Bridge LJ applied to the case of a television presenter who had courted publicity as a man sexually attractive to many women, and had not objected to those with whom he had sexual relations discussing publicly

those relations in a manner that was generally favourable to him, but then sought to restrain publication of details of his sexual activity in a brothel.

In **Campbell v MGN Ltd [2004] AC 457**, Lord Hope explained at [122]: “The European court has recognised that a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television: *PG and JH v United Kingdom* Reports of Judgments and Decisions 2001-ix, p 195, para 57. But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain. In *Peck v United Kingdom* (2003) 36 EHRR 719, para 62 the court held that the release and publication of CCTV footage which showed the applicant in the process of attempting to commit suicide resulted in the moment being viewed to an extent that far exceeded any exposure to a passer-by or to security observation that he could have foreseen when he was in that street.”

In **McKennitt v Ash [2006] EMLR 178**, Eady J said at [58] “the mere fact that information concerning an individual is “anodyne” or “trivial” will not necessarily mean that Article 8 is not engaged”; “Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home” [135]; but, in contrast, a description of a shopping trip was said to be “anodyne, and not such as to attract any obligation of confidence” [138].

Informational autonomy was recognised by the Court of Appeal in **Douglas v Hello! Ltd (No 3) [2006] QB 125** at [253]-[259]: “The Court of Appeal [in *Douglas v Hello! Ltd* [2001] QB 967] did not have the benefit of the reasoning in the House of Lords in *Campbell v MGN* or, even more significantly for present purposes, the reasoning of the European Court of Human Rights in *Von Hannover v Germany* 40 EHRR 1. Had the court had the opportunity to consider those two decisions, we believe that it would have reached the conclusion that the Douglases appeared to have a virtually unanswerable case for contending that publication of the unauthorised photographs would infringe their privacy ... Of course, as recently emphasised by the House of Lords in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, a claimant seeking an interlocutory injunction restraining publication has to satisfy a particularly high threshold test, in light of section 12(3) of the Human Rights Act 1998. However, with the benefit of the reasoning in *Campbell v MGN Ltd* [2004] 2 AC 457 and *Von Hannover v Germany* 40 EHRR 1, we consider that this threshold test was in fact satisfied by the Douglases when they sought the interlocutory injunction in this case.”

Photographs

As the Court of Appeal observed in **Douglas v Hello! Ltd (No 3) [2006] QB 125**, Lord Phillips MR giving the judgment of the Court at [84]: “Special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would

be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive. This is quite apart from the fact that the camera, and the telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public." At [105]-[107] the Court of Appeal made a number of further points about photographs, ending as follows at [107]: "There is a further point. The objection to the publication of unauthorised photographs taken on a private occasion is not simply that the images that they disclose convey secret information, or impressions that are unflattering. It is that they disclose information that is private. The offence is caused because what the claimant could reasonably expect would remain private has been made public. The intrusion into the private domain is, of itself, objectionable."

This accords with a long line of cases containing statements to similar effect. In **Theakston**, for example, photographs were restrained, although text was not.

Children

As the Court of Appeal observed in **Murray** at [45]: "The courts have recognised the importance of the rights of children in many different contexts and so too has the international community: see eg *R v Central Independent Television Plc* [1994] Fam 194 per Hoffmann LJ at 204-5 and the United Nations Convention on the Rights of the Child, to which the United Kingdom is a party".

Specifically, so far as concerns tensions between Article 8 on the one hand and Article 6 on the other, the distinction between "the interests of juveniles" and the "protection of the private lives of the parties" is one which is reflected in domestic jurisprudence. Moreover, children enjoy a special position in the context of family law, as was recently considered of by the President in **Re Child X (Residence and Contact – Rights of media attendance – FPR Rule 10.28(4)) [2009] EMLR 26** at [26]-[37] and as reflected in his statement at [48]: "Whilst the principle of open justice is important in civil proceedings concerning children, the need for the protection of children from publicity in the course of proceedings which concern them, was long ago recognised at common law in *Scott v Scott*, and is provided for in the statutory provisions as to identification to which I have referred at paragraphs 29-31 above."

Privacy and public domain

The first of three limiting principles to the duty of confidence was expressed in *Spycatcher*, Lord Goff at p282: "The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it."

However, and especially in privacy cases, the question of whether the material is in the public domain involves careful analysis of (1) the information's accessibility, and how general it is; (2) the extent to which the information has, or is likely to have been, or continues to be, accessed in consequence of that accessibility; and (3) the extent to which the information can be said to have lost the necessary quality of confidentiality in light of (1) and (2) taking account of, amongst other things, the extent of further harm that may be caused by continued or further publication.

The need to adopt a more purposive examination of public domain in order to give effective protection in cases of confidence or privacy has repeatedly been recognised in subsequent cases. Thus, in **A v M (Family Proceedings: Publicity) [2000] 1 FLR 562**, Charles J held that children would be likely to suffer harm if allegations which had already been made public were repeated, stating at p565: "... the repetition of material that has been placed in the public domain can be damaging to a child".

In **Venables and Thompson v News Group International [2001] Fam 430**, Butler Sloss P continued injunctions for the protection of the identity of Venables and Thompson under the doctrine of the law of confidence, notwithstanding the risks of material becoming public by reason of acts committed outside England and Wales resulting in information being placed on the internet. She imposed a further proviso in the injunctions to protect the special quality of the new identity, appearance and addresses of the claimants or information leading to that identification, even after that information had entered the public domain to the extent that it had been published on the internet, or elsewhere such as outside the UK. She did so on the basis that the injunctions could prevent wider circulation of that information through the newspapers or television or radio.

In **Re X and Y (Children) [2004] EMLR 607** Munby J gave consideration to whether there was jurisdiction to restrain publication of material in the public domain, concluding at [48]: "There was a certain amount of debate before me as to whether the court also has jurisdiction to restrain the re-publication of information which is already in the public domain. In my judgment the court plainly has jurisdiction to make such an order. That seems to me necessarily to follow from the general principles articulated in *Re S*". Munby J then went on in any event to consider the particular meaning of "public domain" in this context, and the distinctions between information that is well-known or currently in the minds of people generally, and that which is merely accessible and the varying factors which will affect the nature of the accessibility of such information.

In **Green Corns Ltd v Claverley Group Ltd [2005] EMLR 748** Tugendhat J reviewed these and other authorities. Having stated that it was not possible in a case about personal information simply to apply Lord Goff's test of whether the information is generally accessible, and to conclude that if it is, then that is the end of the matter, he concluded at [81]: "... the information as to the addresses which is sought to be restrained is not in the public domain to the extent, or in the sense, that republication could have no significant effect, or that the information is not eligible for protection at all. The information as to the addresses linked with information as to the business

of the applicant and thus to the likely disabilities and other characteristics of the occupants of the addresses brings together matters which together amount to new information which was previously accessible to the public only in a limited and theoretical sense. Publication or republication risks causing serious harm to the children and carers who occupy, or are to occupy, the addresses concerned. The extent to which the material has or is about to become available to the public is not, on the evidence of this case, a reason for withholding the injunction sought."

