Easter Term
[2016] UKSC 26
On appeal from: [2016] EWCA Civ 393

JUDGMENT

PJS (Appellant) *v* News Group Newspapers Ltd (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Mance
Lord Reed
Lord Toulson

JUDGMENT GIVEN ON

19 May 2016

Heard on 21 April 2016

Appellant	*Respondent*
Desmond Browne QC	Gavin Millar QC
David Sherborne	Ben Silverstone
Adam Speker	
Lorna Skinner	
(Instructed by Carter-Ruck)	(Instructed by Simons Muirhead & Burton Solicitors)

LORD MANCE: (with whom Lord Neuberger, Lady Hale and Lord Reed agree)

Introduction

1. The interim injunction the subject of this application has attracted much attention. Whatever the decision of the Supreme Court, it will probably give rise to further, entirely legitimate, debate on the value of such injunctions in the internet age. But the majority of this Court has concluded that, in the light of legal principles that were effectively uncontroversial and for reasons more particularly summarised in paras 44 to 45 below, the application for permission to appeal should be granted and the interim injunction continued until trial or further order. The ground on which the Court acts is to preserve the privacy interests of the appellant, his partner and their young children in England and Wales, pending a trial. Without the injunction, there will be further unrestricted and extensive coverage in hard copy as well as other media in England and Wales, and the purpose of any trial will be largely undermined. On the basis of the case law, the fact that there has been significant internet and social media coverage (and limited hard copy publication outside the jurisdiction) which already invades the privacy of the appellant and his family is not decisive. News Group Newspapers Ltd's ("NGN's") purpose in applying to set aside the interim injunction is to add extensively and in a qualitatively different medium to such invasions, without, on present evidence, having any arguably legitimate basis for this and at the risk only of having to pay damages after a trial.

2. Some may still question whether the case merits the weight of legal attention which it has received. But the law is there to protect the legitimate interests of those whose conduct may appear unappealing, as well as of children with no responsibility for such conduct. The Supreme Court must in any event apply the law as it has been laid down by Parliament, paying due regard to the case law which Parliament has required it to take account. The Court must do so in the present case in relation to what, on present evidence, appears to be a clearly unjustified proposed further invasion of the relevant privacy interests - one which is unsupported by any countervailing public interest in a legal sense, however absorbing it might be to members of the public interested in stories about others' private sexual encounters. At trial, it will be open to the respondents to seek to show some genuine public interest in publication. But none has been shown to date, and, pending trial, the point of any trial should not be prejudged or rendered irrelevant by unrestricted disclosure.

3. The Court is well aware of the lesson which King Canute gave his courtiers. Unlike Canute, the courts can take steps to enforce its injunction pending trial. As

to the Mail Online's portrayal of the law as an ass, if that is the price of applying the law, it is one which must be paid. Nor is the law one-sided; on setting aside John Wilkes' outlawry for publishing *The North Briton*, Lord Mansfield said that the law must be applied even if the heavens fell: *R v Wilkes* (1768) 4 Burr 2527, 98 ER 327 (347). It is unlikely that the heavens will fall at our decision. It will simply give the appellant, his partner and their young children a measure of temporary protection against further and repeated invasions of privacy pending a full trial which will not have been rendered substantially irrelevant by disclosure of relatively ancient sexual history.

The facts

4. We can for the most part take the facts from Jackson LJ's judgment in the Court of Appeal. PJS, the claimant (now the appellant) is in the entertainment business and is married to YMA, a well-known individual in the same business. They have young children. In 2007 or 2008, the claimant met AB and, starting in 2009, they had occasional sexual encounters. AB had a partner, CD. By text message on 15 December 2011, the claimant asked if CD was "up for a three-way", to which AB replied that CD was. The three then had a three-way sexual encounter, after which the sexual relationship between PJS and AB came to an end, though they remained friends for some time.

5. By or in early January 2016, AB and CD approached the editor of the Sun on Sunday, and told him about their earlier sexual encounters with PJS. The editor notified PJS that he proposed to publish the story. PJS's case is that publication would breach confidence and invade privacy. He brought the present proceedings accordingly, and applied for an interim injunction to restrain the proposed publication.

6. Cranston J refused an interim injunction on 15 January, but the Court of Appeal (Jackson and King LJJ) on 22 January 2016 allowed an appeal and restrained publication of the relevant names and of details of their relationship: [2016] EWCA Civ 100. The Court provided the parties with its full judgment, but published only a redacted version omitting the names and details.

7. The injunction was effective for eleven weeks, but AB took steps to get the story published in the United States. In consequence a magazine there published an account of PJS's sexual activities on 6 April 2016, naming those involved. But, as a result of representations by the appellant's solicitors, it restricted publication to hardcopy editions only, and "geo-blocked" online publication so as to restrict this to the United States. The evidence is that, apart from the one further state publication, the story was not taken up in America. Some other similar articles followed in

Canada and in a Scottish newspaper. But, whatever the source, details started to appear on numerous websites, one of which contained equivalent detail to that which had appeared in the American magazine, as well as in social media hashtags.

8. Various English and Welsh newspapers have in these circumstances published vigorous complaints about their own inability to publish material which was available on the internet. The Times on 8 April 2016 reported that the injunction was being "flouted on social media" after the "well-known" man was named in the US and that the Society of Editors had condemned such injunctions as "bringing the whole system into disrepute". The Sun on 10 April 2016 called "on our loyal readers to help end the farce that means we can't tell you the full story of the celebrity father's threesome" by writing to their MPs "to get them to voice the public outcry in parliament and bring an end to this injustice". It set out a suggested form of letter. It appears that an MP was by 11 April 2016 proposing to name the appellant in Parliament, something that intervention by the Speaker may have prevented. The Mail Online on 14 April 2016 reported that it had held a survey which "found that 20 percent of the public already know who he is while others said they know how to find out". The online tool Google Trends shows a massive increase in the number of internet searches relating to the appellant and YMA by their true names.

9. The Court of Appeal noted that the appellant's solicitors have been assiduous in monitoring the internet and taking steps, wherever possible, to secure removal of offending information from URLs and web pages, but concluded that this was a hopeless task: the same information continued to reappear in new places, and tweets and other forms of social networking also ensured its free circulation. On the other hand, the evidence of the appellant's solicitor, Mr Tait, is that social media are responding to objections of invasion of privacy, that a material number of links has been removed, disabled or become inactive and that Mr Tait is confident that, with the continuation of the injunction, this process will continue and it will become increasingly difficult to identify the appellant online. In the light of the Court of Appeal's assessment and its own review of the material available, the Supreme Court must however assume that a significant body of internet material identifying those involved by name and reproducing details from the original American publication about their alleged activities still exists and will continue to do so for the foreseeable future.

10. On 12 April 2016 NGN applied to the Court of Appeal to set aside the interim injunction granted on 22 January 2016, on the grounds that the protected information was now in the public domain, and that the injunction therefore served no useful purpose and was an unjustified interference with NGN's own rights under article 10 of the European Convention on Human Rights ("ECHR"). By a judgment published in slightly redacted terms on 18 April 2016, the Court of Appeal (Jackson, King and Simon LJJ) discharged the injunction: [2016] EWCA Civ 393. On 21 April 2016 the Supreme Court heard the appellant's application for permission to appeal together

with submissions relevant to the appeal, if permission was granted, and continued the interim injunction pending the delivery of the present judgment.

The statutory provisions

11. The appeal falls to be determined by reference to the Human Rights Act 1998 ("HRA") and the ECHR rights scheduled to it. Those rights include articles 8 and 10, reading:

> "Article 8
>
> Right to respect for private and family life.
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> Article 10
>
> Freedom of expression.
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law

and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

12. HRA Section 12 provides:

"Freedom of expression.

(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.

(2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied -

a. that the applicant has taken all practicable steps to notify the respondent; or

b. that there are compelling reasons why the respondent should not be notified.

(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."

Cranston J's decision

13. When refusing an injunction on 15 January 2016, Cranston J:

(i) accepted that the appellant had a reasonable expectation that his sexual activities would remain private,

(ii) added that he was "especially troubled" by the children's privacy interests under ECHR article 8, though these could not operate as a "trump card",

(iii) rejected the respondent's suggestion that the proposed publication went to any relevant matter of "public debate",

(iv) identified the appellant and his partner as portraying an image to the world of a committed relationship, accepted that "commitment may not entail monogamy", but concluded that there was a public interest in correcting the image by disclosing that the appellant had engaged in the sort of casual sexual relationships demonstrated by the evidence, and

(v) on that basis, and noting that the threshold test for granting an interim injunction was in this context higher than the generally applicable test in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, refused an injunction.

