DEVELOPMENTS IN PRIVACY LAW: WHAT A DIFFERENCE A YEAR MAKES

Richard Spearman QC 25 April 2012

The Report on "Super-Injunctions, Anonymised Injunctions and Open Justice"

The rise and fall of super-injunctions

The Committee chaired by the Master of the Rolls, Lord Neuberger, was set up in April 2010 in response to concern following two cases:

RJW and SJW v Guardian News and Media Ltd (***"Trafigura"***) – 11/9/09 Maddison J

- The Order made in that case provided:

  "Until after the conclusion of the hearing on the Return Date or further order in the meantime, the First Respondent must not use and must not publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings for the purpose of obtaining legal advice in relation to these proceedings (ii) otherwise for the purpose of these proceedings or (iii) for the purpose of carrying this Order into effect): (a) the information that the Applicants have obtained an injunction and/or (b) the existence of these proceedings and/or (c) the Applicants' interest in these proceedings; and must not cause or authorise any other person, firm or company to do any of those acts."

- At the original hearing, which was "without notice on notice" to GNM, Maddison J granted relief on an interim basis until the Return Date.

- Thereafter, the issues – including whether revealing that Trafigura had obtained an injunction would have "frustrated or rendered impracticable the interests of justice" - were never argued further: initially, the Return Date hearing was postponed by agreement due to delays in the preparation of evidence; subsequently, it never happened because the proceedings were compromised (there having been a furore in the meantime as to whether the order of Maddison J purported to prevent the reporting of proceedings in Parliament).

Terry (previously "LNS") v Persons Unknown [2010] EMLR 400 (***"Terry"***) – 29/1/10 Tugendhat J

- When the point was raised by the Judge, C accepted that the proposed Order prohibiting the reporting of the fact of the injunction was not necessary [137].

- This is not always so, as recognised by (a) [7] of the Model Order annexed to the "Practice Guidance: Interim Non-Disclosure Orders"; (b) the standard wording in the Form of Search Order given in the Practice Direction to CPR Part 25 at [20]:

  "Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly inform anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 p.m. on the return date or further order of the court."

According to the Report of the Committee (which was published on 20 May 2011):

- "A super-injunction is an interim injunction which restrains a person from: (i) publishing information which concerns the applicant and is said to be confidential or private; and, (ii) publicising or informing others of the existence of the order and the proceedings."

- Following *Terry*, super-injunctions had only been granted in two cases:

  Ntuli v Donald [2011] 1 WLR 294 – 2/4/10 Eady J; 5/10/10 and 16/11/10 CA

  The super-injunction in that case was set aside by the Court of Appeal, on the basis explained by Maurice Kay LJ at [54]

  "… in view of the terms of the substantive injunction and the circumstances of this case, the appropriate restriction on publicity is one that limits reporting and publicity to what is contained in this judgment, together with any ancillary orders necessary to fortify such an order. I am simply unpersuaded that greater restriction is necessary at this stage."

  DFT v TFD [2010] EWHC 2355 (QB) – 27/9/10 Sharp J

  - D was accused of blackmailing C about a sexual relationship; D had learned shortly before the application was made that no money would be paid; C suspected that D had been in touch with unknown and unidentifiable journalists with a view to fulfilling the blackmail threat; real concern that if D found out or was "tipped off" about the application she might avoid service and/or attempt to frustrate any order made before she could be served.

  - Super-injunction granted for only 7 days. *Terry* at [138]-[139] applied.

The suggestion that super-injunctions had more or less vanished by the end of 2010 is borne out by later cases. Cases in which super-injunctions were not sought include:

RST v UVW [2010] EMLR 355 – 11/9/09 Tugendhat J

AMN v HXW [2010] EWHC 2457 (QB)

Gray v UVW [2010] EWHC 2367 (QB) – 21/10/10 Tugendhat J

KJH v HGF [2010] EWHC 3064 (QB) – 24/11/10 Sharp J (blackmail)

XJA v News Group Newspapers Ltd [2010] EWHC 3174 (QB) – 3/12/2010 Sharp J

CDE & FGH v MGN Ltd & LMN [2010] EWHC 3308 (QB) – 16/12/10 Eady J

POI v The Person Known as "Lina" [2011] EWHC 25 (QB) – 13/1/11 and 14/2/11, Tugendhat J and Supperstone J (blackmail)

JIH v News Group Newspapers Ltd [2011] 1 WLR 1645, [2011] EMLR 177 – 22/10/10 and 5/11/10 Tugendhat J, 14/1/11 and 31/1/11 CA - when reversing the decision of the Judge not to grant anonymity to C, the Court of Appeal set out the principles to be

applied in cases in which the Court is asked to make orders for anonymity, reporting restrictions or other restraints on publication of normally reportable details of a case

YYZ v YVR [2011] EWHC 274 (QB) – 4/2/11

Hirschfield v McGrath [2011] EWHC 249 (QB) – 15/2/11 Tugendhat J

ZAM v CFW [2011] EWHC 476 (QB) – 7/3/11 Tugendhat J - claim for libel and protection from harassment; anonymity granted because it would frustrate the purpose of the injunctions if the application had the effect of making the allegations public; Judge observing that, in cases involving blackmail, such orders are common

Ambrosiadou v Coward [2011] EMLR 419 – 15/10/10 Eady J, 12/4/11 CA - appeal against the refusal of an interim injunction allowed, as an injunction was needed to provide protection on the *"Spycatcher"* principle against third parties to whom D had disseminated private material; guidance provided as to the steps which parties should take to facilitate that wherever possible hearings should take place in public

ETK v News Group Newspapers Ltd [2011] EMLR 434 – 5/3/11 Collins J, 19/4/11 CA

OPQ v BJM & Anor [2011] EMLR 445 - 20/4/11 Eady J (contra mundum injunction)

TSE and ELP v News Group Newspapers Ltd [2011] EWHC 1308 (QB) – 23/5/11 Tugendhat J

Hutcheson (Formerly Known As "KGM") v News Group Newspapers Ltd & Ors [2011] EWCA Civ 808 – 19/7/11 – CA

Anonymity orders and other restrictions on open justice

Although there can be no doubt that super-injunctions were granted in a number of cases before *Trafigura* and *Terry*, a fuller indication of what had been going on in privacy cases in which interim orders were sought, and of the media's grounds for concern, is provided by the full title of the Report of the Committee.