In **Douglas v Hello! Ltd (No 3)** at [105] the Court of Appeal said: "In general, however, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, though this may not always be true ...The same may generally be true of private information of a personal nature. Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it."

The correct approach towards balancing competing Convention rights

The Court must carry out the parallel analysis mandated by the House of Lords in **Re S [2005] 1 AC 593** (Lord Steyn at [17]): "First, neither article 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."

Accordingly, there are "two key questions which must be answered in a case where the complaint is of the wrongful publication of private information. They are first, whether the information is private in the sense that it is in principle protected by Article 8 (ie such that Article 8 is in principle engaged) and, secondly, if so, whether in all the circumstances the interest of the owner of the information must yield to the right to freedom of expression conferred on the publisher by Article 10" (**Murray v Big Pictures Ltd [2008] 3 WLR 1360**, Sir Anthony Clarke MR at [27]).

As the structure of Articles 8 and 10 of the Convention are the same, the like considerations apply to Article 8(2) as apply to Article 10(2).

In this regard, the House of Lords in **R v Shayler [2003] 1 AC 247** summarised the approach to be adopted in relation to Article 10 (2) as follows (Lord Bingham at [23]): "It is plain from the language of article 10 (2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10 (2) only if it is prescribed by law, is directed at one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a

democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside v United Kingdom* (1976) 1 EHRR 734, 754 para 48. One must consider whether the interference complained of corresponded to a pressing social need, whether it is proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times v United Kingdom* (1979) 2 EHRR 245, 277-278 para 62."

Further, in *Shayler* Lord Hope said at [56]: "The principle of legality requires the court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third, is whether, assuming that these two requirements are satisfied, it is nevertheless open to the criticism on the Convention ground that it was applied in a way that is arbitrary because, for example, it has been resorted to in bad faith or in a way that is not proportionate."

An interference with the right to respect for private life cannot be said to be "necessary in a democratic society" unless: (a) relevant and sufficient reasons are given by the national authority to justify the restriction; (b) the restriction on protection corresponds to a "pressing social need"; and (c) it is proportionate to the legitimate aim pursued. See the decisions of the European Court of Human Rights cited and applied by Lord Bingham in *Shayler* in the passage cited above.

In a concurring speech in *Shayler* [61], Lord Hope elaborated on the meaning of proportionality in this context and concluded that the following three stage test should be applied: (a) whether the objective to be achieved - the pressing social need - is sufficiently important to justify limiting the fundamental right; (b) whether the means chosen to limit that right are rational, fair and not arbitrary; and (c) whether the means used impair the right as minimally as possible.

The same approach can be applied to conflicts with other rights, such as Article 6.

The relevance of a confidential relationship

As Bingham LJ observed in *Spycatcher* (at 217H to 218B-C): "In the ordinary case where an employer, principal or other confider sues to restrain the disclosure of confidential information confided in a commercial context, the role of the court is very limited. It will consider whether the information was and remains confidential, whether it was imparted or acquired in circumstances giving rise to a duty of confidence and whether there has been a breach or threatened breach of the duty. If those ingredients of the cause of action are established, and in the absence of an iniquity defence, a restraint on disclosure would ordinarily be imposed unless the confider would be adequately compensated by damages which the other party could pay. There would in such a case be no public interest in favour of disclosure which

could outweigh or counter-balance the public interest in upholding the confider's right to preserve the confidentiality of his information. Indeed, such a case between two private citizens would not be seen as involving the public interest at all."

In **HRH the Prince of Wales v Associated Newspapers Ltd [2007] 3 WLR 222** the Court of Appeal explained at [67]-[68] that: "... a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

Conducting the balancing exercise

On the Article 8 side, "the more intimate the aspect of private life that is being interfered with, the more serious must be the reasons for interference before the latter can be legitimate" (see **Douglas v Hello! Ltd [2001] QB 967**, Keene LJ at [168]).

When striking a balance between competing rights, the Court is not restricted to considering the Article 8 rights of the claimant(s) and the defendant(s) alone, but, where appropriate, can and should take account of the extent to which the threatened publication would adversely affect the Article 8 rights of others, such as close family members (see, for example, **CC v AB [2007] EMLR 312**, Eady J at [42]).

On the Article 10 side, "There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made. But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community, and the intellectual, artistic or personal

development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life" (Baroness Hale in **Campbell** at [158]-[159]).

The majority opinion in **Von Hannover** stated (among other things) that: (1) "a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'imparting information and ideas on matters of public interest' it does not do so in the latter case" [63]; (2) "the context in which these photos were taken – without the applicant's knowledge or consent – and the harassment endured by many public figures in their daily lives cannot be fully disregarded" [68]; (3) "The Court considers that anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life" [69]; (4) "... the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest" [76].

The effect of **Peck v United Kingdom** [2003] 36 EHRR 719, per Lord Hoffmann in **Campbell** at [74] is: "But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of [*Peck*], Mr Peck was filmed on a public street in an embarrassing moment by a CCTV camera. Subsequently, the film was broadcast several times on the television. The Strasbourg court said, at page 739, that this was an invasion of his privacy contrary to Article 8: 'the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995'".

In **Karhuvaara and Iltalehti v Finland** (No 53678/00) [2005] 41 EHRR 51 the Court found that, even assuming the facts gave rise to an interference with the Article 8 rights of a politician, that interference was justified where a newspaper article printed a story concerning her husband's conviction for drunk and disorderly behaviour and affray. The story did not suggest that the politician had been involved but instead focussed on the fact of their marriage. The Court held that although the newspaper report had no express bearing on the wife's political affairs, any interference with Article 8 was limited because her marriage was public knowledge, and "... the public has the right to be informed, which is an essential right in a democratic society that, in certain special circumstances, may even extend to aspects of the private life of public figures, particularly where politicians are concerned (see *Von Hannover v. Germany*, [64]). In this connection the Court notes the District Court's opinion, according to which the conviction of the spouse of a politician could affect people's voting decisions. In the Court's opinion this indicates that, at least to some degree, a matter of public interest was involved in the reporting" [45].

In **Leempoel v Belgium** (App. No. 64772/01, 9 November 2006) the Court said: "In matters relating to striking a balance between protecting private life and the freedom of expression that the Court had had to rule upon, it has always emphasised ... the requirement that the publication of information, documents or photographs in the press should serve the public interest and make a contribution to the debate of general interest ... Whilst the right for the public to be informed, a fundamental right in a democratic society that under particular circumstances may even relate to aspects of the private life of public persons, particularly where political personalities are involved ... publications whose sole aim is to satisfy the curiosity of a certain public as to the details of the private life of a person, whatever their fame, should not be regarded as contributing to any debate of general interest to society."

In **Standard Verlags GmbH v Austria (No 2)** (No 21277/05) [2009] ECHR 853 the Court observed at [52]-[53] that even in the case of a public political figure "idle gossip about the state of his or her marriage or alleged extra-marital relationships ... does not contribute to any public debate in respect of which the press has to fulfil its role of "public watchdog", but merely serves to satisfy the curiosity of a certain readership (see, *mutatis mutandis*, *Von Hannover*, [65])" and that "while reporting on true facts about a politician's or other public person's private life may be admissible in certain circumstances, even persons known to the public have a legitimate expectation of protection of and respect for their private life".