The Court of Appeal judgment of 22 January 2016

14. The Court of Appeal in its judgment of 22 January 2016 held that there were "two significant shortcomings" in the judge's approach, which enabled (or required) it to re-open the matter:

(i) although the judge had correctly identified the children's article 8 privacy rights, he had not explained how he had taken them into account;

(ii) once it was accepted that "commitment may not entail monogamy", there was no false image to require correction by disclosure of the appellant's occasional sexual encounters with others. In this connection, the Court of Appeal concluded positively that on the evidence before it the image presented by the appellant and his partner had been one of commitment not monogamy.

15. The Court of Appeal went on to identify the well-established principle that "kiss and tell" stories which do no more than satisfy readers' curiosity about the private lives of other persons, however well-known to the public, do not serve any legally recognised public interest: see eg *Couderc and Hachette Filipacchi Associés v France* (Application No 41454/07), paras 100-101 and *Axel Springer AG v Germany* (Application No 39954/08), para 91. The Supreme Court will revert to this principle in paras 22-25 below.

16. There was a respondents' notice alleging additional grounds for upholding the judge's decision. In this connection, the Court of Appeal agreed with the judge that the proposed publication did not go to any matter of public debate: para 12(iii) above. Referring to *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808, which itself refers back to *Terry v Persons Unknown* [2010] EWHC 119 (QB), the Court accepted that the respondents were entitled to publish articles critical of people in the public eye, even though there was nothing illegal about their conduct. But it noted that the appellant had an expectation that his sexual encounters would remain private, that the proposed story would, if published, be "devastating" for him and that on any proper balancing his article 8 right to privacy must prevail over the respondents' article 10 right to publish an account of the adultery. It added that the position of the children was also a factor to consider: the proposed article would generate a media storm and much public interest in the appellant's family, including increased press attention to the children, meaning that the children would in due course learn about the relevant matters from school friends and the internet. On the evidence before the Court, the appellant was likely to establish at trial that publication should not be allowed, and had therefore satisfied the test in section

12(3) of the Human Rights Act 1998. The appeal was therefore allowed and an injunction granted.

The Court of Appeal judgment of 18 April 2016

17. In its judgment of 18 April 2016, the Court of Appeal in a judgment given by Jackson LJ, with which King and Simon LJJ agreed:

(i) accepted that claims based on confidentiality were to be distinguished from claims based on privacy, in that, while "claims for confidentiality generally fail once information has passed into the public domain", the law "extends greater protection to privacy rights than rights in relation to confidential material" (paras 35-36);

(ii) concluded that "a claim for misuse of private information can and often will survive when information is in the public domain", continuing (para 39):

> "It depends on how widely known the relevant facts are. In many situations the claim for misuse of private information survives, but is diminished because that which the defendant publishes is already known to many readers. The publication is an invasion of privacy and hurtful for the claimant, but is not as egregious as it would otherwise be. That does not deprive the claimant of his claim for damages, but it weakens his claim for an injunction. This is for two reasons. First, the article 8 claim carries less weight, when the court carries out the balancing exercise of article 8 rights as against article 10 rights. Secondly, injunctions are a discretionary remedy. The fact that material is generally known is relevant to the exercise of the court's discretion."

(iii) added that:

> "40. In this regard it is important to note that HRA section 12 does not affect the existence of the claimant's article 8 claim nor does it provide any defence to the tort of misusing private information. The effect of section 12 is twofold. First, it enhances the weight which article 10 rights carry in the balancing exercise. Secondly, it raises the hurdle which the

claimant must overcome in order to obtain an interim injunction.

41. Although it will be a matter for the trial judge at the end of the day, I adhere to the view I expressed in January, namely that the story which NGN proposes to publish is likely to be a breach of the claimant's article 8 rights. What has changed is the weight which the claimant's article 8 rights carry, when balanced against NGN's article 10 rights. Also the fact that material is widely known must be relevant to the court's discretion."

(iv) accepted that "the court should not set aside an injunction merely because it has met with widespread disobedience or defiance" (para 42), but noted that this was not a case of disobedience by the media, and that the difficulty about any submission of defiance was that "the Internet and social networking have a life of their own"; furthermore, that an English court "has little control over what foreign newspapers and magazines may publish" (para 44); and that "it does appear that those who want to find out the individuals' identities have already done so" (para 45).

18. In these circumstances, the Court concluded, in Jackson LJ's words, that

"47. In the situation which now prevails, I still think that the claimant is likely to establish a breach of ECHR article 8. But, notwithstanding the limited public interest in the proposed story, I do not think that the claimant is 'likely' to obtain a permanent injunction. I reach this conclusion for seven reasons:

i) Knowledge of the relevant matters is now so widespread that confidentiality has probably been lost.

ii) Much of the harm which the injunction was intended to prevent has already occurred. The relatives, friends and business contacts of PJS and YMA all know perfectly well what it is alleged that PJS has been doing. The 'wall-to-wall excoriation' which the claimant fears (CTB at 24) has been taking place for the last two weeks in the English press. There have been numerous headlines such as 'celebrity love cheat' and 'Gag celeb couple alleged to have had a threesome'. Many readers know to whom that refers.

iii) The material which NGN wishes to publish is still private, in the sense that it concerns intimate sexual matters. I reject Mr Millar's submission that PJS's article 8 rights are no longer engaged at all. First, there are still many people, like Mr Browne's hypothetical purchaser of the Financial Times, who do not know about PJS's sex life. Secondly, NGN's planned publication in England will be a further unwelcome intrusion into the private lives of PJS and his family. On the other hand, it will not be a shock revelation, as publication in January would have been. The intrusion into the private lives of PJS and his family will be an increase of what they are suffering already.

iv) If the interim injunction stands, newspaper articles will continue to appear re-cycling the contents of the redacted judgment and calling upon PJS to identify himself. Websites discussing the story will continue to pop up. As one is taken down, another will appear. This process will continue up to the trial date.

v) As stated in para 59 of the previous redacted judgment (para 61 of the full judgment), NGN is entitled to publish articles criticising people in the public eye. Therefore it has an article 10 right to publish an account of PJS's conduct. That article 10 right has to be balanced against PJS's article 8 right for his sexual liaisons to remain a private matter. The need to balance article 8 rights against article 10 rights means that there is a limit to how far the courts can protect individuals against the consequences of their own actions.

vi) As a result of recent events, the weight attaching to the claimant's article 8 right to privacy has reduced. It cannot now be said that when the day of trial comes, PJS's article 8 right is likely to prevail over NGN's article 10 right to freedom of expression, such as to warrant the imposition of a permanent injunction.

vii) Finally, the court should not make orders which are ineffective. It is in my view inappropriate (some may use a stronger term) for the court to ban people from saying that which is common knowledge. This must be relevant to the exercise of the court's discretion. Injunctions are a discretionary remedy.

> 48. I turn next to the position of YMA and the children. As explained in para 39 of my previous judgment, the interests of other family members, in particular children, are a significant consideration, but they cannot be a trump card. Paragraph 61 of the redacted judgment (para 63 of the full judgment) referred to the likelihood that, in the absence of an injunction, the children would in the future learn about these matters from school friends or the Internet. That is now a less material consideration. In my view, whether or not the court grants an injunction, it is inevitable that the two children will in due course learn about these matters."

Analysis of the Court of Appeal's judgment of 18 April 2016

(i) HRA section 12

19. There is, as all members of the Supreme Court conclude, a clear error of law in the Court of Appeal's reasoning in relation to section 12. For reasons given in para 20 below, it consists in the self-direction that section 12 "enhances the weight which article 10 rights carry in the balancing exercise" (para 40). The Court of Appeal's further self-direction, that section 12 "raises the hurdle which the claimant must overcome in order to obtain an interim injunction" is unexceptionable, in so far as section 12 replaces the general *American Cyanamid* test, focused on the balance of convenience, with a test of whether the appellant is "likely to establish that publication should not be allowed" at trial. The position was stated more particularly by Lord Nicholls said in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44; [2005] 1 AC 253, para 22, in a speech with which the other members of the House agreed:

> "Section 12(3) makes the likelihood of success at trial an essential element in the court's consideration of whether to make an interim order. 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."

20. The Court of Appeal's initial self-direction is however contrary to considerable authority, including authority at the highest level, which establishes that, even at the interlocutory stage, (i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see eg *In re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593, para 17, per Lord Steyn, with whom all other members of the House agreed; *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73, para 47, per Buxton LJ, with whom the other members of the Court agreed; and *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), para 28, per Eady J, describing this as a "very well established" methodology. The exercise of balancing article 8 and article 10 rights has been described as "analogous to the exercise of a discretion": *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, para 8). While that is at best only an analogy, the exercise is certainly one which, if undertaken on a correct basis, will not readily attract appellate intervention. The Court of Appeal's error in its initial self-direction is, however, one of potential significance, since it necessarily affects the balance. By itself it would require the Supreme Court to re-exercise the discretion which the Court of Appeal exercised in setting aside the injunction which it had previously granted. But there are further aspects of the Court of Appeal's treatment of the issues which together lead to the same conclusion.