In brief, and with increasing frequency, claimants in such cases had sought orders which had some or (with increasing regularity) most or all of the following features:

- the applications were heard in private
- there was no public judgment
- they were sought without notice to anyone (for example, because D is a "person unknown", or because D is said to be likely to frustrate the order if given notice)
- the injunctions were served on media third parties with the intention of binding them in accordance with the *"Spycatcher"* principle
- the proceedings were brought in an anonymised form

- CPR 25 PD [9] was disapplied by "ordering otherwise"

The media protested strongly against such orders, essentially on the grounds that they run counter to elementary principles of fairness and open justice. In addition, as "super-injunction" is not a legal term, but is instead a phrase coined by the media, and maybe also because it has a catchy ring to it, such injunctions were often called "super-injunctions". At the same time, the media raised other complaints about the rising tide of privacy orders, not always in accurate terms. In *Goodwin v News Group Newspapers Ltd* [2011] EWHC 1309 (QB) – 23/5/11 - Tugendhat J had this to say:

> "9. After announcing my decision in court [on 19 May 2011], I explained to the journalists then in court, but who had not been present at 2pm, what had happened. What I said included the following:
>
> "1. There was no super-injunction made or asked for. The Order made by Sharp J and the reasons for it are both public documents and the reasons have been available since 9 March on www.bailli.org …
>
> 5. No injunction had ever prohibited anyone from calling Sir Frederick Goodwin a banker. The injunction had prevented publication of the fact that the person who applied for the injunction on 1st and 9th March was a banker. That person was, of course, Sir Frederick Goodwin. But Sharp J had held that that part of the order was necessary because if the applicant were identified as a banker that would be likely to lead to his being named, which would defeat the purpose of granting him anonymity".
>
> 10. I made these remarks in the light of the press reports which counsel produced and referred to in court. If the words attributed to Lords Oakeshott and Stoneham are correct, then these reports disclose a fundamental misunderstanding on the part of them, and on the part of many other commentators, of the facts of the present case. A typical report is that on the Telegraph website of 19 May under the heading "Lord Breaks Superinjunction on Fred Goodwin" …
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> 11. In addition to the five inaccuracies (listed in paragraph 9 above) in the words attributed to Lord Stoneham, the Telegraph report contained further inaccurate and misleading statements, as can be seen from the following:
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> "6. Since January 2010, so far as the Committee [that is the Committee chaired by Lord Neuberger MR whose report was published on 20 May] is aware, two super-injunctions have been granted, one which was set aside on appeal and the second which was in force for seven days. Super-injunctions are now only being granted, for very short periods, and only where this level of secrecy is necessary to ensure that the whole point of the order is not destroyed.
>
> 7. Although many of those who obtain injunctions and anonymised orders to restrain the publication of private or confidential information are rich and famous, many others are not, and some are amongst the most vulnerable children: see the judgment of Baker J in *W v M & Ors* [2011] EWHC 1197 (COP) (12 May 2011) at paragraph [44], and my judgment in *TSE and ELP v NGN Ltd* [2011] EWHC 1308 (QB)"."

Claimants sought such orders on the grounds that they had a genuine need for them, possibly even to the extent that if they were not granted these protections they would be deterred from seeking any relief at all. Among other things, claimants argued that:

- to give prior notice to potential media third parties would risk (a) secrets that are sought to be protected being made known to those who do not already know of them and/or (b) the damage being done before any order can be obtained and/or (c) considerable exposure to costs

- to allow publication of the claimant's interest in the proceedings would give rise to speculation and further intrusion

- in similar vein, to allow publication even of the fact of the proceedings themselves would give rise to speculation and further intrusion

- complying with CPR 25 PD [9] would give rise to serious invasion of the claimant's privacy and/or a risk of use or publication of the secret(s)

Prior to *Terry*, the claimant's arguments tended to prevail. In that case, however, Tugendhat J emphasised that these protections were only to be granted if they were truly necessary. In addition, a number of cases made clear that some public judgment was always required. Next, in *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645, the "vigilance" of Tugendhat J led to the rejection of the draft Order that he had been invited to make, on the basis that, in general, anonymisation and the withholding of information about the subject matter of the action are alternative forms of protection for a claimant. Finally, and especially following the decision in *Ambrosiadou v Coward* [2011] EMLR 419 of 12/4/11, the divergence in practice between the High Court (in which hearings were typically conducted in private) and the Court of Appeal (in which hearings were typically conducted in public, with protection for private information being achieved by other mechanisms) increasingly disappeared.

In the result, even before the Report of the Committee, the above features of what the media not infrequently termed "super-injunctions" (albeit that they did not contain a prohibition on reporting the existence of the order) became less and less prevalent.

The Report and the subsequent "Practice Guidance: Interim Non-Disclosure Orders" issued by Lord Neuberger MR with effect from 1 August 2011 entrenched not only these developments but also further protections for free speech and open justice:

- [9] "Open justice is a fundamental principle … This applies to applications for interim non-disclosure orders."

- [10] "Derogations … can only be justified in exceptional circumstances, when they are strictly necessary to … secure the proper administration of justice."

- [12] "There is no general exception … where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done."

- [14] "… the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article8 Convention right is entitled."

- [15] "It will only be in the rarest cases that … a super-injunction … will be justified on grounds of strict necessity."

- [17] Among other things, the applicant is generally required to prepare not only evidence "justifying the need for an order" but also (1) legal submissions and (2) an Explanatory Note.

- [18] states that section 12(2) of the Human Rights Act 1998 "applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order" such that they are both "entitled to advance notice of the application hearing and should be served with a copy of the Application Notice and any supporting documentation before that hearing". The Guidance therefore removed from the statement in *X v Persons Unknown* [2007] EMLR 290, per Eady J at [18] that "where a litigant intends to serve a prohibitory injunction upon one or more [media publishers], in reliance on the *Spycatcher* principle, those individual publishers should be given a realistic opportunity to be heard on the appropriateness or otherwise of granting the injunction, and on the scope of its terms" the constraint that this applies only to other publishers within the jurisdiction who the claimant knows to have a specific interest in the story (see *WER v REW* [2009] EMLR 304, Gray J at [18]).