In the result, the correct balance between competing rights very often depends on the extent to which there is a public interest in the disclosure of private information. See, for example:

(1) Lord Hoffmann in **Campbell** at [56] and [60]: "Take the example I have just given of the ordinary citizen whose attendance at NA is publicised in his local newspaper. The violation of the citizen's autonomy, dignity and self-esteem is plain and obvious. Do the civil and political values which underlie press freedom make it necessary to deny the citizen the right to protect such personal information? Not at all. While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right. In the example I have given, there is no public interest whatever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information...The relatively anodyne nature of the additional details is in my opinion important and distinguishes this case from cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office) but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning."

(2) **Jameel (Mohammed) v Wall Street Journal Europe Sprl [2007] 1 AC 359**, Baroness Hale at [147]: “The public only have a right to be told if two conditions are fulfilled. First, there must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying this is information which interests the public - the most vapid tittle-tattle about the activities of footballers’ wives and girlfriends interests large sections of the public but no one could claim any real public interest in our being told all about it.”

(3) **Mosley v News Group Newspapers Ltd [2008] EMLR 679**, Eady J at [131]: “When the courts identify an infringement of a person's Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established "limiting principles" comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell's public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in *Von Hannover* at [60] and [76], would make a contribution to "a debate of general interest"? That is, of course, a very high test. It is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.”

Examples of sufficient public interest in the public being informed

In **London Regional Transport v Mayor of London [2003] EMLR 4** the Court of Appeal held that there was a public interest in enabling the general public (and especially the travelling public in London) to be informed of serious criticism from a responsible source of the value for money evaluation of the proposed public-private partnership involvement in the London Underground; and that this outweighed the preservation of commercial confidentiality in an interim report prepared by a firm of accountants which was based on commercially sensitive and confidential information that had been disclosed by private-sector bidders subject to express confidentiality agreements. An injunction to restrain the publication of a redacted version of that report—which, although interim in form, would in practice have irreversible consequences—was, therefore, refused.

In **Jockey Club v Buffham [2003] QB 462** Gray J held that questions of the integrity and fairness of bookmaking to the betting public; the relationship of bookmakers to trainers and racing stables; and the effectiveness of the Jockey Club’s regulatory role over the sport and industry of horseracing, were questions of proper and serious interest and concern to the public and, in particular, to the very many hundreds of thousands of people interested in horseracing, very many of whom will place bets from time to time. Accordingly, he ruled that the BBC should be allowed to

broadcast information relating to such matters notwithstanding that it had been obtained from a “whistleblower” who divulged it to the BBC in breach of express contractual obligations.

Public interest in the public not being misled

Where a public person chooses to present a false image and make untrue pronouncements about himself or herself, the press will normally be entitled to put the record straight: see **Campbell v MGN Ltd [2003] QB 633** at [43] - cited with approval in the House of Lords at [2004] 2 AC 457, [24] and [82].

This principle is consonant with the public interest considerations that arise in defamation claims, as to which see, for example, **Reynolds v Times Newspapers Ltd [2001] 2 AC 127**, Lord Nicholls at 201: “Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely”. See also Lord Hobhouse at 238: “There is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation. The working of a democratic society depends on the members of that society, being informed not misinformed. Misleading people and the purveying as facts statements which are not true is destructive of the democratic society and should form no part of such a society. There is no duty to publish what is not true: there is no interest in being misinformed. These are general propositions going far beyond the mere protection of reputations”.

Article 8 and the protection of reputation

It is now well established that protection of reputation is a right which is covered by the right to respect for private life under Article 8: **Lindon v France [2008] 46 EHRR 35** at O-I18, p799; **Affaire Radio France v France [2005] 40 EHRR 706** at [31]; **Chauvy v France (2005) 41 EHRR 29**.

In **Lindon v France [2008] 46 EHRR 35** in a concurring opinion, Judge Loucaides stated at O-I11, p800: “The main argument in favour of protecting freedom of expression, even in cases of inaccurate defamatory statements, is the encouragement of uninhibited debate on public issues. But the opposite argument is equally strong: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible journalism. Moreover, such debates may be suppressed if the potential participants know that they will have no remedy in the event that false defamatory accusations are made against them. The prohibition of defamatory speech also eliminates misinformation in the mass media and effectively protects the right of the public to truthful information. Furthermore, false accusations concerning public officials, including candidates for public office, may drive capable persons away from government service, thus frustrating rather than furthering the political process. The right to reputation, having the same legal status as freedom of speech, as explained above, is entitled to effective protection so

that under any circumstances, any false defamatory statement, whether or not it is malicious and whether or not it may be inevitable for an uninhibited debate on public issues or for the essential function of the press, should not be allowed to remain unchecked.”

Surely it follows that the parallel analysis mandated by **Re S** is applicable to a claim for protection of reputation just as much as to any other claim based on Article 8?

In **Greene v Associated Newspapers Ltd [2005] QB 972**, however, the Court of Appeal held with regard to the rule in *Bonnard v Perryman* (in accordance with which – per Brooke LJ at [57]- “in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at a trial”) that “there is nothing in the Convention that requires the rule to be done away with” [77] on the grounds that “In a defamation action, on the other hand, while some damage may be done by permitting the publication of what may later turn out to be false, everyone knows that it is at the trial that truth or falsehood will be tested and the claimant vindicated if the defendant cannot prove that the sting of the libel is justified or that he has some other defence the law will recognise” [78]. The Court therefore held that, in a libel claim, **Re S** has no application at the interim stage.

According to the authors of the Law of Human Rights, 2nd Edn (at §15.28): “The analysis in **Greene** is unsatisfactory and inconsistent with the modern jurisprudence of the Court of Human Rights”.

It is suggested that this is right, as (1) the reasoning in **Greene** pays no due regard to the impact on the claimant’s Article 8 rights of the damage which the claimant may sustain “by permitting the publication of what may later turn out to be false”, (2) the reasoning also makes no allowance for balancing the detriment occasioned to the claimant by refusing an injunction against the detriment occasioned to the defendant (and to potential recipients of the information) by the grant of an injunction, on the concrete facts of each specific case, but instead endorses a mechanistic approach of the kind expressly rejected in **Re S**, (3) the reasoning also takes no account of the public interest in suppressing untrue defamatory statements, and (4) if and in so far as this reasoning is intended to reflect the understanding of the general public, it would appear to proceed on an unrealistic basis as to what “everyone knows”.

Further complications arise, first, because the distinction between truth and falsehood which separates claims in confidence (covering information which is secret and true) and claims in defamation (covering information which is reputation harming and false) does not apply to privacy claims: “The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry” (**McKennitt v Ash [2008] QB 73**, Longmore LJ at [86]). Accordingly, a privacy claim may be brought in respect of information which the claimant says that s/he does not need to identify as true or false (**WER v REW [2009] EMLR 304**) or even which s/he unequivocally states to be false (**P and Ors v Quigley [2008] EWHC 1051 (QB)**).