(ii) The reference to a "limited public interest"

21. The Court of Appeal in my opinion also erred in the reference it made, at three points in its judgment (paras 13, 30 and 47), to there being in the circumstances even a "limited public interest" in the proposed story and in its introduction of that supposed interest into a balancing exercise (para 47(v)). In identifying this interest, the Court of Appeal relied upon a point made by an earlier Court of Appeal in *Hutcheson* (and before that by Eady J in *Terry*), namely that the media are entitled to criticise the conduct of individuals even where is nothing illegal about it. That is

obviously so. But criticism of conduct cannot be a pretext for invasion of privacy by disclosure of alleged sexual infidelity which is of no real public interest in a legal sense. It is beside the point that the appellant and his partner are in other contexts subjects of public and media attention - factors without which the issue would hardly arise or come to court. It remains beside the point, however much their private sexual conduct might interest the public and help sell newspapers or copy. The matter is well put by Anthony Lester (Lord Lester of Herne Hill) in a recent book, *Five Ideas to fight for* (Oneworld, 2016), p 152: "News is a business and not only a profession. Commercial pressures push papers to publish salacious gossip and invasive stories. It is essential to ensure that those pressures do not drive newspapers to violate proper standards of journalism."

22. That criticism of supposed infidelity cannot be the guise under which the media can disclose kiss and tell stories of no public interest in a legal sense is confirmed by a series of European Court of Human Rights ("ECtHR") judgments. Thus, in *Armonienė v Lithuania* [2009] EMLR 7, para 39, the Court emphasised the duty of the press to impart information and ideas on matters of public interest, but noted that

> "a fundamental distinction needs to be made between reporting facts - even if controversial - capable of contributing to a debate in a democratic society and making tawdry allegations about an individual's private life";

In *Mosley v United Kingdom* [2012] EMLR 1, para 114, the Court reiterated that

> "there is a distinction to be drawn between reporting facts - even if controversial - capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life (see *Armonienė*, para 39). In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life (*Von Hannover v Germany* (2005) 40 EHRR 1, para 65; *Hachette Filipacchi Associés (ICI PARIS) v France*, no 12268/03, para 40; and *MGN Ltd v United Kingdom* (2001) 53 EHRR 5, para 143). Such reporting does not attract the robust protection of article 10 afforded to the

> press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation (see *Société Prisma Presse v France (dec)*, nos 66910/01 and 71612/01, 1 July 2003; *Von Hannover*, cited above, para 66; *Leempoel & SA E Ciné Revue v Belgium*, no 64772/01, para 77, 9 November 2006; Hachette Filipacchi Associés (ICI PARIS), cited above, para 40; and *MGN Ltd*, cited above, para 143."

23. Most recently, in *Couderc and Hachette Filipacchi Associés v France* (Application No 40454/07), paras 100-101, the Court said:

> "100. The Court has also emphasised on numerous occasions that, although the public has a right to be informed, and this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest to society (see *Von Hannover*, cited above, para 65; *MGN Ltd v United Kingdom*, no 39401/04, para 143, 18 January 2011; and *Alkaya v Turkey*, no. 42811/06, para 35, 9 October 2012).
>
> 101. Thus, an article about the alleged extra-marital relationships of high-profile public figures who were senior State officials contributed only to the propagation of rumours, serving merely to satisfy the curiosity of a certain readership (see *Standard Verlags GmbH v Austria (No 2)*, no 21277/05, para 52, 4 June 2009). Equally, the publication of photographs showing scenes from the daily life of a princess who exercised no official functions was aimed merely at satisfying the curiosity of a particular readership (see *Von Hannover*, cited above, para 65, with further references). The Court reiterates in this connection that the public interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism."

24. In these circumstances, it may be that the mere reporting of sexual encounters of someone like the appellant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under article 10 at all. But, accepting that article 10 is not only engaged but capable in principle of protecting any form of expression, these cases clearly demonstrate that

this type of expression is at the bottom end of the spectrum of importance (compared, for example, with freedom of political speech or a case of conduct bearing on the performance of a public office). For present purposes, any public interest in publishing such criticism must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of outweighing such article 8 privacy rights as the appellant enjoys.

(iii) The distinction between rights of confidence and privacy rights

25. Mr Desmond Browne QC for the appellant submits the Court of Appeal also erred by too close an assimilation of a claim based on the tort of invasion of privacy with breach of confidence. Jackson LJ recognised, correctly, that the former attracts greater protection than the latter (para 36 of his judgment: see para 17(i) above). But he went on in para 39 to suggest that, whether a claim for misuse of private information will survive when information is in the public domain "depends on how widely known the relevant facts are". That suggests a quantitative test, measuring what has already been disclosed with what is yet undisclosed. That is a test which is not only appropriate but potentially decisive in the context of an application based on confidentiality, as witnessed famously by *Sunday Times v United Kingdom (No 2) ("Spycatcher No 2")* (1991) 14 EHRR 229, paras 54-55. There, the loss of secrecy by 30 July 1987 was central to the European Court of Human Rights' conclusion that injunctions could after that date no longer be justified either as necessary to ensure a fair trial or to protect national security. The promotion of the efficiency and reputation of the Security Service constituted insufficient justification.

26. However, different considerations apply to the present privacy claim. First, as Mr Browne submits, a quantitative approach overlooks the invasiveness and distress involved, even in repetition of private material. Second, open hard copy exposure, as well no doubt as further internet exposure, is likely to add significantly to the overall intrusiveness and distress involved. I return to the second point in paras 34-37 below. As to the first point, there is substantial recent authority recognising that even "the repetition of known facts about an individual may amount to unjustified interference with the private lives not only of that person but also of those who are involved with him": *JIH v News Group Newspapers Ltd* [2010] EWHC 2818 (QB), para 59, per Tugendhat J. The Court of Appeal referred (in para 25) to the submission which Mr Browne made before it to like effect, and to the supporting authority which he cited, but did not, Mr Browne submits, give effect to it in its decision. The point made in *JIH* is worth elaborating for its resonance on this appeal. It can be traced back to *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 260F, where Lord Keith gave examples of circumstances in which a person could be entitled to restrain disclosure of private information, which had received widespread publication abroad. It was taken up by Eady J in *McKennitt v Ash* [2006] EMLR 178, para 81, by Tugendhat J in *Green Corns Ltd v Claverley*

Group Ltd [2005] EMLR 748, paras 78-79, where he said that the question was not whether information was generally accessible, but rather whether an injunction would serve a useful purpose and by Briggs J in *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), paras 22-26, where he also said that HRA section 12(4)(a)(i) in his judgment "creates no separate or different test …, at least where … there is no suggestion that the material is about to become available to the public".

27. Eady J and Tugendhat J have since further elaborated the significance of the principle in successive judgments in *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) and 1334 (QB). In *CTB*, as in the present case, an interim injunction had been granted to restrain disclosure of information about an alleged sexual relationship. In *CTB* the claimant was a well-known footballer who was married and had a family. In the five or so weeks after the injunction was granted, substantial information, from sources which could not be attributed to the defendant, became available on Twitter and the internet generally identifying or pointing towards the footballer. The defendants argued in effect that privacy injunctions (and no doubt other forms of injunction also) had ceased to serve any useful purpose in an age when information could be put out on various networks within or outside this jurisdiction by persons other than the immediate defendant.

28. More specifically, the defendants in *CTB* also placed reliance on Eady J's refusal of an injunction to Mr Max Mosley in *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB). Eady J had there said that:

> "The court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised, in the traditional terminology, as a brutum fulmen. It is inappropriate for the court to make vain gestures."