In *Spelman v Express Newspapers (No 1)* [2012] EWHC 239 (QB) - 15/2/12 - this Guidance led Lindblom J to conclude that:

> "this is not a case in which the court should take the exceptional course of anonymizing the proceedings. Sufficient protection is afforded by the parties being named in the normal way in the proceedings – so that the public will be able to identify the claimant as the person who has sought particular injunctive relief against the defendant – but ensuring that the subject-matter of the application and the precise nature of the relief granted will not be in the public domain. This seemed to me properly to reflect the course which the court ought now normally to take in situations such as these."

Gold and Ann Summers Ltd v Allison Cox and Leanne Bingham [2012] EWHC 272 (QB) and [2012] EWHC 367 (QB) – 17/2/12 and 24/2/12 - concerned a claim to prevent publication of private information concerning C1 and her daughter which the defendants had obtained as a result of working for Cs. The interim injunction granted on 15/2/12 and continued on 17/2/12 was made into a final order by consent on 24/2/12, and judgment was entered for Cs accordingly. No application for anonymity was made. At [4] of his judgment of 17/2/12 Tugendhat J recorded:

> "The proceedings before me were heard in public. I made only the most limited derogation from open justice in the form of provisions protecting those parts of the evidence which relate specifically to the private information of the first claimant."

Failure to progress claims

Another feature of a number of privacy injunctions which had been obtained over the years was that they were kept in place for long periods and potentially indefinitely, either because the initial orders granting interim relief did not contain a Return Date or because the substantive claims were not progressed towards trial.

Leaving aside savings on the expenditure of legal costs, claimants benefitted from adopting this course because it enabled them to get round the effect of the ruling in *Jockey Club v Buffham* [2003] QB 462 that interim injunctions do not bind third parties on the *"Spycatcher"* principle once the proceedings have come to an end. The courts had repeatedly addressed the need for orders to contain a Return Date, and for claimants to progress proceedings: see, for example, *X v Persons Unknown* [2007] EMLR 290 and *G and G v Wikimedia Foundation Inc* [2010] EMLR 364. However, it was Tugendhat J's reiteration of the need to avoid these and other practices in *Terry* which enabled the Report of the Committee on Super-Injunctions to state at [2.35]:

> "It is true that, until early 2010, there were justifiable concerns that a form of permanent secret justice was beginning to develop. However, that concern should be dispelled by the decision in the *Terry* case."

Under the heading "Active Case Management" the Practice Guidance provides:

- [37] "Interim non-disclosure orders, as they restrict the exercise of the Article 10 Convention right and, whether or not they contain any derogation from the principle of open justice, require the court to take particular care to provide active case management."

- [41] "Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim proceed to trial in the absence of a third party …"

In *Spelman v Express Newspapers (No 3)* [2012] EWHC 392 (QB) - 24/2/12 – Tugendhat J stated when refusing an extension of time for service of the Particulars of Claim:

> "3. Non-disclosure orders affect the right of freedom of expression (Art 10) not only of the defendant, but also of others who may wish to publish or receive information. That they have that effect on third parties is one of the main reasons that claimants apply for them. But the court is required by HRA s.6 not to act in a manner incompatible with the Convention rights. It follows that in cases in which relief granted may affect the exercise of the Convention right of freedom of expression, the court cannot give the same consideration to the autonomy of the parties to the action as it commonly gives to that of the parties to litigation which does not have the same effect on the Convention rights of third parties.

4. Parties must have in mind the Practice Guidance on Interim Non-Disclosure Orders issued by the Master of the Rolls in August 2011…

5. It might be thought that where the defendant is a media organisation it would give priority to freedom of expression, and so require that a claimant progress a claim to trial as expeditiously as possible with a view to vindicating its rights if it can. But experience has shown that media defendants rarely do that in privacy cases. That may be on account of the high costs of litigation, or it may be for other reasons. But the result is that the court must do it …

7. The court is sympathetic to any proposal to save costs. But even if there were to be a possible saving of costs in the present case, for the reasons given above, it is necessary that the costs of proceeding to trial should be incurred, and that the trial, or any settlement should be reached promptly, in order that the interference with the Art 10 rights of third parties should be no more than is necessary and proportionate."

In *Giggs v News Group Newspapers Ltd* [2012] EWHC 431 (QB) (***"Giggs"***) – 2/3/12 - Tugendhat J ended by saying:

"103. The effect of s.12 (and the *Cyanamid* rules on interim injunctions) being so favourable to claimants is that defendants generally offer undertakings, or do not oppose the grant of an interim injunction, as happened in this case on 20 April. But because the law is favourable to claimants in this way, there is an incentive upon claimants to abuse the process of the court, so as to avoid the need to prove their cases at trial. Having obtained an interim non-disclosure order, it may appear to be in a claimant's interest to hold on to it as long as possible, and proceed to trial as slowly as possible, if at all.

104. HRA s.12 and the other rules on interim injunctions assume that there will be a trial …

105. In particular, the shorter the anticipated delay, the more likely it is that the balance of convenience (or balance of justice as it is better referred to) favours the preservation of the status quo (ie non-disclosure). An interim injunction must be no more than is necessary and proportionate to achieve the legitimate aim of protecting the rights of the claimant (including Art 8 rights). So the shorter the period likely to elapse between the making of the interim order and the trial, the more ready the court will be to find that the interference with the Art 10 rights of the claimant and third parties is proportionate. And, of course, *vice versa*.

106. It was for this reason that Eady J, in his order of 20 April, laid down a timetable for the matter to proceed to trial. And it is for this reason that the agreement between the parties on 12 May to depart from that timetable was so serious. It was not just a breach of CPR Part 15.5. It was an abuse of the process of the court to interfere with the Art 10 rights of third parties, which had not been approved by any judge …

111. In short, claimants and defendants must prosecute a claim for breach of confidence and privacy so as to ensure that the interference with the Art 10 rights of third parties is kept to as short a time as is possible … And the court should not grant extensions of time for service of statements of case, or any other step in the action, unless satisfied that the extension of the period during which there will be an interference with the Art 10 rights of third parties is necessary and proportionate."

The effect of Internet publication on the grant of injunctions

It is suggested that the following points are borne out by the cases discussed below:

- In practical terms, at least in accordance with the arguments presented by claimants to date, court orders are ineffective against publication on the Internet – where social networking platforms have assumed increasing significance.

- However, the courts will strive not to allow either Internet publication or, more generally, the revelation of information in breach of an order to deter them from providing whatever protection they are able to provide to those who they regard as being entitled to the benefit of injunctions (ie claimants and their families).