Second, the information which is sought to be protected may, and not infrequently does, adversely affect the claimant's reputation (an obvious example is adultery). In this regard: "If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process" (**McKennitt v Ash**, Buxton LJ at [79]). As Tugendhat J pointed out in **John Terry (previously referred to as "LNS") v Persons Unknown** [2010] EWHC 119 (QB) at [90]: "The reference to falsity in that passage is because the claimant in that case contested the truth of the book's allegations. The point would have had more force, not less, if the claimant admitted the truth of the allegations, and was attempting to protect an undeserved reputation by recourse to the cause of action in misuse of private information, at least where there was a public interest in her not doing so".

In these circumstances, live arguments may arise as to whether a claim to protect private information is properly to be regarded as governed by the law of defamation. If the answer is affirmative, that may have far reaching consequences, because, as the authors of the Law of Human Rights, 2nd Edn point out at §12.19, the English courts have effectively avoided engaging directly with the extent to which "the tort of defamation – which has developed to take account of Article 10 rights of defendants - may now have to be further adapted to take into account the Article 8 rights of claimants". In the **Terry** case, Tugendhat J considered, but did not decide, whether an Article 8 challenge could be mounted in respect of the defences of justification, fair comment, and qualified privilege: "The point in relation to justification is that the defendant is free to say anything that is true, however harmful or distressing even if there is no public interest or public benefit. See Lord Denning MR's statement in *Fraser v Evans* [1969] 1 QB 349, 360-1, and the citation by Lord Nichols from Littledale J, set out below. But I note that the harshness of this rule has been tempered by the recent development of the law against harassment. Reputation is an Art 8 right. So the argument is that English law requires reform along the lines of what was recommended by The Select Committee of the House of Lords on the Law of Defamation in 1843. The Committee recommended that the defendant who pleads justification should also have to establish "it was for the benefit of the community that the words should be spoken". Or there is the model of French law, which has imported from Arts 8 and 10 the concepts of legitimate aim and proportionality. In the case of a defence of justification, the reputation of a successful claimant can be vindicated by an award of damages if the words are not true. In the case of a successful defence of common law and statutory qualified privilege, a claimant has no means of vindicating his reputation at all. It is not just that damages are not an adequate remedy: there is no remedy in damages and no declaration of falsity" [80].

In fact, the prospect that the tort of defamation may need to be adapted to take account of the parallel analysis mandated by the House of Lords in **Re S** appears to have been recognised in **W v JH** [2009] EMLR 200 by Tugendhat J at [48], [52-54]: "... where the information the subject of the communication might engage rights ... under Article 8 ... the Claimant should be afforded the opportunity to argue that there should reconsideration of the test by which to answer the question whether the

defendant's right to freedom of expression (afforded in such a case by the defence of qualified privilege) prevails over the claimant's rights. It is for consideration whether the determination of such conflict between the rights of the parties may require the approach set out for resolving that conflict, in a different context, in *Re S* [at §17] ..."

Recovering damages for harm to reputation in a privacy claim

In *Mosley v News Group Newspapers Ltd* [2008] EMLR 679, Eady J accepted that claims for misuse of private information and claims for defamation were analogous in certain respects, such as "it is reasonable to suppose that damages for such an infringement may include distress, hurt feelings and loss of dignity" [216] and "It must be recognised that it may be appropriate to take into account any aggravating conduct in privacy cases on the part of the defendant which increases the hurt to the claimant's feelings or "rubs salt in the wound"" [222].

However, Eady J held that pecuniary compensation for harm to reputation could only be recovered in a claim for defamation, and could not be recovered in a claim for misuse of private information: "Because both libel and breach of privacy are concerned with compensating for infringements of Article 8, there is clearly some scope for analogy. On the other hand, it is important to remember that this case is not directly concerned with compensating for, or vindicating, injury to *reputation*. The claim was not brought in libel. The distinctive functions of a defamation claim do not arise. The purpose of damages, therefore, must be to address the specific public policy factors in play when there has been "an old fashioned breach of confidence" and/or an unauthorised revelation of personal information. It would seem that the law is concerned to protect such matters as personal dignity, autonomy and integrity" [214]; and "I am conscious naturally that the analogy with defamation can only be pressed so far. I have already emphasised that injury to reputation is not a directly relevant factor, but it is also to be remembered that libel damages can achieve one objective that is impossible in privacy cases. Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action" [230].

It is suggested that this analysis may be open to reconsideration. Once it is recognised that the right to reputation is an Article 8 right, in the event that misuse of private information concerning someone results in harm to that person's reputation, why should s/he be unable to recover damages to compensate him/her for that harm?

An award of general damages to an individual in a defamation claim is traditionally said to perform three functions: to provide consolation for distress and injury to feelings, to repair harm to reputation, and to vindicate reputation. It appears to be accepted that damages in a privacy claim also serve the first of these functions. There appears to be no reason why such damages should not also serve the second purpose - on the basis that the claimant is being compensated for harm to a reputation that

s/he deserves to have, not in the sense that what has been published is untrue, but in the sense that what has been published ought never to have been published at all. It would seem ironic if the claimant could not recover damages under the third limb on the reasoning that s/he cannot be restored to the esteem in which s/he was previously held. It may be, however, that the answer is simply to award more generous damages in privacy claims under the first limb, in order to take account of the upset and indignity caused by a loss of reputation that cannot be vindicated by damages.

Exemplary damages in claims for misuse of private information

The availability of this remedy was also considered, and rejected, by Eady J in the **Mosley** case. Following a careful analysis of the law at [172]-[194], Eady J summed up and responded to the arguments of the claimant and the defendant, in turn, at [195] “it would be inconsistent to acknowledge the possibility of exemplary damages for libel but not for invasion of privacy, since both causes of action are directed to protecting rights under Article 8. So it may be, but claims for exemplary damages in libel (albeit awards are very rare) have long been recognised. As Lord Reid pointed out, it is a different matter to make an extension by judicial intervention” and at [196] “since a claim for invasion of privacy nowadays involves direct application of Convention values and of Strasbourg jurisprudence as part of English law, that it would be somewhat eccentric to graft on to this Convention jurisprudence an alien anomaly from the common law in the shape of exemplary damages – not apparently familiar in Strasbourg. I agree with that submission”. Eady J then ruled at [197] that “exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension and, indeed, it would fail the tests of necessity and proportionality”.

It is suggested that this, again, may be open to reconsideration. The categories of causes of action in respect of which exemplary damages may be awarded are not closed (see **Kuddus v Chief Constable of Leicestershire [2002] AC 122**) – although the ease with which such a remedy could be extended to claims for misuse of private information may depend on whether they are properly regarded as claims in tort. Further, necessity and proportionality cut both ways: the court would only make such an award if it was considered to be necessary and proportionate on the concrete facts of any particular case. A greater objection may be the uncertainty of whether the availability of such a remedy is “sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law” (see **Shayler** at [56]), but this would be resolved by a decision on the matter, which would not now have to be by the Court of Appeal.

Famous people’s sex lives: from Theakston to Terry via McKennitt and Mosley

In **Theakston v MGN Ltd [2002] EMLR 398** and **A v B plc [2003] QB 195** the Court did not confine itself to considering the type of information which was sought to be protected, and the intrusion which would result from publication of it, and instead attached importance to the transient nature of the sexual relationships.