In *CTB* Eady J explained why this statement did not cover the circumstances in CTB:

> "18. The circumstances here are rather different. In *Mosley*, I took the view that there was no point in granting an injunction because, even before the application was made, several hundred thousand people had seen the intimate video footage which NGN had put on line - conduct that was recently characterised by the ECtHR as a 'flagrant and unjustified

> intrusion': *Mosley v UK* (Application No 48009/08), 10 May 2011 at 104. In a real sense, therefore, it could be said that there was nothing left for the court to protect by an injunction.
>
> 19. Here, the Internet allegations prayed in aid by Mr Spearman took place after the order was made. Different policy considerations come into play when the court is invited to abandon the protection it has given a litigant on the basis of widespread attempts to render it ineffective. Furthermore, unlike the Mosley case, there is no doubt other information that Ms Thomas could yet publish, quite apart from this claimant's identity, which is not yet in the public domain. The injunction thus continues to serve a useful purpose, from the claimant's point of view, for that reason alone, since she is amenable to the jurisdiction of the court. Otherwise, he would not seek to maintain it.
>
> 20. Mr Spearman's application is therefore quite narrow. He seeks only to vary the injunction so as to permit the claimant to be identified. …"

In the circumstances, Eady J held that even identification should not be permitted. It will be apparent that the circumstances in *CTB* bore some relevant similarities to those of the present case. In particular, reliance was placed on internet disclosures subsequent to the original injunction in support of an application to set aside the injunction on the basis that it served no further useful protective purpose. This situation was distinguished in principle from that where an injunction is granted after substantial internet disclosure. The substantial internet disclosure which had occurred after the injunction was not regarded as justifying the lifting of the injunction. The injunction, enforceable against the defendant, was seen as continuing to serve a useful purpose.

29. As to the general suggestion that injunctions really have no sensible place in an internet age, Eady J said:

> "23. It is important always to remember that the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with intrusion. … [That] also largely explains why it is the case that the truth or falsity of the allegations in question can often be irrelevant: see eg *McKennitt v Ash* [2008] QB 73 at 80 and 87.

> 24. It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or 'broadsheet', is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with each exposure of personal information or allegations, whether by way of visual images or verbally, there is a new intrusion and occasion for distress or embarrassment. Mr Tomlinson argues accordingly that 'the dam has not burst'. For so long as the court is in a position to prevent some of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection. The analogy with King Canute to some extent, therefore, breaks down.
>
> 25 It may be thought that the wish of NGN to publish more about this 'story', with a view to selling newspapers and perhaps achieving other commercial advantages, demonstrates that coverage has not yet reached saturation point. Had it done so, the story would no longer retain any interest. This factor tends, therefore, to confirm my impression that the court's attempts to protect the claimant and his family have not yet become wholly futile.
>
> 26. In these circumstances, it seems to me that the right question for me to ask, in the light of *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324 and *In re Guardian News and Media Ltd* [2010] UKSC 1, is whether there is a solid reason why the claimant's identity should be generally revealed in the national media, such as to outweigh the legitimate interests of himself and his family in maintaining anonymity. The answer is as yet in the negative. They would be engulfed in a cruel and destructive media frenzy. Sadly, that may become unavoidable in the society in which we now live but, for the moment, in so far as I am being asked to sanction it, I decline to do so. On the other side, …, it has not been suggested that there is *any* legitimate public interest in publishing the story."

The analysis in these passages is both relevant and indeed largely transposable to the circumstances of the present appeal.

30. The same theme was developed by Tugendhat J in the second *CTB* judgment, which followed the naming in Parliament by an MP of the footballer: Tugendhat J said:

> "3. It is obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed. The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media."

31. Tugendhat J's reasoning in *JIH* and Eady J's reasoning in *CTB* were cited with approval by MacDonald J in *H v A (No 2)* [2015] EWHC 2630 (Fam), para 47. In so far as it is likely that the respondents in the present case would wish to accompany any stories with pictures of the relevant individuals, it is also consistent with the Leveson Inquiry Report's conclusion (para 3.4) that:

> "There is a qualitative difference between photographs being available online and being displayed, or blazoned, on the front page of a newspaper such as the Sun. The fact of publication in a mass circulation newspaper multiplies and magnifies the intrusion, not simply because more people will be viewing the images, but also because more people will be talking about them. Thus, the fact of publication inflates the apparent newsworthiness of the photographs by placing them more firmly within the public domain and at the top of the news agenda."

32. It is right that the Supreme Court should on the present application express its own view on the correctness of the approach taken in the authorities discussed in the preceding paragraphs (paras 26-32). In my opinion, the approach is sound in general principle. Every case must be considered on its particular facts. But the starting point is that (i) there is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is

capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made - especially if it occurs in a different medium (see paras 34-37 below).

33. However, whether an interim injunction should be granted to restrain an anticipated tortious invasion of privacy raises different considerations from those involved in the simple question whether disclosure or publication would constitute a tortious act. The courts have to apply HRA section 12, and, before restraining publication prior to trial, have in particular to be "satisfied that the applicant is likely to establish that publication should not be allowed". They have, under section 12(4), to have particular regard to the importance of the article 10 right to freedom of expression, although, as already explained (paras 19-20 above), that right has no necessary claim to priority over the need to have due regard to any article 8 privacy right which the applicant for an injunction enjoys. Where, as here, the proceedings relate to journalistic material (or conduct connected to such material) the courts must also have particular regard under section 12(4)(a) to two specific factors which point potentially in different directions:

(i) the extent to which the material has, or is about to, become available to the public and

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

Under section 12(4)(b), the courts must also have particular regard to any relevant privacy code.

34. As to the factor identified in section 12(4)(a)(ii), for reasons already given (paras 21-24 above), the present appeal must be approached, on the evidence presently available, on the basis that there is and would be effectively no public interest in a legal sense in further disclosure or publication. As to the factor in section 12(4)(a)(i), the requirement to have particular regard to the extent to which journalistic material (or conduct connected with such material) "has, or is about to, become available to the public" does not preclude a court, when deciding whether to grant or lift injunctive relief, from having regard to both

a) the nature of the journalistic material involved and the medium in which it is, or is to be, expressed, and

b) the extent to which it is already available in that medium and the extent to which steps are being or can be taken to remove or limit access to any other publication in that or any other medium.

In short, the question whether material has, or is about to, become available to the public should be considered with reference to, inter alia, the medium and form in relation to which injunctive relief is sought.

35. In the light of the above, I consider that the Court of Appeal focused too narrowly on the disclosures already made on the internet, and did not give due weight to the qualitative difference in intrusiveness and distress likely to be involved in what is now proposed by way of unrestricted publication by the English media in hard copy as well as on their own internet sites. There is little doubt that there would be a media storm. It would involve not merely disclosure of names and generalised description of the nature of the sexual activities involved, but the most intimate details. This would be likely to add greatly and on a potentially enduring basis to the intrusiveness and distress felt by the appellant, his partner and, by way of increased media attention now and/or in the future, their children. The Court of Appeal did not do justice to this qualitative difference either when it said that the "wall-to-wall excoriation which the claimant fears has already been taking place for the last two weeks in the English press", as a result of "numerous headlines such as 'celebrity love cheat' and 'Gag couple alleged to have had a threesome'" (para 47(ii), or when it went on to refer to the likely impact of the proposed publication as "a further unwelcome intrusion", increasing what is being suffered already, not "a shock revelation, as publication in January would have been" (para 47(iii)).

36. As to section 12(4)(b), this is of particular relevance in relation to the appellant's and his partner's children. The respondents subscribe to the Independent Press Standards Organisation ("IPSO"), whose *Editors' Code of Practice* of January 2016 provides that "Everyone is entitled to respect for his or her private and family life" and that editors "will be expected to justify intrusions into any individual's private life without consent" (clause 3(i) and (ii)). The Code notes that there can be exceptions in the public interest, emphasising however that "editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of [children under 16])". The last point echoes the thinking in article 3(1) of the United Nations Convention on the Rights of the Child (providing that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration") which has in turn informed the ECtHR's and United Kingdom courts understanding of ECHR article 8: see eg *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166, *H v Lord Advocate* 2012 SC (UKSC) 308, *H (H) v Deputy Prosecutor of the Italian Republic (Genoa)* [2013] 1 AC 338 and *Zoumbas v Secretary of State for the Home Department* [2013] 1 WLR 3690.

37. Mr Browne submits that the interests of the appellant's children were not given the primacy or importance which they deserved. The Court of Appeal in granting injunctive relief in January 2016 identified as relevant consequences of the proposed article both that "the children would become the subject of increased press attention, with all that that entails" and that, "even if they do not suffer harassment in the short-term, they are [ie if the proposed article is published] bound to learn about these matters from school friends and the internet in due course". The Court of Appeal in deciding to discharge the injunction in April 2016 addressed only the latter consequence, saying that it was "now a less material consideration" as "whether or not the court grants an injunction, it is inevitable that the two children will in due course learn about these matters". The Court of Appeal did not expressly advert to the short term risks involved in media attention and communication of the information to young children, and still less did it advert to the qualitative difference between, on the one hand, unrestricted exposure in the hard copy media as well as on internet sites and, on the other hand, internet exposure which the appellant and those advising him have made and intend to continue to make every effort to restrict, so far as lies within their power. I prefer simply to agree with what Lady Hale says in this area in the open part of her judgment, without finding it necessary to refer to or rely on what is said in the redacted part.