- The legal basis for the approach of the courts is that (a) in the case of private information, there is no bright line between what is and what is not "in the public domain", as there is in the case of commercial information and (b) the law of privacy is concerned with preventing not only unwanted access to private information but also unwanted access to, or intrusion into, one's personal space.

- The fact that exposure on the Internet is less intrusive than exposure in the media is a relevant consideration when balancing Article 8 and Article 10 rights, and may cut both ways: (a) on the one hand, even where exposure on the Internet has occurred, there may still be some purpose in restraining additional exposure in other media, but (b) on the other hand, because exposure on the Internet is less intrusive, to allow it may be a proportionate interference with Article 8 rights, whereas exposure in other media would be a disproportionate interference.

- Sooner or later, however, the effect of Internet publication may be to undermine the protection that the Court can give to such an extent that the injunction becomes pointless (a) from the claimant's perspective (causing the claimant to refrain from seeking relief or, as in the case of Jeremy Clarkson, to abandon that relief) and (b) from the perspective of the Court (causing the Court to refuse to continue relief, as in the case of the anonymity order in favour of Ryan Giggs).

Injunctions and Parliamentary debate

- It is clear that court orders do not inhibit Parliamentary debate (although it should be noted that both House of Parliament are subject to *sub judice* rules which, while not absolute, are designed to strike a balance between (a) the principle that the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions and (b) the principle that Parliament has a constitutional right to discuss any matter it pleases – see the Report of the 1999 Joint Committee on Parliamentary Privilege at [191]).

- It is, in the words of Lord Neuberger "astonishingly unclear" whether any court order could prohibit the reporting of what was said in Parliament (and, specifically, the question tabled by Paul Farrelly MP concerning *Trafigura*, the

question asked by Lord Stoneham on behalf of Lord Oakeshott concerning Sir Fred Goodwin, and the question asked by John Hemming MP concerning Ryan Giggs). The Report of the Committee on Super-Injunctions concluded at [6.33]:

> "It therefore appears to be an open question whether, and to what extent, the common law protects media reporting of Parliamentary proceedings where such reporting appears to breach the terms of a court order and is not covered by the protection provided by [the Parliamentary Papers Act 1840, which protects (a) publications printed by order of Parliament, and (b) extracts from or abstracts of such publications which are published in good faith and without malice]. What is clear is that unfettered reporting of Parliamentary proceedings (in apparent breach of court orders) has not been established as a clear right."

The disappearance of privacy injunctions against the media

It is suggested that this is the product of the following factors:

- In practical terms, injunctions are ineffective to prevent Internet publication.

- Among other difficulties in the path of enforcing orders in respect of Internet publication is the fact that many search engine and website operators are outside the jurisdiction (see *G and G v Wikimedia Foundation Inc* [2010] EMLR 364).

- Further, information can be, and often is, posted anonymously. If and to the extent that it is possible to obtain *Norwich Pharmacal* orders in these circumstances, such orders may lead to a dead end or may be rendered nugatory by the same person continuing to post material using a different name and/or IP address. In *Bacon v Automattic Inc & Ors* [2011] EWHC 1072 (QB) - 6/5/11, Tugendhat J held that he had power to order the service upon Ds in the USA of a claim against three USA website operators requiring them to disclose names, addresses, IP addresses and other information that would identify, or assist in identifying, the person(s) responsible for publishing on those websites statements that were alleged to be defamatory of C. See, also, *Lockton Companies International v Persons Unknown* [2009] EWHC 3423 (QB), Eady J and *Patel v UNITE* [2012] EWHC 92 (QB), HH Judge Parkes QC. However, even assuming there is a system for enforcing such orders abroad, and even assuming that utilising this system is not prohibitively costly, it is unclear whether such orders achieve their aim.

- Moreover, due to the Internet, an injunction may do a claimant more harm than good: the information which is sought to be kept secret may be made more public than if no injunction had been sought, and even if that does happen the claimant may suffer more from speculation and vilification than from loss of that secrecy.

- Most privacy claimants are drawn from a relatively small community (comprising in large part sportspeople, celebrities, wealthy businesspeople, and political figures), and they are likely to know that although Fred Goodwin, Ryan Giggs, NEJ and Jeremy Clarkson each obtained relief from the court, their overall experiences were not such as to be particularly encouraging for any claimant.

- In addition, many privacy claims relate to extra-marital or covert sexual relationships, and a significant concern in may of those cases is to prevent the information from reaching spouses, partners and other family members: yet there is a real risk that this will occur through the Internet, as happened with Jeremy Clarkson, even if an injunction is obtained and obeyed by the media.

- Further, footballers in particular will have regard to the outcomes in *Terry* and *Giggs* and to the result of the full trial in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) – 29/9/11 - Nicol J; and they and other claimants may consider the freeing up of the concept of what is in the public interest apparent from cases like *Goodwin*.

- The courts have become more vigilant about derogations from open justice, including whether and to what extent hearings should be held in private and whether anonymity orders should be made, and about restraints on freedom of expression, such that the risks for claimants of seeking relief have increased.

- Claimants must expect to progress their claims to final resolution, either by reaching an agreement with the defendant which the court is prepared to endorse or by taking the claim to trial: this (a) is costly, (b) carries a risk of failure at trial, and (c) involves uncertainty as to whether the protection which interim relief provides against third parties will be lost: see, for example, *Giggs* at [65]:

  > "Eady J's order of 20 April effectively binds third parties: see *Jockey Club v Buffham* [2003] QB 642 and *Hutcheson v Popdog* [2011] EWCA Civ 1580 at [26] (it cannot be assumed that final injunctions do not bind third parties)."

- It may also be the case that the media have become more cautious about what they publish: however, this has clearly not prevented all publication of stories of a type which might previously have been enjoined (for example, Natasha Giggs).

Some important cases in the last 12 months

(i) Fred Goodwin

MNB v News Group Newspapers Ltd [2011] EWHC 528 (QB) – 9/3/11 Sharp J

On 1 March 2011, Henriques J granted an interim injunction "without notice on notice" to D, prohibiting the publication until a Return Date of 4 March 2011 of:

> "(a) Any information concerning the subject matter of these proceedings or any information identifying or tending to identify the applicant save for that contained in this Order and in any public judgment of the court given in this action.
>
> (b) Any information concerning the fact or details of any sexual relationship between the Applicant and the person named in the Confidential Schedule to the Order….."
>
> PROVIDED THAT:

"nothing in paragraph 1 of this Order shall prevent the Respondent from publishing, communicating or disclosing any material that before the service of this Order was already in, or that thereafter comes into, the public domain as the result of national media publication (other than as a result of this Order or a breach of confidence or privacy)".