This approach may have been influenced (1) by the consideration that earlier case law recognised confidences rooted in marriage and long term relationships (see **Argyll v Argyll [1967] 1 Ch 302**, Ungood-Thomas J at 317G, 322B-D, 329F-334C; *Spycatcher*, Lord Keith at 255D-256C; Lord Goff @ 281B-282F; and **Stephens v Avery [1988] 1 Ch 449**, Sir Nicolas Browne-Wilkinson V-C at 454-456) and (2) because participation in the relationships was considered to be “misbehaviour”.

The Court of Appeal in **McKennitt v Ash [2008] QB 73** appears to have endorsed the first point: “In the preceding paragraph I deliberately and not merely conventionally described the latter as a relationship of casual sex. A could not have thought, and did not say, that when he picked the women up they realised that they were entering into a relationship of confidence with him. Small wonder that Lord Woolf said, *A v B* at [45]: “Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential” [30]”. It is, perhaps, ironic that the decision in **A v B** should be said to be correct when tested by reference to traditional breach of confidence considerations, when elsewhere in **McKennitt** the Court appears to suggest that the decision in **A v B** is undependable because it did not apply Convention law.

This second point is relevant in light of the argument that (1) people like the claimants in those two cases are public figures who can be deemed to be role models and (2) there is a public interest in exposing misbehaviour by such people.

Thus Lord Woolf CJ said: “Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention” [11(xii)]. The statement that “Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media” has been repeatedly criticised as confusing what the public are interested in as a matter of curiosity with what is in the public interest. This may be a misunderstanding, because as the Court of Appeal pointed out in **Campbell** at [40] “When Lord Woolf CJ spoke of the public having “an understandable and so a legitimate interest in being told” information, even including trivial facts, about a public figure, he was not speaking of private facts which a fair-minded person would consider it offensive to disclose. That is clear from his subsequent commendation of the guidance on striking a balance between article 8 and article 10 rights

provided by the Council of Europe Resolution 1165 of 1998". In any event, that does not directly affect the status and reach of the remainder of Lord Woolf CJ's statements, which remain a live subject of both judicial and wider deliberation.

The role model argument in turn has a number of facets. First, assuming that the claimant is indeed properly described as a role model of some sort, there may be an issue as to whether, either by choice or by circumstance, the claimant has become a role model as to the morality of his/her personal life, as opposed to a role model for his/her professional activities. Second, there may be a question as to the nature of the public interest which is served by exposing his/her misbehaviour. In **Campbell v MGN Ltd [2003] QB 633** Lord Phillips MR, giving the judgment of the Court of Appeal, said at [41]: "For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual, who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay".

In **McKennitt v Ash [2008] QB 73**, the Court of Appeal did not purport to overrule **A v B plc [2003] QB 195**, but nevertheless said that it was not binding authority for the content of Articles 8 and 10: "If the court in *A v B* had indeed ruled definitively on the content and application of article 10 then the position would be different; but that is what the court did not do. Having made the important observation that the content of the domestic law was now to be found in the balance between articles 8 and 10, the court then addressed the balancing exercise effectively in the former English domestic terms of breach of confidence. No Convention authority of any sort was even mentioned ... However that may be, and wherever that leaves courts that would have to apply the guidance given in *A v B*, it seems clear that *A v B* cannot be read as any sort of binding authority on the content of articles 8 and 10. To find that content, therefore, we do have to look to *Von Hannover*. The terms of that judgment are very far away from the automatic limits placed on the privacy rights of public figures by *A v B*" [63]-[64].

In **Mosley v News Group Newspapers Ltd [2008] EMLR 679**, Eady J considered at [124]-[134] in some depth the extent to which revelations concerning sexual relations could lawfully be made by the media. Among other things, he reasoned as follows: "It has now to be recognised that sexual conduct is a significant aspect of human life in respect of which people should be free to choose. That freedom is one of the matters which Article 8 protects: governments and courts are required to afford remedies when that right is breached" [125]; "it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval. Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose" [127]; "Where the law is not breached, as I said earlier, the

private conduct of adults is essentially no-one else's business. The fact that a particular relationship happens to be adulterous, or that someone's tastes are unconventional or "perverted", does not give the media *carte blanche*" [128]; "It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognised criteria" [130].

Eady J concluded as follows: "The facts of this case are far removed from those in *Van Hannover*. There can be little doubt that intimate photographs or recording of private sexual activity, however unconventional, would be extremely difficult to justify at all by Strasbourg standards: see e.g. *Dudgeon v UK* (cited above) at [49]-[53]. It is those to which we are now required by the Human Rights Act to have regard. Obviously, titillation for its own sake could never be justified. Yet it is reasonable to suppose that it was this which led so many thousands of people to accept the *News of the World's* invitation on 30 March to "See the shocking video at notw.co.uk". It would be quite unrealistic to think that these visits were prompted by a desire to participate in a "debate of general interest" of the kind contemplated in *Von Hannover*" [132]; and "In the light of the strict criteria I am required to apply, in the modern climate, I could not hold that any of the visual images, whether published in the newspaper or on the website, can be justified in the public interest. Nor can it be said in this case that even the information conveyed in the verbal descriptions would qualify" [134].

In **John Terry (previously referred to as "LNS") v Persons Unknown [2010] EWHC 119 (QB)**, Tugendhat J read these passages as ones where "Eady J was primarily directing his attention to the excesses of the defendant in that case. This appears from his use of the words "hound" and "carte blanche" ([127], [128]). In *X v Persons Unknown* [25] Eady J gave as examples of a public interest speech "for the purpose of revealing (say) criminal misconduct or antisocial behaviour". And in *Mosley* Eady J was giving a judgment after hearing submissions from the defendant" [100].

Tugendhat J also held (among other things) that, in the absence of argument from the media, including as to the social utility of whatever they might be threatening to say about the claimant, he was unable to form a view as to the social utility of the speech that might be in question [101]-[103]; that the claimant had not satisfied him that he was likely to establish that publication of the fact of the relationship in that case should not be allowed [44], [68],[149(i)]; and that there was no sufficient evidence of a risk to publish photographs or intrusive details which would be susceptible to a permanent injunction [69], especially as the media were governed by the PCC Code, knew the law, and could be expected with regard to both the claimant and interested parties "to report any story within reasonable limits as the law now requires" [129].

Perhaps of particular interest, Tugendhat J said at [104]: "There is much public debate as to what conduct is or is not socially harmful. Not all conduct that is socially harmful is unlawful, and there is often said to be much inconsistency in the law. For example, some commentators contrast the law on consumption of alcohol with that on other intoxicating substances. 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 that it be discouraged. There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it should be. But in a plural society there will be some who would suggest that it ought to be discouraged. That is why sponsors may be sensitive to the public image of those sportspersons whom they pay to promote their products. Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being socially harmful, or wrong. Both the law, and what are, and are not, acceptable standards of lawful behaviour have changed very considerably over the years, particularly in the last half century or so. During that time these changes (or, as many people would say, this progress) have been achieved as a result of public discussion and criticism of those engaged in what were, at the time, lawful activities. The modern concept of public opinion emerged with the production of relatively cheap newspapers in the seventeenth century. Before that there was no medium through which public debate could be conducted. It is as a result of public discussion and debate, that public opinion develops”.