(iv) An effective remedy

38. Mr Browne makes a fourth criticism of the Court of Appeal's approach to the exercise of its discretion. The Court, having concluded that the appellant was likely at trial to establish that publication was a tortious invasion of privacy, nonetheless left the appellant to a claim for damages. It is therefore a criticism of the Court of Appeal's exercise of the discretion which, as Lord Nicholls recognised in *Cream Holdings*, exists under HRA section 12 once a court has decided that a proposed publication is likely to be tortious and goes on to consider whether the applicant is also likely to establish at trial that publication should not be allowed.

39. By exercising its discretion so as to discharge the injunction, Mr Browne submits, the Court of Appeal failed to ensure that the appellant's privacy rights were "practical and effective": *Von Hannover v Germany*, para 40, *Armonienė v Lithuania*, para 38. The submission must, however, be approached with caution at a European level, because in *Mosley v United Kingdom* [2012] 2012] EMLR 1, para 120, the ECtHR (when considering whether the Convention required the media, before publishing potentially private material, to inform the subject of such material) observed that

> "in its examination to date of the measures in place at domestic level to protect article 8 rights in the context of freedom of expression, it has implicitly accepted that ex post facto

> damages provide an adequate remedy for violations of article 8 rights arising from the publication by a newspaper of private information."

The ECtHR went on to explain *Armonienė v Lithuania* as a case where damages had not provided an adequate remedy, because of the "derisory sum" that had been awarded.

40. On the other hand, in *Mosley v United Kingdom* the ECtHR was primarily engaged in delimiting the scope of ECHR rights, particularly with regard to pre-notification, at a European level. It was not excluding the possibility of or justification for a prior restraint on publication in appropriate cases at a domestic level. Indeed, it upheld such a prior restraint in *Editions Plon v France* (2006) 42 EHRR 36. Further, it said this in *Mosley* (para 117):

> "117. Finally, the Court has emphasised that while article 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see *Observer and Guardian v United Kingdom* (26 November 1991, (1992) 14 EHRR 153, para 60). The Court would, however, observe that prior restraints may be more readily justified in cases which demonstrate no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest."

In the present case, it can be said that there is no urgency about any publication, as well as no evident contribution to any debate of general public interest.

41. At a domestic level, the Court of Appeal has itself also recognised that the refusal of an interlocutory injunction can operate as "a strong potential disincentive to respect for aspects of private life" and that, depending on the circumstances, it may only be by the grant of such an injunction that privacy rights can be satisfactorily protected: *Douglas v Hello! Ltd (No 3)* [2006] QB 125, paras 257 and 259; and that such an injunction may be "the only remedy which is of any value": *A v B plc* [2003] QB 195, para 11. Damage done by publication of a defamatory statement can be redressed by a public finding at trial that the allegation was false, but an invasion of privacy cannot be cured in a similar way, and for that reason there may never be a trial, whatever damages might be recoverable. These points are also

recognised in the academic writing: see eg *Freedom of Speech* (OUP, 2006), by Professor Eric Barendt, p 137 and *Privacy and Press Freedom* (Blackstone 1995), by Professor Raymond Wacks, p 156.

42. Mr Browne further notes, with reference to the first instance decision of *Mosley v News Group Newspapers* [2008] EMLR 20, that it has been held at first instance that exemplary or punitive damages are not recoverable at common law for misuse of private information. On the other hand, the contrary remains open to argument at higher levels, and whether an account of profits might be claimed is likewise open. (In future, there may be a statutory possibility of obtaining an award of exemplary damages against a publisher not a member of an approved regulator; that is under sections 34-36 of the Crime and Courts Act 2013, if a court were to be satisfied that the respondents' conduct "has shown a deliberate or reckless disregard of an outrageous nature for the claimant's rights", that "the conduct is such that the court should punish the defendant for it" and that "other remedies would not be adequate to punish that conduct". But no approved regulator at present exists, so that the section has no application to the present case.)

43. In any event, whether or not substantial or even exemplary damages could be recovered in the present case is not decisive of the question whether an interim injunction should be granted. Once again, it is necessary to consider the particular facts. Here, it is highly likely, having regard to the nature of the material sought to be published and the identity and financial circumstances of the appellant, that the appellant's real concern is indeed with the invasion of privacy that would be involved in further disclosure and publication in the English media, and that any award of damages, however assessed, would be an inadequate remedy.

Conclusions

44. The circumstances of this case present the Supreme Court with a difficult choice. As in the Court of Appeal, so before the Supreme Court the case falls to be approached on the basis that the appellant is likely at trial to establish that the proposed disclosure and publication is likely to involve further tortious invasion of privacy rights of the appellant and his partner as well as of their children, who have of course no conceivable involvement in the conduct in question. The invasion would, on present evidence, be clear, serious and injurious. On the other hand, those interested in a prurient story can, if they try, probably read about the identities of those involved and in some cases about the detail of the conduct, according to where they may find it on the internet. The Court will be criticised for giving undue protection to a tawdry story by continuing the injunction to trial. There is undoubtedly also some risk of further internet, social media or other activity aimed at making the Court's injunction seem vain, whether or not encouraged in any way by any persons prevented from publishing themselves. On the other hand, the legal

position, which the Court is obliged to respect, is clear. There is on present evidence no public interest in any legal sense in the story, however much the respondents may hope that one may emerge on further investigation and/or in evidence at trial, and it would involve significant additional intrusion into the privacy of the appellant, his partner and their children.

45. At the end of the day, the only consideration militating in favour of discharging the injunction is the incongruity of the parallel - and in probability significantly uncontrollable - world of the internet and social media, which may make further inroads into the protection intended by the injunction. Against that, however, the media storm which discharge of the injunction would unleash would add a different and in some respects more enduring dimension to the existing invasions of privacy being perpetrated on the internet. At the risk of appearing irredentist, the Supreme Court has come to the conclusion that, on a trial in the light of the present evidence, a permanent injunction would be likely to be granted in the interests of the appellant, his partner and especially their children. The appeal should therefore be allowed, and the Court will order the continuation of the interim injunction to trial or further order accordingly.

LORD NEUBERGER: (with whom Lady Hale, Lord Mance and Lord Reed agree)

46. The issue which we have to decide is whether to uphold or reverse the decision of the Court of Appeal to lift an interlocutory injunction which it had previously granted at the suit of PJS, who is married to YMA, and they have two young children. That interlocutory injunction restrained NGN until trial or further order from publishing a story about a sexual relationship between PJS and AB and another, a story which had been communicated to News Group Newspapers Ltd, NGN, by AB. I agree that we should reverse the decision and continue, or re-impose, the interlocutory injunction, for the reasons given in the judgment of Lord Mance, and I also agree with Lady Hale. Because we are reversing the Court of Appeal and are not unanimous in doing so, I add a few words of my own.

The history in summary

47. After NGN had obtained the story from AB, they very properly informed PJS of their intention to publish it in the *Sun on Sunday* newspaper. PJS's case was and remains that this would be unlawful as it would violate his legal rights as it would be an unlawful misuse of his private information. Accordingly, he immediately issued proceedings against NGN seeking a permanent injunction to prevent such publication. Because a permanent injunction can only be granted after a trial, NGN would have been able to publish the story in the meantime. Accordingly, PJS also

immediately applied for a temporary, or interlocutory, injunction to restrain NGN from publishing the story until the trial.

48. NGN resisted both the proceedings and the grant of the interlocutory injunction on the ground that the public interest in freedom of expression and in the story being published outweighed any privacy rights enjoyed by PJS. Cranston J decided that NGN were right and refused PJS an interlocutory injunction (but granted one very temporarily to enable PJS to appeal). PJS appealed to the Court of Appeal which on 22 January 2016, granted an interlocutory injunction for reasons given by Jackson LJ. In summary, he considered that PJS had a legally recognised expectation of privacy, that there was no public interest in the story being published, that PJS therefore had a strong case that publication of the story would infringe his legal rights, that such publication would be "devastating" for PJS, that there would be "increased press attention" paid to his children, and that "when this action comes to trial, [PJS] is likely to establish that publication should not be allowed" - [2016] EWCA Civ 100.

49. Thereafter, the story was published in a newspaper in the United States, in Canada and in Scotland, and it has been available to the public in England and Wales to the extent described by Lord Mance in paras 6-8 above. As a result, NGN applied to the Court of Appeal to lift the interlocutory injunction on the ground that the dissemination of the story since January 2016 meant that the information was now out in the public domain to such an extent that a permanent injunction would not be granted at trial, so that the interlocutory injunction should therefore be discharged. On 18 April 2016, the Court of Appeal, for reasons given by Jackson LJ, accepted that argument and discharged the interlocutory injunction - [2016] EWCA Civ 393. The Court of Appeal nonetheless stayed the discharge of the injunction for two days to enable PJS to apply to this Court. We decided to hear PJS's application for permission to appeal to this Court together with the arguments which the parties wished to raise on any appeal, and to continue the stay until we had determined the application and any appeal.