D subsequently published an article which, among other things, said that C had a particular occupation and included comments about the sexual relationship between C and the person named in the Confidential Schedule to the Order. C contended, and D disputed, that this was a breach of (i) paragraph 1(a) of the above Order and (ii) paragraph 1(b) of the above Order. Sharp J ruled in favour of C, holding at [37]-[38]:

"First, in my judgment the purpose of the order made by Henriques J was to prevent the publication of items of information which actually identified the Claimant or which tended to identify him (that is, they might, in conjunction with other information as explained above). Second, publication of the details to which particular objection is taken fall within the category of information which tends to lead to his identification. Third, the subject matter of the action is the affair; comment by relatives or others which reveal information about the affair (for example, its length, when it occurred, the parties' reaction to what has occurred, or their current status) is therefore information concerning the subject matter of these proceedings.

Fourth, the Claimant is likely to establish at trial that he is entitled to an order in the form or substantially in the form made by Henriques J in paragraph 1 of the Order. He is likely to do so on the ground that such an order is necessary (i) to prevent the risk of jigsaw identification thus frustrating the purpose of the court's order prohibiting the publication of the information (whether on an interim or final basis); and therefore (ii) to protect his article 8 rights in the private information this action is brought to protect and in his identification as the person concerned - bearing in mind the principles set out in JIH to which I have referred above, and in accordance with the proper approach to such applications where the article 8 rights of the claimant and the article 10 rights of the defendant are engaged, as in my judgment they are here."

This Order was extensively reported in the media as prohibiting the identification of Sir Fred Goodwin as a banker. As Tugendhat J said in his later judgment of 9/6/11 at [21], this reporting "did not explicitly identify Sir Fred Goodwin as the claimant in this case, although some understood the publicity as giving a hint that it was him."

Goodwin v News Group Newspapers Ltd [2011] EWHC 1309 (QB) – 23/5/11 Tugendhat J

On 19 May 2011 there were numerous reports that in Parliament Lord Stoneham on behalf of Lord Oakeshott had identified Sir Fred Goodwin as the applicant for the injunction granted by Sharp J on 9 March 2011. NGN gave short notice to Sir Fred Goodwin that it wished to apply to discharge the injunction of 9 March 2011 in its entirety on the grounds that it would be in the public interest for there to be publication outside Parliament of the information of which publication was prohibited by the order, and on the ground that that information was already available to the public in the form of reports of proceedings in Parliament. Sir Fred Goodwin accepted that the injunction should be varied so as to permit publication of the fact that he was the person who had applied for the injunction on 9 March 2011,

but he opposed the discharge of the whole order. The parts of the order that Sir Fred Goodwin submitted should remain in force were the parts which prohibited identification of the lady with whom he had had the relationship, and details of the relationship, other than the fact that she was a work colleague of his. Tugendhat J varied the order substantially in the terms for which Sir Fred Goodwin contended. The Judge observed at [5]:

> "If this statement had been made outside Parliament it would have been a contempt of court. But court orders do not prohibit members of either House from making of statements in Parliament."

Goodwin v News Group Newspapers Ltd and VBN [2011] EMLR 501 – 9/6/11 Tugendhat J

On 26 May 2011 NGN gave notice of its intention to apply to vary the order of 19 May 2011 so as to permit the identification of the lady named in the confidential schedule. The form of draft order made clear that there was no intention to seek a variation of the order which might permit publication of any sexual or salacious information, or any photographs of the lady or any members of her family. The lady intervened as "VBN" to oppose this application. Tugendhat J reasoned as follows, considering in turn questions of (i) confidentiality and (ii) intrusion:

> 100.… the evidence about the relationship of the parties and their personal circumstances which they have put before the court is so sparse that I cannot be satisfied that Sir Fred Goodwin and VBN are likely to establish that they have a reasonable expectation of privacy in respect of the bare fact of their relationship.
>
> 101.But I do find that there is one fact in the case which in any event presents an obstacle to them establishing that they have such an expectation. That fact is that Sir Fred Goodwin was the Chief Executive of RBS, the company for which VBN worked. As Mr Spearman submitted: "The role of both parties, but perhaps more particularly that of the Claimant, is a matter of legitimate public interest and concern, and (it may be) censure, and these issues can only be ventilated if the lady (or at least her role) can be identified".
>
> 102.First … It is rarely realistic for partners in a relationship to expect that the bare fact of their relationship will remain confidential between the two of them for a long or indefinite period.
>
> 103.Second, the extent to which men in positions of power benefit from that power in forming relationships with sexual partners who are less senior within the same organisation is also a matter which is of concern to an audience much wider than the work colleagues of either partner in the relationship … Whatever limits there may be to the legal concept of a public figure, or of a person carrying out official functions, in my judgment Sir Fred Goodwin came within the definition …
>
> 111.… So far as confidentiality is concerned, in my judgment VBN does not have a right to keep the fact of the relationship confidential, or, to the extent that she does, then it would not be necessary or proportionate to restrict NGN's freedom of expression to prevent disclosure of that information. Her position at work, and to a lesser extent

her name, are each important parts of the story, for the reasons given by Lord Rodger.

112. If VBN's position in RBS were at a level at which there are many other women, it might be possible to identify her position in the company without identifying herself. But in the present case that is not likely to be possible. Her position is sufficiently senior that identification of her status or the department in which she works is likely to identify her name …

120. I consider first whether VBN's name should be published. In my judgment publication in The Sun (or any other print or broadcast medium) of VBN's name would be a significant intrusion into her private and family life from which she is entitled to be protected (as she is likely to establish at trial). And I am satisfied that she is likely to establish that the interference with NGN's Art 10 right which would be involved in prohibiting publication of her name is necessary and proportionate for the protection of that right of hers.

121. I consider next whether the role or job description of VBN should be published. While publication of her job description would lead many people to identify her, and would also be an intrusion into her private and family life, in my judgment the information about her job description is an important feature of the story. I am not satisfied that she is likely to establish that the interference with NGN's Art 10 right, which would be involved in prohibiting publication of her job description, is necessary and proportionate for the protection of her rights.