It is suggested that this is a serious point, and one that is more straightforward than arguments based on the concept of role models. Perhaps, however, the difficulty is to know its limits. Without criticism and debate about the conduct of other members of society, that conduct is likely to go unchecked; and that may not be in the public interest; and it may not be possible to have a debate which is either informed or which catches public attention without naming individuals. But what degree of sacrifice of the privacy interests of those individuals is necessary and proportionate for these purposes? And what about other public interests which may be positively damaged by that debate or by the manner in which it is conducted? For example, if footballers and television presenters are to be exposed to criticism in this fashion, the same must also (presumably) apply to politicians and judges: but will that benefit the public by improving standards of behaviour or harm it by driving talent away?

The importance of injunctions in this area of the law

Where Article 10 is engaged, section 12 of the Human Rights Act 1998 applies. This includes the following:

“12. - (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression...

(3) No such relief 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.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression

and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-

(a) the extent to which-

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

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

(b) any relevant privacy code.”

As to section 12(3), the correct approach appears from decision of the House of Lords in **Cream Holdings Ltd v Banerjee [2005] 1 AC 253**, Lord Nicholls at [22]-[23]: “... section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', 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 the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: 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.”

There are two main reasons in practice why many privacy cases never progress beyond the injunction stage: (1) for the claimant, an injunction is often the only effective remedy; conversely, for a defendant, if an injunction is granted that is often effectively determinative of the matter, as few stories are of sufficient interest and importance to be worth publishing months later and/or to justify the expenditure of trial costs; and (2) because the test at the interim stage involves an appraisal of the merits, it may be taken by the parties as a good indication of the likely result at trial.

The legal framework of privacy injunctions

Injunction against persons unknown

The basis for claiming this form of relief is **Bloomsbury Publishing Group Ltd & Anr v News Group Newspapers Ltd & Ors [2003] 1 WLR 163**, in which an Order was sought against “the person or persons who have offered the publishers of 'The Sun', the 'Daily Mail', and the 'Daily Mirror' newspapers a copy of the book *Harry Potter and the Order of the Phoenix* by J K Rowling or any part thereof and the person or persons who has or have physical possession of a copy of the said book or any part thereof without the consent of the claimants”. The Chancellor decided that he had jurisdiction to make such an order and that it was appropriate to do so on the facts of that case. Those facts involved a need to prevent – for a short time, and until the book reached the general public by lawful means - the contents of the fifth book in the Harry Potter series from being sold and revealed to the public by one or more of a number of individuals who could not be identified (the Second Defendant(s)) who appeared to have been involved in stealing a copy from the publishers or dealing with such a copy. The judgment records (at [17]) the submission of Counsel for the Claimants that “an order in the form sought cannot cause confusion because anyone to whom it is shown will know immediately whether or not it is descriptive of and therefore directed to him or her”, and at [21] the Chancellor said that “The crucial point ... is that the description used must be sufficiently certain as to identify both those who are included and those who are not”.

Private hearing

Although the general rule is that a hearing is to be in public, the Court has express power to order that a hearing, or part of it, may be in private if (among other things) (i) publicity would defeat the object of the hearing or (ii) it involves confidential information and publicity would damage that confidentiality or (iii) the Court considers this to be necessary in the interests of justice: see CPR 39.2(3)(a), (c) and (g).

Anonymity

The Court has jurisdiction to make an Order for anonymity in accordance with section 11 of the Contempt of Court Act 1981 and CPR 39.2(4) – and see, also, CPR 5.4 - and under the inherent jurisdiction. Such an Order is often argued to go together with a substantive injunction seeking (a) the protection of private information and (b) prevention of publicity concerning the existence of the proceedings and the claimant’s interest in them (sought on the basis that to allow such publicity would encourage speculation about the subject matter of the action, which would be intrusive in itself and may well light on the very class of secret which actually exists). If anonymity is not ordered, the fact that the claimant has had to seek relief against the defendants may become a story in its own right and/or lead to speculation as to what secrets the claimant has been concerned to protect. It is typically argued that it would be unfair to the claimant that, as the price of protecting information s/he is entitled to protect, s/he should be exposed to invasive speculation of this sort.

The "Spycatcher" principle

As a matter of procedural law, where (1) there is an action between A and B in which A is granted an injunction against B, (2) there is another person C, who is not a party to the action and is not referred to in the injunction, but who nevertheless has notice of it and (3) C aids and abets B in doing acts which are in breach of the injunction against B, there is authority that, in such a case, C commits a contempt of court: see **A-G v Times Newspapers Ltd [1992] 1 AC 191**, Lord Brandon of Oakbrook at 205.

This is quite different from a situation where B himself does no act which is in breach of the injunction, but C, solely of his own volition and in no way aiding or abetting B, does acts which, if they had been done by B, would have constituted a breach of the injunction by B. In this situation, whether or not C commits a contempt of court by acting in that way with notice of the injunction that A has obtained against B depends upon whether C's acts impede the administration of justice in A's action against B. If C's acts do not impede the administration of justice, C will not be in contempt; but, if they do - and if C has the necessary *mens rea* - C will be in contempt. This is the "*Spycatcher*" basis for rendering third parties liable for contempt of court.

It follows from the above that the *Spycatcher* principle does not apply to final, as opposed to interim, injunctions. The reason is that C is liable to be held in contempt of court because his acts impede the administration of justice in A's action against B; and, once the issue that falls to be resolved in that action has been finally determined by the court as between A and B, C's acts can no longer impede the administration of justice in that action: see **Jockey Club v Buffham [2003] QB 462**, Gray J at [20]-[26], applying and adopting the detailed analysis of the ratio of *Spycatcher* that was carried out by Lord Phillips of Worth in **A-G v Punch Ltd [2001] QB 1028** at [39]-[88].

Open justice

Article 6(1) provides as follows: "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

Article 6(1) was explained in **Diennet v France [1995] 21 EHRR 195** at [33]: "The court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society."

In Article 10 terms, the workings of the Courts fall within the scope of "political expression". See **Sunday Times v United Kingdom (No 1) [1999] 2 EHRR 245** at [65]:

“As the Court remarked in the *Handyside* judgment, freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to the those that offend, shock or disturb the State or any sector of the population. These principles are of particular importance so far as the press is concerned. They are equally applicable in the field of administration of justice, which serves the interests of the community at large and requires the co-operation of an enlightened public. There is a general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large.”

The principle enshrined in Article 6(1) is entirely consonant with the reasons why it is a fundamental part of the English legal system that justice should be done in public.

In this regard, the classic statement of the principle of open justice is the speech of Lord Shaw of Dunfermline in **Scott v Scott [1913] AC 417**, at 477: “It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. “In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.” “Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.” “The security of securities is publicity.” But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten: “Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any State be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise.” I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic”.

To similar effect, Lord Atkinson said at p463: “The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.”

In **AG v Levens Magazine [1979] AC 440**, Lord Diplock, having referred to *Scott v Scott*, continued: “Apart from statutory exceptions, however, where a court in the

exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.”