Can this Court consider whether to continue the interlocutory injunction?

50. On the face of it, a decision whether or not to discharge an interlocutory injunction is a matter for the court which determines that issue. However, an appellate court can interfere with such a decision if the determining court proceeds on an erroneous basis. In this case, there are three possible reasons why this Court is, as a matter of law, entitled to reconsider the issue raised on this appeal for ourselves.

51. First, although he gave an impressive and careful judgment, Jackson LJ misdirected himself in an important respect when reaching the decision to discharge the interlocutory injunction which had been previously granted. Having rightly said that it was necessary to balance PJS's right to respect for his private and family life against NGN's right to freedom of his expression, he said that section 12 of the Human Rights Act "enhances the weight" to be given to the latter factor. However, that is not right. As Lord Steyn made clear in *In re S (A Child)* [2005] 1 AC 593, para 17, each right has equal potential force in principle, and the question is which way the balance falls in the light of the specific facts and considerations in a particular case. This was an error which entitles, indeed obliges, us to reconsider the question of discharging the interlocutory injunction.

52. Secondly, there is an argument that it was wrong to proceed on the basis that the story had what Jackson LJ described as "limited", as opposed to no, "public interest". Of course, there is always a public interest in anyone - particularly, some may think, the media - having the right to say what they want. As Jackson LJ rightly said in his first judgment in this case at para 55, "[freedom of expression is an important right for its own sake"; and that is recognised by section 12(4) of the Human Rights Act 1998, which provides that "[t]he court must have particular regard to the importance of the Convention right to freedom of expression". However, following section 12(4)(a)(ii) of the 1998 Act, it appears to me that it was the public interest (as opposed to the interests of some members of the public) in the story being published which Jackson LJ was describing. In his earlier judgment in which he decided to grant the injunction, Jackson LJ decided that there was no public interest in the story being published (see [2016] EWCA Civ 100, para 53), and, as that finding has unsurprisingly not been appealed, it must be accepted, at least until trial. Having said that, I very much doubt that this factor would have been enough to persuade me that we could reconsider the question of continuing the interlocutory injunction, but, in the light of what I say in para 51 above and para 53 below, that is an academic point.

53. Thirdly, it appears to me that the Court of Appeal overlooked, or at any rate gave insufficient weight to, the intrusive and distressing effect on PJS and his family of newspaper coverage of the story, to some extent conflating that question with confidentiality. I will say more about that aspect in the next section of this judgment.

The continuation of the interlocutory injunction

54. It is therefore for this Court to decide whether or not to re-impose the interlocutory injunction, it appears to me that the central issue in that connection is whether the trial judge would be likely to grant a permanent injunction when this case comes to trial. Section 12(3) of the 1998 Act precludes the grant of an interlocutory injunction unless a permanent injunction is "likely" to be granted at

trial; on the other side of things, it is hard to see why, in this case at least, an interlocutory injunction should not be granted (and, *a fortiori*, continued) if a permanent injunction is likely to be granted. In this context, the proper approach to likelihood is as set out by Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, para 22, which is set out by Lord Mance in para 19 above.

55. In January 2016, the Court of Appeal thought it was likely that, at the end of the trial of this action, a judge would grant a permanent injunction restraining NGN from publishing the story. Accordingly, the question to be resolved is whether, despite the publicity which has already been given to the story, as described by Lord Mance in paras 6, 7 and 8 of his judgment, that is still the likely outcome at trial.

56. On that centrally relevant issue, it must be remembered that this is an application to discharge an interlocutory judgment before the trial of the action concerned. NGN's case must therefore be that the interlocutory injunction should be revoked because of "some significant change of circumstances" since it was granted in January 2016 - *Thevarajah v Riordan* [2016] 1 WLR 76 para 18 citing Buckley LJ in *Chanel Ltd v F W Woolworth & Co Ltd* [1985] 1 WLR 485, 492-493. Accordingly, with the exception of the effects of the subsequent publicity referred to in para 55 above, the conclusions reached in the first judgment of the Court of Appeal must be assumed to be correct; in particular, it must be assumed that there is no public interest in publication of the story, and that, were it not for the publicity which has occurred since January 2016, it is likely that a permanent injunction would be granted.

57. If PJS's case was simply based on confidentiality (or secrecy), then, while I would not characterise his claim for a permanent injunction as hopeless, it would have substantial difficulties. The publication of the story in newspapers in the United States, Canada, and even in Scotland would not, I think, be sufficient of itself to undermine the claim for a permanent injunction on the ground of privacy. However, the consequential publication of the story on websites, in tweets and other forms of social network, coupled with consequential oral communications, has clearly resulted in many people in England and Wales knowing at least some details of the story, including the identity of PJS, and many others knowing how to get access to the story. There are claims that between 20% and 25% of the population know who PJS is, which, it is fair to say, suggests that at least 75% of the population do not know the identity of PJS, and presumably more than 75% do not know much if anything about the details of the story. However, there comes a point where it is simply unrealistic for a court to stop a story being published in a national newspaper on the ground of confidentiality, and, on the current state of the evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case.

58. However, claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone. As Tugendhat J said in *Goodwin v News Group Newspapers Ltd* [2011] EMLR 502, para 85, "[t]he right to respect for private life embraces more than one concept". He went on to cite with approval a passage written by Dr Moreham in *Law of Privacy and the Media* (2nd ed (2011), edited by Warby, Moreham and Christie), in which she summarised "the two core components of the rights to privacy" as "unwanted access to private information and unwanted access to [or intrusion into] one's … personal space" - what Tugendhat J characterised as "confidentiality" and "intrusion".

59. Tugendhat J then went on to identify a number of cases where "intrusion had been relied on by judges to justify the grant of an injunction despite a significant loss of confidentiality", namely *Blair v Associated Newspapers Ltd* (10 March 2000, Morland J), *West v BBC* (10 June 2002, Ouseley J), *McKennitt v Ash* [2006] EMLR 178, para 81 (Eady J), *X & Y v Persons Unknown* [2007] EMLR 290, para 64 (Eady J), *JIH v News Group Newspapers Ltd* [2011] EMLR 177, paras 58-59 (Tugendhat J), *TSE v News Group Newspapers Ltd* [2011] EWHC 1308 (QB), paras 29-30 (Tugendhat J) and *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB), para 23 (Eady J), to which can be added *CTB v News Group Newspapers Ltd* [2011] EWHC 1334 (QB), para 3 (Tugendhat J), *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch), para 25 (Briggs J), and *H v A (No 2)* [2015] EWHC 2630 (Fam), paras 66-69 (MacDonald J).

60. Perusal of those decisions establishes that there is a clear, principled and consistent approach at first instance when it comes to balancing the media's freedom of expression and an individual's rights in respect of confidentiality and intrusion. There has been not even a hint of disapproval of that approach by the Court of Appeal (although it considered appeals in *McKennitt* [2008] QB 73 and *JIH* [2011] 1 WLR 1645). Indeed, unsurprisingly, there has been no argument that we should take the opportunity to overrule or depart from them. Accordingly, it seems to me that it is appropriate for this Court to adhere to the approach in those cases. Not only do they demonstrate a clear and consistent approach, but they are decisions of judges who are highly respected, and, at least in the main, highly experienced in the field of media law and practice; and they were mostly decided at a time when access to the internet was easily available to the great majority of people in the United Kingdom.

61. The significance of intrusion, as opposed to confidentiality, in these decisions was well explained in the judgment of Eady J in *CTB* [2011] EWHC 1326 (QB), where he refused an application by a newspaper to vary an interlocutory injunction because of what he referred to as "widespread coverage on the Internet". At para 24 he said that "[i]t is fairly obvious that wall-to-wall excoriation in national newspapers … is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals

to those, however many, who take the trouble to look it up". As he went on to say in the next paragraph of his judgment, in a case such as this, "[f]or so long as the court is in a position to prevent some of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection".

62. The same approach was taken by Tugendhat J in a later judgment in the same case, *CTB* [2011] EWHC 1334 (QB), when refusing a further application to lift the interlocutory injunction after the applicant's name had been mentioned in the House of Commons. At para 3, having accepted that it was "obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose", he said that "in so far as its purpose is to prevent intrusion or harassment, it has not failed". Indeed, he regarded the fact that "tens of thousands of people have named the claimant on the internet" as confirming, rather than undermining, the argument that "the claimant and his family need protection from intrusion into their private and family life".