122. There is a further reason. As VBN's evidence makes clear, her name has already become known to some of her acquaintances, in some cases by reason of publications outside the press and broadcast media. The additional publication of her name that is likely to follow from publication of her role in the press and broadcast media is not, in my judgment, likely to be so great a further intrusion into her private life as to make it necessary and proportionate to interfere with the Art 10 rights of NGN.

123. Accordingly, I shall vary the injunction to remove the prohibition upon publication of VBN's job description, while leaving in place the prohibition upon publication of her name.

124. In reaching this decision I am aware that many individuals with access to blogs and other internet means of communication may publish the name of VBN. If my purpose was to keep her name confidential, that would render the injunction futile, and I would not adopt the course I have decided upon. Courts do not grant injunctions that would be futile

125. But the degree of intrusion into a person's private life which is caused by internet publications is different from the degree of intrusion caused by print and broadcast media. Important though this story is, there are very many people who will not take the trouble to find out from VBN's job description what her name is. And there are many people who would not be sufficiently interested in the story to learn VBN's name unless it were exposed in The Sun … Once a person's name appears on a newspaper or other media archive, it may well remain there indefinitely. Names mentioned on social networking sites are less likely to be permanent.

VBN later obtained permission to appeal from Maurice Kay LJ, and her appeal to the Court of Appeal was compromised before it was due to be heard in March 2012.

(ii) NEJ

NEJ v Wood and Person Unknown (NGN intervening) [2011] EWHC 1972 (QB) – 13/4/11 King J – C accepted that D had an Article 10 right to share with the public her experiences so long as what was published did not identify C and that for that reason and in the public interest there should be some publication of some information concerning D's sexual encounters with a person of C's status; C contended that the court should not permit any publication which would tend to identify C, and in particular which permitted a process of jigsaw identification so that little by little C's identity was revealed; the Judge considered D had a strong argument that there is a public interest in enabling the media to debate in public the general issue of the grant by the courts of injunctions "which can have the effect of suppressing from public scrutiny the private conduct of public persons, which some might think offend notions of social morality according to one's view of social morality"; publication of an article which included "information concerning the facts of this case going beyond the publication allowed for in that Order" was not a ground for denying relief to C as "If it were the case that a publication in breach or apparent breach of an existing court order would of necessity compel a court on the return date of the order, to the conclusion that because the dam has been breached there is nothing the court can do to repair the breach, this would be a sad day for the rule of law"; holding at [23]:

> "Ultimately what I have concluded is that the respondent and the media should be allowed to publish the fact that the respondent has had a sexual relationship with a leading actor, and indeed, if they so wish, to include the expression of his being a world famous celebrity. I will also allow publication of the fact that the actor is married and a father. It seems to me that this is material to the public debate about the class of person who is seeking these injunctions and the status they are seeking to protect when preventing the publication of private sexual encounters."

(iii) *Giggs*

CTB v News Group Newspapers Ltd & Anor [2011] EWHC 1232 (QB) – 16/5/11, Eady J

Against the background of a threat by CTB to seek an injunction on the evening of 13 April 2011, The Sun undertook not to publish any information which identified or tended to identify CTB as the other party to a sexual relationship with Imogen Thomas. The undertaking nevertheless allowed the newspaper to publish that CTB was a top Premier League footballer and/or Premiership star or words to that effect, and that he was known as a married man with a family. The newspaper published an article which did not identify CTB, but contained that information and the further information that (1) CTB and Ms Thomas met for sexual encounters at a string of luxury hotels, usually for an hour or two, and sometimes before key games (2) he and Ms Thomas had a "six month fling" (3) he told Ms Thomas that she was the love of his life (4) a friend of Ms Thomas feared that he had been stringing Ms Thomas along for sex (5) Ms Thomas was completely lovestruck by him and (6) when his

agent was asked about these matters, his agent said that the agent was shocked, that the agent could not believe it, and that the agent did not know what to say because he was such a family man, and having regard to the closeness of his family. The Sun declined to extend the undertaking beyond the afternoon of 14 April 2011, and CTB therefore applied to the Court "to restrain publication not only of the identity of the Claimant but also of any further account, or purported account, of such a relationship" (per Eady J at [2]). Eady J granted an injunction to that effect.

CTB v News Group Newspapers Ltd & Anor [2011] EWHC 1326 (QB) – 23/5/11, Eady J

NGN applied to vary the injunction of Eady J on the grounds that there had been such widespread coverage on the Internet since the Order was first granted on 14 April 2011 that it would be pointless for the court to maintain the anonymity of CTB. Rejecting that application Eady J said:

> "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 …
>
> 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 *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, as I recorded in my judgment on 16 May, it has not been suggested that there is any legitimate public interest in publishing the story."

CTB v News Group Newspapers Ltd & Anor [2011] EWHC 1334 (QB) – 23/5/11, Tugendhat J referred to the judgment of Eady J of earlier that day and continued:

> "2. Very shortly afterwards a name was mentioned by Mr Hemming MP in the House of Commons in the course of a question which was interrupted by the Speaker. On that basis NGN asked me to hear a further application shortly after 5pm for the anonymity of the claimant to be removed. As the public now know, anyone who wanted to find out the name of the claimant could have learnt it many days ago. The reason is that it is has been repeated thousands of times on the internet. NGN now want to join in.
>
> 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."

Giggs. It emerged that when Eady J had made a Consent Order on 1 February 2012, embodying the terms of settlement agreed between Giggs and Imogen Thomas, (a) he had declined to continue the anonymity order in favour of Giggs, and (b) title of the claim had been amended in that Order to name Giggs as the claimant. Although no reasons were given by Eady J for this decision, because the matter was not dealt with at a hearing, it would appear that he had taken this stance because he considered that any further attempt to preserve anonymity had become futile in light of (a) Internet publication and/or (b) widespread disregard of the earlier orders of the Court by the media. The failure of Giggs' solicitors to notify NGN or any third parties of these events was one matter which led Tugendhat J to refuse relief from the sanctions imposed on Giggs by the Order for directions dated 2 November 2011 (made in circumstances where neither side was ready for trial on 7 November 2011).