It is apparent from **R v Legal Aid Board ex p Kaim Todner [1999] QB 966** that an exception to the open justice rule is justified only if it is necessary in the interests of justice: see per Lord Woolf MR at 976H, delivering the judgment of the Court. The Court said (at 977E): “The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve.”

In **Ex p Guardian Newspapers Limited [1999] 1 WLR 2130** the Court of Appeal adopted “as our own” the following proposition put forward by Mr Michael Tugendhat QC (as he then was) (see [25], [39]): “Mr. Tugendhat submitted that the first of the reasons given in *Ex parte Kaim Todner* [1999] Q.B. 966, 977 should be stated more broadly. Open justice promotes the rule of law. Citizens of all ranks in a democracy must be subject to transparent legal restraint, especially those holding judicial or executive offices. Publicity, whether in the courts, the press, or both, is a powerful deterrent to abuse of power and improper behaviour.”

Injunctions sought without notice

In accordance with section 12 (2) of the Human Rights Act 1998:

“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) that there are compelling reasons why the respondent should not be notified”.

This accords with general principles as to the circumstances in which it is legitimate to seek an order without notice. The position is the same under CPR 25.3.

CPR PD 25 §9 provides:

"9.1 The following provisions apply to orders which will affect a person other than the applicant or respondent, who:

(1) did not attend the hearing at which the order was made; and

(2) is served with the order.

9.2 Where such a person served with the order requests –

(1) a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or

(2) a note of the hearing,

the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise".

In keeping with the decision of Eady J in **X v Persons Unknown [2007] EMLR 290** at [18]: "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 on the scope of its terms".

However, it appears that this is limited to other publishers within the jurisdiction who the claimant knows to have a specific interest in the story: see **WER v REW [2009] EMLR 304** at [18].

The debate about "super-injunctions"

It is against this background that claimants apply for, and not infrequently obtain, injunctions which have some or all of the following features: (1) they are sought without notice to anyone (for example, because the defendant is a "person unknown", or because s/he is said to be likely to frustrate the order if given notice); (2) the injunction is served on media third parties with the intention of binding them in accordance with the "*Spycatcher*" principle; (3) not only are the proceedings brought in an anonymised form, but the injunction restrains publication of both specified information and, in addition, "the existence of these proceedings and the claimant's interest in them"; (4) CPR PD §9 is disapplied by "ordering otherwise".

It is entirely understandable that the media should strongly protest against such orders, which appear to run counter to elementary principles of fairness and open justice. On the other hand, claimants may have genuine reasons for seeking such orders, to the extent that if some or all of the above protections are not available they may not seek relief at all. For example, (1) to give prior notice to potential media

third parties may risk (a) secrets that are sought to be protected being made known to those who do not already know of them and/or (b) the damage being done before any order can be obtained and/or (c) considerable exposure to costs; (2) to allow publication of the claimant's interest in the proceedings, or possibly even of the fact of the proceedings themselves, may give rise to speculation and further intrusion; and (3) serving papers in accordance with CPR PD §9 may give rise to serious invasion of the claimant's privacy and/or a risk of use or publication of the secret(s).

One particular feature of the debate is the impact which such orders may have on reporting proceedings in Parliament. However, any exception which allows such reporting also presents problems for the claimant, and, indeed, is open to abuse.

Amendments to the Family Proceedings Rules

For a general discussion, see **Spencer v Spencer [2009] EMLR 469; Re Child X (Residence and Contact – Rights of media attendance – FPR Rule 10.28(4)) [2009] EMLR 489.**

Rule 10.28(4) of the FPR, which forms part of Rule 10.28 which came into force on 27 April 2009, does not contain any wording which allows the Court to direct that the media should be excluded on the grounds that the Article 8 interests of the parties (as opposed to those of the child) so require. It would therefore appear that, in this context, the Article 8 interests of adult parties can only be relied upon as a basis for seeking exclusion of the media if the presence of the media has such an impact on their Article 8 rights that "justice will otherwise be impeded or obstructed". See *Re X* at [45]: "Put in terms of the Convention, the position seems to me to be as follows. The restrictions i.e. the grounds for exclusion under Rule 10.28 (4) are in broad terms Article 6 compliant. Paragraph (a) (i) is within the legitimate aim of protecting the interests of juveniles and grounds (a) (ii) (iii) and (b) are legitimised under the heading of "special circumstances where publicity would prejudice the interests of justice". It is to be noted in passing that nothing is included in the Rule to provide for exclusion of the press where the Article 8 interests of the parties (as opposed to those of the child) so require. However, one can envisage a situation where a ground for exclusion, at least for part of the proceedings, might be required to protect the Article 8 interests of the parties which could properly justify exclusion of the media under ground (b) to prevent the press from hearing and/or reporting allegations of an outrageous or intimate nature before the Court's decision as to whether or not they were established. This might well constitute a serious and irredeemable invasion of the privacy and/or family life of an adult party if the press were not excluded."

Privacy and data protection

The Data Protection Act 1998 ("the DPA") replaces the Data Protection Act 1984. It was passed to give effect to Council Directive 95/46/EC ("the Directive") and largely follows the format of the Directive. Foremost among the aims of the Directive is the protection of individuals as a consequence of the processing of their personal data,

including invasion of their privacy.² That is also the “central mission” of the DPA. See **Campbell** in the Court of Appeal at [2003] QB 633, Lord Phillips MR at [72]-[73]; **Johnson v MDU** [2007] EWCA Civ 262, (2007) 96 BMLR 99, Buxton LJ at [1].

The product of the DPA has been described as ‘informational self-determination’: “Effectively it moves from a situation where the data controller can process personal data unless otherwise prevented by law, to one where the individual can claim what is almost a proprietary right to prevent processing unless the controller can show cause why this should be permitted” (Professor I. Lloyd, *A Guide to the Data Protection Act 1998* (Butterworths, 1998), §4.6; and see, further, Raymond Wacks, ‘Privacy in Cyberspace’ in P. Birks (ed) *Privacy and Loyalty* (Clarendon Press, Oxford, 1997), at 109).

An essential feature of the DPA (see section 4) is that it imposes a duty on a data controller to comply with the data protection principles (“the DPPs”) set out in Part I of Schedule 1 to the DPA in relation to all personal data with respect to which he is the data controller. The 1st DPP provides that personal data must be processed both “fairly” and “lawfully”. The 1st DPP also provides that personal data shall not be processed unless at least one of the conditions in Schedule 2 to the DPA is met, and, in addition, that sensitive personal data shall not be processed unless at least one of the conditions in Schedule 3 to the DPA is met. These conditions cater for specific circumstances in which countervailing interests and considerations require to be taken into account by way of balance against the data subject’s fundamental right to privacy with respect to the processing of personal data, which it is the object of the Directive to protect (see Article 1).

The conditions contained in Schedules 2 and 3 to the DPA reflect, respectively, the criteria for making data processing legitimate which are set out in Article 7 of the Directive and the “special categories of processing” set out in Article 8.