63. It also seems to me that if there was no injunction in this case, there would be greater intrusion on the lives of PJS and YMA through the internet. There may well be room for different views as to whether the lifting of the injunction would lead to an increase or a decrease in tweets and other electronic communications relating to the story. However, if the identity of PJS and the story could be communicated within England and Wales, then it would be likely that anyone in this jurisdiction who was searching for PJS (or indeed YMA) through a search engine, for reasons wholly unconnected with the story, would find prominent links to that story. But if search engines serving England and Wales are geo-blocked from mentioning PJS, or indeed YMA, in connection with the story, as they should be so long as an injunction is in place, this would not happen. It might be said that PJS and YMA could ask the search engine operators to remove any links to the story pursuant to the decision of the Court of Justice in *Google Spain SL v Agencia Española de Protección de Datos* (Case C-131/12) [2014] QB 1022, but it seems unlikely that the reasoning in that case could apply to a story which has only recently become public and is being currently covered in the newspapers.

64. In the instant case, Jackson LJ said in his first judgment, when granting the interlocutory injunction, that "[t]he proposed article would generate a media storm and much public interest in [PJS's] family. There would be increased press interest in [his] and YMA's family life. The children would become the subject of increased press attention, with all that that entails". There is no reason to think that that would be significantly different now, despite the internet coverage of the story - and indeed it may be that the press interest and attention identified by Jackson LJ in that passage would be increased as a result of the internet coverage.

65. In my view, the case for lifting the interlocutory injunction imposed in January 2016 has not been made out. The publication of the story and the identification of PJS in the electronic media since January 2016 has undoubtedly severely undermined (and probably, but not necessarily, demolished) PJS's claim for an injunction in so far as he relies on confidentiality. However, I am unconvinced, on the basis of the evidence and arguments we have heard, that it has substantially reduced the strength of his claim in so far as it rests on intrusion. Bearing in mind those factors and the lack of public interest in the story being published, as well as the factors mentioned by Lord Mance and Lady Hale, I consider that the interlocutory injunction should be continued until trial (or further order in the meantime).

66. One argument for discharging the injunction which I have not so far mentioned is that it may be arguable that things have got to the stage where it would be less damaging to PJS for the story to be published in the *Sun on Sunday* and other newspapers and got out of the way in one go, with all the intrusion that that would entail, as opposed to the potential drip-feeding of the story on the internet coupled with oblique references in the print media, often coupled with indignation at being unable to report the story. It is very hard indeed to assess the strength of that argument at least on the basis of the evidence which we were taken to. Further, it is a point which was scarcely, if at all, relied on by NGN, and it is a point on which the view and experience of PJS and his family should, I would have thought, carry some weight. Accordingly, I am not persuaded that it should carry the day for NGN at least at this stage.

Concluding remarks

67. I would therefore grant PJS permission to appeal to this Court, set aside the decision of the Court of Appeal given on 18 April 2016, and continue the injunction granted on 22 January 2016, until trial or further order in the meantime.

68. In summary terms this is because it seems likely that PJS will establish at trial that (i) publication of the story in the *Sun on Sunday* would be an unlawful breach of his rights, and (ii) he should be entitled to an injunction to restrain it, because of the consequential intrusion into his and his family's private lives. It is one thing for what should be private information to be unlawfully disseminated; it is quite another for that information to be recorded in eye-catching headlines and sensational terms in a national newspaper, or to be freely available on search engines in this jurisdiction to anyone searching for PJS or YMA, or indeed AB, by name in a different connection. If, as seems to me likely on the present state of the evidence and the current state of the law, PJS will succeed in obtaining such an injunction at trial, then it follows that he ought to be granted an injunction to restrain publication of the story in the meantime.

69. I referred in para 66 above to the indignation of the newspapers. It is easy to understand, and indeed to sympathise with, the concern of NGN and other newspapers at being excluded from reporting in this jurisdiction a story which is available, at least in part, to people in this country via electronic media. I appreciate that it is scant consolation, but the fact is that this situation arises from the perception that a story in a newspaper has greater influence, credibility and reach, as well greater potential for intrusion, than the same story on the internet.

70. I also accept that, as many commentators have said, that the internet and other electronic developments are likely to change our perceptions of privacy as well as other matters - and may already be doing so. The courts must of course be ready to consider changing their approach when it is clear that that approach has become unrealistic in practical terms or out of touch with the standards of contemporary society. However, we should not change our approach before it is reasonably clear that things have relevantly changed in a significant and long-term way. In that connection, while internet access became freely available in this country only relatively recently, almost all the cases listed at the end of para 59 above were decided since that happened, and many of those cases were decided after blogging and tweeting had become common. It is therefore quite understandable that Mr Millar QC, for NGN did not suggest that the law as laid down in those cases was wrong or outdated; and, currently at least, I am unpersuaded that they do not represent the law.

71. In the light of the facts as they currently appear and the law as it has now been developed, it appears to me that the interlocutory injunction sought by PJS should be granted. The courts exist to protect legal rights, even when their protection is difficult or unpopular in some quarters. And if Parliament takes the view that the courts have not adapted the law to fit current realities, then, of course, it can change the law, for instance by amending section 12 of the 1998 Act.

LADY HALE: (with whom Lord Neuberger, Lord Mance and Lord Reed agree)

72. I agree that this appeal should be allowed and the interim injunction restored for the reasons given by Lord Mance. I wish only to add a few words about the interests of the two children whom PJS has with YMA. It is simply not good enough to dismiss the interests of any children who are likely to be affected by the publication of private information about their parents with the bland statement that "these cannot be a trump card". Of course they cannot always rule the day. But they deserve closer attention than they have so far received in this case, for two main reasons. First, not only are the children's interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own. They also have a right to respect for their family life with their

parents. Secondly, by section 12(4)(b), any court considering whether to grant either an interim or a permanent injunction has to have “particular regard” to “any relevant privacy code”. It is not disputed that the IPSO Code, which came into force in January, is a relevant Code for this purpose. This, as Lord Mance has explained, provides that “editors must demonstrate an exceptional public interest to over-ride the normally paramount interests of [children under 16]”.

73. This means that, at trial, the court will have to consider carefully the nature and extent of the likely harm to the children’s interests which will result in the short, medium and longer terms from the publication of this information about one of their parents. At present, there is no evidence about this. It is possible that, at trial, the evidence will not support any risk of harm to the children’s interests from publication of the story in the English print and broadcasting media. It is possible that the evidence will indicate that the children can be protected from any such risk, by a combination of the efforts of their parents, teachers and others who look after them and some voluntary restraint on the part of the media.

74. On the other hand, it is also possible that the evidence will support a risk of harm to the children’s interests from the invasion of their own and their parents’ privacy, a risk from which it will be extremely difficult to protect them. There is all the difference in the world between the sort of wall to wall publicity and intrusion which is likely to meet the lifting of this injunction and their learning this information in due course, which the Court of Appeal thought inevitable. For one thing, the least harmful way for these children to learn of these events is from their parents. Their parents have the resources to take wise professional advice about how to reveal and explain matters to their children in an age-appropriate way and at the age-appropriate time. No doubt their parents are already giving careful thought to whether this might be the best way of protecting their children, especially from the spike of interest which is bound to result from this judgment let alone from any future judgment. The particular features which are relevant to the balancing exercise in this case are contained in three short paragraphs in the unredacted version of this judgment. These unfortunately have to be redacted because it would be comparatively easy to surmise the identity of the children and their parents from them. There are particular reasons why care should be taken about how, when and why these children should learn the truth.

75. [redacted]

76. [redacted]

77. [redacted]

78. In the leading case of *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, very careful consideration was given, at first instance, in the Court of Appeal and in the House of Lords, to balancing the public interest in publishing the name of a woman accused of murdering her child against the welfare interests of her surviving child who was living with his father. The public interest, in the legal sense, of publication was very strong. There was expert evidence of the welfare interests of the surviving child. It could not be more different from this case. As Lord Mance has demonstrated, there is no public interest in the legal sense in the publication of this information. There is no expert evidence of the interests of these children. These are all matters which should be properly argued at trial, not pre-empted by premature disclosure.

LORD TOULSON: (dissenting)

79. I respectfully disagree with the judgment of the majority. Despite the arguments persuasively advanced by Mr Desmond Browne QC on behalf of PJS, I have concluded on reflection that the injunction originally granted by the Court of Appeal on 22 January 2016 should not be reinstated. That injunction provided that NGN (as I will refer to the respondent) should not publish any information which might lead to PJS's identification, or any of the information referred to in a confidential schedule to the order, until trial of the action or further order.