(iv) Hutcheson

In [2011] EWCA Civ 808 at [29] (adopting an approach which was followed in *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) by Nicol J at [63]) the CA approved the emphasis which had been given to the importance of public discussion and the freedom to criticise by Tugendhat J in *Terry* at [101] and [104]:

> "It is not for the judge to express personal views on such matters, still less to impose whatever personal views he might have. That is not the issue. The issue is what the judge should prohibit one person from saying publicly about another…..
>
> … There is no suggestion that the conduct in question in the present case ought to be unlawful, or that any editor would ever suggest that it ought to be. But in a plural society there will be some who would suggest that it ought to be discouraged…..Freedom to live as one chooses is one of the most valuable freedoms. But so is the freedom to criticise (within the limits of the law) the conduct of other members of society as being harmful or wrong….It is as a result of public discussion and debate that public opinion develops….."

In *Hutcheson v Popdog Ltd* [2011] EWCA Civ 1580 – 19/12/11- CA while declining at [26] to give permission to appeal, and therefore to reconsider and, if it thought it appropriate to do so, overrule the decision in *Jockey Club v Buffham* [2003] QB 462, the Court nevertheless went on to say:

> "… it cannot be safely assumed that the conclusion in *Jockey Club v Buffham* [2003] QB 462, that the *Spycatcher* principle does not apply to final injunctions but only applies to interim injunctions, would be approved by this court."

(v) Rio Ferdinand

Ferdinand v MGN Ltd [2011] EWHC 2454 (QB) – 29/9/11 - was a rare trial in a privacy case. Nicol J held that C had a reasonable expectation of privacy with regard to the information in question, but that the balance between C's Article 8 rights and D's Article 10 rights came down in favour of D for reasons summarised in [84]-[90]:

> "84. In my judgment there was a public interest in this article. At one level it was a "kiss and tell" story. Even less attractively, it was a "kiss and paid for telling" story, but stories may be in the public interest even if the reasons behind the informant providing the information are less than noble. The interview with the *News of the World* was significant. This was not a casual encounter with a reporter who elicited an off the cuff remark. As the Claimant explained, the interview was set up by his publicity agent. He did quite clearly wish to portray himself as a reformed character. He confessed past mistakes. They included his missed drugs test which had directly impacted on his career. But they were not restricted to matters so closely related to the football pitch. Even though he had played no part in the articles about women with whom he had allegedly had affairs while living with Ms Ellison, those stories had contributed to his wild image and it was that image to which he confessed in the article and said he was now putting behind him. He contrasted his past behaviour with where he was in the present – older, more mature, and, critically, in a stable family relationship with Ms Ellison. The article was accompanied by a picture of the two of them together. She was heavily pregnant and he was cradling her 'bump'. The picture reinforced the message of the article: Rio Ferdinand is now a family man and has given up the ways of his past including 'cheating' on Ms Ellison …
>
> 87. But on the evidence presented in this case, it is by no means a universal view that the captain's role is confined to what happens on the pitch or what affects the players' performance. The phrase "role model" is somewhat ubiquitous. In *A v B plc* [2003] QB 195 Lord Woolf CJ spoke at [11(xii)] of a public figure who
>
> "may hold a position where higher standards can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely will that be the position. Whether you have courted publicity or not, you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information."
>
> Lord Woolf went on at [43 (vi)] to say specifically that footballers were role models and undesirable behaviour on their part can set an unfortunate example.
>
> 88. In *McKennitt v Ash* (above) Buxton LJ said at [62] that the width of the rights given to the media by *A v B plc* could not be reconciled with *Von Hannover.* He went on to add (at [65]) that Lorenna McKennitt … did not hold a position where higher standards of conduct could be rightly expected by the public. That, Buxton LJ said, "is no doubt the preserve of headmasters and clergyman, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists." Ms McKennitt had, at most, been an involuntary role model and it was clear that Lord Woolf thought that

role models anyway were only at risk of disclosure of disreputable conduct which had not been the position in her case.

89. To return to the present case. The Claimant voluntarily assumed the role of England captain. It was a job that carried with it an expectation of high standards. In the views of many the captain was expected to maintain those standards off, as well as on, the pitch …

90. Buxton LJ's list of those from whom higher standards were expected certainly was not meant to be closed. The captain of England's football team, for a substantial body of the public, would come comfortably within it. In *Sir Frederick Goodwin v NGN Ltd* [2011] EWHC 1437 (QB) Tugendhat J. said at [103] that the Claimant, an exceptionally forceful business man, came within the concept of a public figure and that distinguished him from sportsmen and celebrities in the world of entertainment. However, as can be seen from the remarks that I have quoted there are many who would indeed see the captain, at least, of the England football team as a role model."

(vi) Max Mosley in Europe

Mr Mosley failed to obtain a ruling requiring the media in the United Kingdom to provide advance notification to an individual where an intended publication could amount to an invasion of that individual's privacy. Although critical of the approach to publication which the newspaper had taken in his case, the European Court of Human Rights concluded that, having regard to the chilling effect of a pre-notification requirement in privacy cases and the margin of appreciation, there was no violation of Article 8. Mr Mosley also failed in his request for a reference to the Grand Chamber of the Court to reconsider that decision. The judgment of 10 May 2011 therefore became final on 15 September 2011: see *Mosley v UK* [2012] EMLR 1.

(vii) *Spelman v Express Newspapers (No 2)* [2012] EWHC 355 (QB) - 24/2/12 – Tugendhat J

This case concerned a claim by a Cabinet Minister to prevent publication of private information concerning her 17 year old son, who was a successful Rugby player. On the Return Date an interim injunction until trial was refused. The correct approach to "public figures" and to what "contributes to a debate of general interest" form important elements of the reasoning, as does the inter-relation between the public roles of (in that case) participants in sport and aspects of what for other people would be part of "private life":

"49. This test of contribution to a debate of general interest was adopted by the Court of Appeal in *Ntuli v Donald* [2011] 1 WLR 294 at para [20]. It has recently been re-affirmed by the Strasbourg Court in *von Hannover v Germany (no 2)* [2012] ECHR 228 (7 February 2012) at para 109 and *Axel SpringerAG v Germany* [2012] ECHR 227 (7 February 2012). In that case the Court cited the Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the Right to Privacy. It refers specifically to sport:

"6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."