There is a further “special category of processing” which is the subject of Article 9. This provides that “Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression”. This additional “special category” is addressed in the DPA by the provisions of section 3 (which defines “the special purposes” as “the purposes of journalism”, “artistic purposes” and “literary purposes”) and section 32 (which provides exemptions for personal data which are processed “only for the special purposes”). In accordance with sections 32(1) and 32(2), those exemptions relate to all the DPPs except the 7th DPP and (among others)

² Note also, as Maurice Kay J acknowledged in *R(Robertson) v Wakefield MDC* [2002] QB 1052 at §38, that the Charter of Fundamental Rights of the European Union (OJ 2000 C364, p. 1) signed at the Nice Summit in December 2000 includes a provision to the effect that everyone has the right to the protection of personal data concerning him or her and that such data, by article 8(2) “must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.”

the provisions of section 7 (data subject requests), section 10 (the right to prevent processing) and section 14 (rectification, blocking, and erasure).

The origins and structure of section 32 of the DPA were subjected to detailed analysis by the Court of Appeal in **Campbell** at [2003] QB 633, [107]-[127]. At [114]-[115] the Court of Appeal observed that section 32 falls into two halves, and that sections 32(4) and 32(5) have the effect that proceedings against a data controller are to be stayed where the data controller claims that any personal data to which the proceedings relate are being processed for one of the special purposes and with a view to publication of previously unpublished material.

Morland J's findings at first instance in **Campbell** (reported at [2002] EMLR 617) were summarised and endorsed by the Court of Appeal at [2003] QB 633, [87]-[88]: "[87] Morland J held that the defendants had failed to comply with the first data protection principle in the following respects. (i) The processing was not "fair". The photographs had not been fairly obtained. They had been taken covertly, giving no opportunity to Miss Campbell to refuse to be photographed. (ii) The processing was unlawful, in that it was in breach of confidence. (iii) None of the conditions in Schedule 2 were satisfied. (iv) The information published constituted sensitive personal data. None of the specific conditions in Schedule 3 were satisfied. Nor did the defendants satisfy the conditions in the Data Protection (Processing of Sensitive Personal Data) Order 2000. [88] It is not necessary to refer in greater detail to the arguments advanced by the defendants that were rejected by the judge in the course of reaching the findings summarised above. Suffice it to say that we agree with the judge that, unless they fell within the section 32 exemption, the defendants were not in a position to satisfy the conditions imposed by the Act."

Section 32(1) provides: "Personal data which are processed only for the special purposes [journalism, literature and art] are exempt from any provision to which the subsection relates if ... (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes".

In construing section 32, it is relevant to keep in mind not only the terms of Article 9 of the Directive but also the guidance on the interpretation of that provision given by the European Commission Working Party on the Protection of Individuals with regard to the Processing of Personal Data, set up pursuant to Article 29 of the Directive, in its Recommendation 1/97 on 'Data protection law and the media' (which is quoted in part in **Campbell** [2003] QB 633 at [112]):

"2. GENERAL ASPECTS

...

2.2 Legislative history of art. 9 of the directive.

According to article F paragraph 2 of the Treaty on European Union the Union shall respect fundamental rights as guaranteed by the ECHR and the constitutional traditions common to the Member States.

The Community legislator has acknowledged the particular case of the media and the need to strike a balance between protection of privacy and protection of freedom of expression.

Art. 19 of the original Commission proposal provided that Member States might grant derogations from the provisions of the directive in favour of the press and the audiovisual media. The explanatory report made it clear that the key feature of this article is the obligation to balance the interests involved and that this balance may take into account the availability of other remedies or of a right of reply, the existence of a code of professional ethics, the limits laid down by the ECHR and the general principles of law.

Article 9 of the Commission's modified proposal made the granting of derogations for the media mandatory. The text was also modified as to include journalists and in order to limit the derogations to journalistic activities.

The article was further modified to its current drafting so that derogations may not apply indiscriminately to all the data protection provisions. Under the current text the derogations are indeed mandatory but 'only if they are necessary' meaning that the derogations to each specific principle of the directive must be granted only in so far (French "dans la seule mesure où" German "nur insofern vor, als sich dies als notwendig erweist") as it is necessary to strike a balance between privacy and freedom of expression...

3. CONCLUSIONS

- ...
- Derogations and exemptions under Article 9 must follow the principle of proportionality. Derogations and exceptions must be granted only in relation to the provisions likely to jeopardise freedom of expression and only in so far as necessary for the effective exercise of that right while maintaining a balance with the right to privacy of the data subject.
- ...
- Article 9 of the directive respects the right of individuals to freedom of expression. Derogations and exemptions under article 9 cannot be granted to the media or to journalists as such, but only to anybody processing data for journalistic purposes.
- ...
- The directive requires a balance to be struck between two fundamental freedoms. In order to evaluate whether limitations of the rights and obligations flowing from the directive are proportionate to the aim of protecting freedom of expression particular attention should be paid to the specific guarantees enjoyed by the individuals in relation to the Media. Limits to the right of access and rectification prior to publication could be proportionate only in so far as individuals enjoy the right to reply or obtain rectification of false information after publication.
- Individuals are in any case entitled to adequate forms of redress in case of violation of their rights.

In evaluating whether exemptions or derogations are proportionate, attention must be paid to the existing ethic[s] and professional obligations of journalists as well as to the self-regulatory forms of supervision provided by the profession."

Moreover, in accordance with section 3 of the Human Rights Act 1998, section 32 of the DPA has to be construed so far as it is possible to do so in a way which is compatible with relevant Convention rights, for example the claimant's Article 8 rights, the defendant's Article 10 rights, and both parties' Article 6 rights. In accordance with section 6 of the Human Rights Act 1998, it is unlawful for the Court to act incompatibly with any of those Convention rights.

It is arguable that "journalism" for the purposes of section 32 should be construed, in accordance with Article 9 of the Directive and the Strasbourg jurisprudence which shaped the genesis of that provision³ as 'informative public interest journalism'.⁴

In **Mosley v News Group Newspapers Ltd [2008] EMLR 679**, Eady J raised the question of whether the reasonable belief of the journalist may be relevant to a defence of public interest. He answered that question in the negative on the existing state of the law, but went on to consider the facts on the alternative basis that the reasonable belief of the journalist was relevant, in case the issue was raised on appeal [135ff]. In **John Terry (previously referred to as "LNS") v Persons Unknown [2010] EWHC 119 (QB)**, Tugendhat J alluded to this point, without deciding it, saying that further provisions which may be relevant in this context are the PCC Code (Public Interest, §3) and, where the DPA might apply, s32(1)(b) and 55(2)(d) of the DPA [72].

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³ See *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 280-281 at §§65-66; *Goodwin v United Kingdom* (1996) 22 EHRR 123, 143 at §39, both of which are cited by the European Commission Working Party on the Protection of Individuals with regard to the Processing of Personal Data in relation to its analysis of 'Freedom of expression and the protection of privacy' in §2.1 of Recommendation 1/97. Now also see the observations of the European Court of Human Rights in *Von Hannover* at §§63-66: "The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society...and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" it does not do so in the latter case...As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public. In these conditions freedom of expression calls for a narrower interpretation."

⁴ The court is well used to distinguishing between what is in the public interest and what the public or some section of it may be interested in: see e.g. *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898A-B *per* Sir John Donaldson MR; *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, at §49 *per* Lord Hoffmann.