80. To Lord Mance's full summary of the facts I would add only that there have been numerous twitter hashtags of a fairly obvious kind leading to material identifying PJS in connection with the injunction.

81. I agree with Lord Mance that it was incorrect for the Court of Appeal to say, as it did, that section 12 of the Human Rights Act ("HRA") enhances the weight which article 10 rights carry in the balancing exercise with the article 8 rights of PJS. In its judgment dated 22 January 2016 the Court of Appeal set out correctly the interplay between articles 8 and 10 (at para 30 and following), and I doubt whether the court really intended to adopt a different approach in April, but that is not a sufficient basis to re-interpret, or overlook as immaterial, what it said on the later occasion. In consequence, this court must review for itself the question whether the January injunction should be set aside because of a change of circumstances.

82. Although it does not affect the need for this court to form its own judgment whether the January injunction should be set aside, I would not subscribe to Lord Mance's other three criticisms of the Court of Appeal; that it wrongly referred to "limited public interest"; that it applied a quantitive test to the level of disclosure which there had been, thereby overlooking the invasiveness and distress which the proposed publication would entail; and that its decision involved a failure to ensure

that PJS's privacy rights were practical and effective. As to public interest, the Court of Appeal referred to what it had said on that subject in its earlier judgment without repeating it. In its earlier judgment the court made it clear that it thought very little of the public interest argument, for reasons which it fully explained. The seven reasons which the court gave in the judgment under review, at para 47, for setting aside the injunction were in no way affected by the NGN's suggested public interest in the publication; they were all to do with the consequences of what had become public. As to applying a purely quantitive test, section 12(4) of the HRA required the court to have regard to the extent to which the information embargoed from publication by the injunction was available to the public; the court also considered expressly the impact on PJS and the children of further disclosure in the light of events which had happened. The final criticism, relating to a practical and effective remedy, requires fuller discussion.

83. It is not disputed that this court must approach the question whether the injunction should remain in place on the basis that, on the present information, PJS is likely to succeed at the trial in his claim that publication of his identity, and the other information in the confidential schedule to the injunction, would be a breach of his article 8 rights. The Court of Appeal so found in its January judgment, and it adhered to that view in the judgment under review (para 41). Mr Gavin Millar QC did not try to persuade the court otherwise, although he made it clear that the Sun intends to maintain its public interest defence at the trial. For present purposes, the court must proceed on the basis that there is no public interest in the publication of the material, however interesting it might be to some members of the public. The fact that there is a public appetite, which the proposed publication would feed, for information about the sex lives of celebrities does not mean that its disclosure would be in the public interest. Celebrities are entitled to the same respect for their private lives as anyone else, unless disclosure would genuinely support the function of the press as a public watchdog. All this is well established.

84. The provision in section 12(3) of the HRA that there should be no pre-trial restraint on publication unless the court is satisfied that "the applicant is likely to establish that publication should not be allowed" requires more than that the applicant is likely to establish that publication would be in breach of his rights. It is generally necessary to persuade the court that he is likely to obtain a final injunction at the trial. The Court of Appeal rightly identified this as the crucial question (para 46). On that issue I have reached the same conclusion as the Court of Appeal for essentially the same reasons.

85. Mr Browne concentrated his argument on the impact on PJS and his spouse becoming the subjects of a media storm, together with the consequences for their children.

86. The Court of Appeal rightly recognised that the information which the NGN wants to publish is still private in the sense that it concerns intimate sexual matters, which attract the protection of article 8, although much of the confidentiality has been lost. In the world in which PJS lives, knowledge of the story must be commonplace and it is apparent from the evidence that the circle of those who know is much wider. The story in its essential details has been published in a major Scottish newspaper, it has been widely accessible on websites and twitter, and anyone who seriously wanted to know PJS's identity will have had ways of finding it. Confidentiality in a meaningful sense can survive a certain amount of leakage, and every case must be decided on its own facts, but in this case I have reached a clear view that the story's confidentiality has become so porous that the idea of it still remaining secret in a meaningful sense is illusory. Once it has become readily available to anyone who wants to know it, it has lost the essence of confidentiality. The court must live in the world as it is and not as it would like it to be. I would echo Jackson LJ's words that "[i]t is in my view inappropriate (some may use a stronger term) to ban people from saying that which is common knowledge". In my judgment that is good sense and good law.

87. Mr Browne submitted that even if the story has become widely known, an injunction is still appropriate to protect PJS from the impact of its being reported in the media in a lurid fashion. The Court of Appeal weighed the "media storm" argument both in its January judgment and in its recent judgment. In the later judgment it saw less force in the point than in January. It said that the process of excoriation which PJS fears has already been occurring and will inevitably continue. It did not go as far as to accept the NGN's argument that PJS's article 8 rights had ceased to be engaged at all, because it recognised that the proposed publication would be a further intrusion, but the critical factor in the court's decision whether to continue the injunction, as I read its judgment, was what it saw as the unreality of trying to put a lid on the story.

88. It is well recognised that repeated publication of private (and especially intimate) photos may properly be prevented by injunction, because the original publication does not necessarily reduce the intrusion caused by re-publication. In *Douglas v Hello! Ltd (No 3)* [2006] QB 125, para 105, the Court of Appeal explained that 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, or even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it. The court gave the example of a photograph taken with a telescopic lens of a film star lying naked by a swimming pool. In the present case what is sought to be restrained is the publication of facts of which there has already been widespread disclosure. Once facts are widely known, the legal landscape changes. In my view the court needs to be very cautious about granting an injunction

preventing publication of what is widely known, if it is not to lose public respect for the law by giving the appearance of being out of touch with reality.

89. Lord Mance says at para 33 that the requirement under section 12(4)(a)(i) of the HRA for the court to pay particular regard to "the extent to which the material has, or is about to, become available to the public" must be considered with reference to the form in relation to which injunctive relief is to be sought. As I read the words of the Act, they require the court to take into account how generally available the information has become from whatever source, be it broadcast journalism, print journalism, the internet or social media. The evident underlying purpose of the subsection is to discourage the granting of an injunction to prevent publication of information which is already widely known. If the information is in wide, general circulation from whatever source or combination of sources, I do not see that it should make a significant difference whether the medium of the intended publication is the internet, print journalism or broadcast journalism. The world of public information is interactive and indivisible.

90. I do not underestimate the acute unpleasantness for PJS of the story being splashed, but I doubt very much in the long run whether it will be more enduring than the unpleasantness of what has been happening and will inevitably continue to happen. The story is not going to go away, injunction or no injunction. It is a fact of life that stories about celebrities sometimes acquire their own momentum. In relation to the children, the Court of Appeal took account of their position both in its January judgment and in its recent judgment. They are very young and there are various steps which their parents can take to shield them from the immediate publicity. As the Court of Appeal said, it is inevitable in the longer term that the children will learn about these matters and their parents have no doubt already considered how they propose to handle it.

91. The case of *Editions Plon v France*, to which Lord Mance has referred, arose from the publication shortly after the death of President Mitterand of a book by his doctor entitled "Le Grand Secret". The French court granted an application by the late president's widow and children for an interlocutory injunction to stop its distribution. The doctor was subsequently prosecuted, fined and given a suspended prison sentence. Final judgment in the civil proceedings was given nine months after the president's death. Substantial damages were awarded to his widow and children and the injunction was made permanent. The Strasbourg court held that the temporary injunction had been legitimate, because the publication had occurred so soon after the president's death when his family were grieving. It did not consider that the permanent injunction satisfied the requirement of serving a pressing social need, particularly having regard to the other remedies which had been ordered and to the fact that the story was widely available on the internet. I recognise that the facts were very different from those of the present case, and that the content of the book raised matters of undoubted public interest, but the case nevertheless shows

that the court took a significantly different approach to a permanent ban on the publication of information which was widely available on the internet from its approach to a temporary ban for a specific and limited purpose.

92. Lord Mance has said that the effect of lifting the injunction will be largely to undermine the purpose of any trial, which will be rendered irrelevant. I would make two observations. First, while adequacy of damages as a remedy is a reason to refuse an injunction, you cannot turn the argument on its head and say that inadequacy of damages is a positive reason to grant an otherwise inappropriate injunction. Secondly, I do not agree that the trial will be rendered irrelevant. As to damages, I would not regard Eady J's decision in *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20, that exemplary damages cannot be awarded in an appropriate case for breach of privacy, as the final word on the subject. Proportionality is essential, but I would not rule out the possibility of the courts considering such an award to be necessary and proportionate in order to deter flagrant breaches of privacy and provide adequate protection for the person concerned.

93. I would dismiss the appeal.