50. The Court expressed its own view as to the importance of public debate about sport as follows:

"90. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; …. The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes (…), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007 ["an issue of general interest, namely society's attitude towards a sports star"]; …)." …

69. … those engaged in sport at the national and international level are subject to many requirements which are not imposed on other members of the public. Matters relating to their health have to be disclosed and monitored, and they may have little if any control over the extent to which such information is disseminated. It is a condition of participating in high level sport that the participant gives up control over many aspects of private life. There is no, or at best a low, expectation of privacy if an issue of health relates to the ability of the person to participate in the very public activity of national and international sport.

70. The diminution of the reasonable expectation of privacy in the world of participants in public sports and performing arts cannot be confined only to those who achieve the highest levels. They reach the highest level by ascending from the lower levels. The restriction on what might otherwise be a reasonable expectation of privacy may well apply to those who aim for the highest level, even if they do not achieve it, or can no longer expect to achieve it …

72. … The fact that the Claimant is a child is of limited support for a claim for an expectation of privacy, for both the reasons she gives. He is nearly 18. And even if he were still under 16, as he was when he first played for England, his status as an international player means that discussion of his sporting life, and the effect that it may have upon him, is discussion that contributes to a debate of general interest about a person who is to be regarded a exercising a public function."

Tugendhat J also considered the availability and adequacy of damages and other financial remedies:

"110. In a case where the principle privacy interest at stake is the keeping of a secret, there is often a strong argument for saying that damages will not be an adequate remedy. Once a secret is known, that knowledge cannot be covered up.

111. However, there are privacy claims where the main issue at stake is intrusion, injury to feelings and other distress. In such case the position is less clear in relation to damages …

112. In *Mosley v The United Kingdom* - 48009/08 [2011] ECHR 774; [2012] EMLR 1 the Strasbourg Court has said this at para [120]:

"The Court further observes 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. Thus in *Von Hannover*, cited above, the Court's analysis focused on whether the judgment of the domestic courts in civil proceedings brought following publication of private material struck a fair balance between the competing interests. In [*Armonas v. Lithuania* - 36919/02 [2008] ECHR 1526; [2009] EMLR 7], a complaint about the disclosure of the applicant's husband's HIV-positive status focused on the "derisory sum" of damages available in the subsequent civil proceedings for the serious violation of privacy. While the Court has on occasion required more than civil law damages in order to satisfy the positive obligation arising under Article 8, the nature of the Article 8 violation in the case was of particular importance."

113. It is to be noted that *Armonas* was a case concerning information about health. In para [47] of the judgment in that case the Strasbourg Court said:

"in a case of an outrageous abuse of press freedom, as in the present application, the Court finds that the severe legislative limitations on judicial discretion in redressing the damage suffered by the victim and sufficiently deterring the recurrence of such abuses, failed to provide the applicant with the protection that could have legitimately been expected under Article 8 of the Convention".

114. If a remedy in damages is to be an effective remedy, then the amount that the court may award must not be subject to too severe a limitation. Recent settlements in the much publicised phone hacking cases have been reported to be in sums far exceeding what in the past might have been thought to be available to be awarded by the courts. The sums awarded in the early cases such as *Campbell* were very low. But it can no longer be assumed that damages at those levels are the limit of the court's powers …

118. … Apart from injunctions and damages, there are other orders that a court can make where a defendant has agreed to pay, or be paid, for the disclosure of private or confidential information (although there is no suggestion of that in this case). In support of a claim for damages for breach of a fiduciary duty, or a claim in unjust enrichment, one form of order that has been made, but very rarely, is a restraint on receiving money due to be paid in respect of what is alleged to be a breach of confidence, or a Freezing Order in respect of money actually received. In *A-G v Blake* [2001] 1 AC 268, 277 [such an order was made against the traitor George Blake]."

(viii) (1) SKA and (2) PLM v (1) CRH and (2) Persons Unknown [2012] EWHC 766 (QB) – 28/3/12 – Tugendhat J

This was a claim for misuse of private information and harassment. C1 was an elderly man and C2 was his mistress. D1 was alleged to have threatened to disclose information about their affair, and the fact that C2 was due to give birth to twins of whom C1 was the father, unless D1 was paid a very substantial sum of money. D1 denied that he had made these threats, and Persons Unknown were therefore joined as alternative Ds. Tugendhat J granted anonymity to Cs so that he could give detailed reasons for making the order that he did (see [39]) and to D1 because it would be unjust to name him when he faced an allegation of blackmail and he had not yet had an opportunity to state his case to the Court (see [40]). Tugendhat J also accepted (at [1]) that "The claim is a strong one in relation to much of the information sought to be protected, such as photographs and personal financial information, and intimate details of the private lives of the claimants". However, Tugendhat J declined to grant an injunction retraining Ds from disclosing to C1's grown up children by his first marriage and to C1's second wife, with whom he was still living, the bare fact of the relationship between C1 and C2 and that C2 was due to give birth to C1's twins.

First, following the approach of Eady J in *Hutcheson,* Tugendhat J held at [70] that he was not satisfied that C1 and C2 were likely to succeed at trial in establishing that they have a reasonable expectation of privacy in relation to those bare facts:

> "My conclusion is based on the objective test laid down in the authorities (such as *Murray* at par [35]) as to what reasonable persons of ordinary sensibilities would feel if placed in the same positions as the Claimants and faced with disclosure to the wife and grown up children of the father in question. I would have held that she had a reasonable expectation of privacy in respect of her pregnancy at a time before it was obvious to those associating with her that she was pregnant. But since (as the First Claimant himself says) it is now obvious that she is pregnant, that time has passed."

Second, turning to the question of whether there was some proper justification for the disclosure of that information to C1's grown up children and his wife, and considering the other Convention rights engaged, and the balancing of rights explained in *Re S* [2005] 1 AC 593, Tugendhat J held that Cs' Counsel had rightly conceded that Cs were unlikely to succeed in obtaining a permanent injunction at trial (see [80]-[81]) and he further reasoned (among other things) as follows:

> "74.I do not, therefore, accept that alleged blackmailers forfeit Art 10 rights, or that their rights are necessarily always weak, just because of the unwarranted demands that the blackmailers make. In a case of alleged blackmail, it remains necessary for the court to consider the value of the speech that would be made if the Defendants were permitted to make the disclosure they threaten to make …
>
> 77. In my judgment to tell a grown up child that his or her father aged in his 70s is, or is about to be, the father of twins, is speech of a high order of importance (that is on the scale of relative importance recognised by the Strasbourg Court). It is certainly not trivial. It is of importance to the grown up children and it is important for those about to be born."