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Judgment: approved by the Court for handing down | *Delivered:* **06/01/2017**

(subject to editorial corrections)*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

PATRICK JACKSON AND STUART OLDING

Plaintiffs

v

BBC

Defendant

_____

KEEGAN J

Introduction

[1] The plaintiffs apply for interim injunctions pending trial to prevent publication of material relating to the Police Service of Northern Ireland ("PSNI") investigation into alleged sex offences involving the two plaintiffs and/or the imminent referral of the PSNI investigative materials gathered and/or created as part of the investigation to the Public Prosecution Service ("PPS").

[2] On 2 November 2016 Treacy J granted an interim injunction in terms to the first named plaintiff pending an *inter partes* hearing. The second named plaintiff does not have an interim injunction at present but he also applies for relief in this hearing.

[3] The interim injunction provides that it is ordered that:

(i) All reports of these proceedings are prohibited and no person may publish, communicate or disclose to any other person the fact that the plaintiff has commenced these proceedings, or is a party to these proceedings, other than for the purpose of carrying this Order into effect or by disclosure to legal advisers instructed in relation to these proceedings.

(ii) The name of the plaintiff for all purposes in these proceedings in place of reference to the plaintiff by name, and whether orally or in writing, the plaintiff be referred to by the cypher "TKR".

(iii) That no person may publish, communicate or disclose to any other person any report of these proceedings which identifies, whether directly or indirectly, the plaintiff.

(iv) That no person may publish, communicate or disclose to any other person any report of these proceedings which identifies, whether directly or indirectly, the private and sensitive material contained at Schedule 2 of this Order.

(v) The defendant shall remove the online articles relating to the PSNI investigation into alleged sex offences involving the plaintiff ("the investigation") and/or the allegedly imminent referral of the PSNI investigative materials gathered and/or created as part of the investigation to the Public Prosecution Service ("the referral") including but not limited to the articles found at the following URLs:

(a) http:/www.bbc.co.uk/news/uk-northern-ireland-37830983

(b) http:\\www.bbc.co.uk/news/northern_ireland

(c) http:\\www.bbc.co.uk/sport/rugby/union/37826130

In addition the following relief was not pursued before Treacy J but was applied for in this hearing:

(vi) The defendant to prevent the further broadcast or publication whether upon BBC1, BBC2, BBC iPlayer and/or BBC online or upon social media platforms of any material relating to the investigation and/or the referral.

(vii) The defendant as a data controller shall block, cease or not begin processing or making available any personal data of or relating to the plaintiff as it relates to the investigation and/or the referral, in accordance with Section 10 of the Data Protection Act 1998.

[4] Subsequently, by agreement the injunction was varied in that at (v) the URLs that simply referred to the first named plaintiff being ruled out of the Ireland v New Zealand test "for personal reasons" were removed from the prohibition of the injunction.

[5] During the course of this hearing I granted a Khanna subpoena which enabled relevant PSNI material to be placed before the court. I will refer to this in the course of the judgment. I heard this application over the course of two days on

16 and 17 November 2016. Mr White QC appeared with Mr Girvan BL for the first named plaintiff. Mr Millar QC appeared with Mr Coghlin BL for the BBC. Mr Girvan appeared for the second named plaintiff. I am grateful to all counsel for their written and oral submissions.

[6] Whilst the written arguments filed by the applicants in this case refer to a wide range of claims only two causes of action were pursued in oral argument for the purposes of this injunction application. Mr White sensibly did not pursue the human rights claim against the BBC as a public authority. He did not actively pursue the claims made in relation to contempt or the claim on the basis of the Protection of Harassment (Northern Ireland) Order 1997. The substantive case made by both plaintiffs was in relation to the tort of misuse of private information. This was supplemented by some limited reference to the Data Protection Act 1998. There was no pleaded case of defamation.

Facts

[7] I have read a substantial number of affidavits, submissions and legal authorities and whilst I do not refer to each and every item of evidence herein I can state that I have taken all of the information presented to me into account. I bear in mind that this is an interim application for an injunction and that the burden lies upon the plaintiffs to establish a case. The hearing I conducted was upon submissions and on the basis of affidavit evidence. It was not a full trial of the issues. I am not making findings on any disputed factual matters. I summarise the salient facts and details as follows.

Patrick Jackson

[8] The first named plaintiff is a professional rugby player. He is 24 years of age. He has played for Ulster Rugby at Club level appearing over 100 times in domestic and European competition. He has captained Ulster on a number of occasions. The first named plaintiff has also captained the Ireland Under 20 team at the 2011 World Cup. He now has approximately 18 caps for the Ireland team and is an established presence in the Ireland rugby squad. The first named plaintiff was initially part of the eagerly anticipated clash between Ireland v New Zealand which was scheduled to take place in Chicago in early November 2016. The first named plaintiff applied for a visa to travel to the United States of America but he was refused upon his own declaration regarding a criminal investigation pending in relation to him. On 30 October 2016 it was reported that the first named plaintiff was ruled out of the squad for "personal reasons". This followed a statement from the Irish Rugby Federation Union ("IRFU").

[9] This press release led to publication of material by the BBC about the first named plaintiff and his arrest and involvement in a criminal investigation regarding alleged sex offences. The IRFU statement resulted in information being shared on a confidential basis with the BBC as to actually what the personal reasons were. The

BBC then obtained a statement from the police which had been pre-prepared. It transpired that the first named plaintiff had been arrested on 30 June 2016 after which he was released without charge and bailed on certain conditions including reporting once a week, curfew, and no consumption of alcohol. The first named plaintiff complied with these conditions which led to a relaxation of curfew. On 4 October 2016 he attended with police when he was again released without charge and all of the conditions of bail were removed. He was advised that a file would be passed to the PPS for a direction.

[10] A third individual was part of the criminal investigation but was not named by the BBC although he was part of the same investigation. Also a fourth person being referred to the PPS regarding perverting the course of justice was not named.

[11] Mr Kevin Winters of KRW Solicitors has filed a number of affidavits supporting the case for an interim injunction. In his grounding affidavit of 3 November 2016 he avers to the applicant's personal circumstances. At paragraph 4 of that affidavit he refers to the arrest on 30 June 2016 after which he was released without charge on bail. Mr Winters refers to the fact that on 4 October 2016 the first named plaintiff was released without charge and all bail conditions were removed. Mr Winters avers that 'the plaintiff maintains that he has been the subject of an entirely false allegation of criminal sexual activity with a female. From shortly after the date of his first arrest the plaintiff made his employers Ulster Rugby fully aware of the allegations, criminal investigation and his denial of the same. In turn Ulster Rugby made the Irish Rugby Football Union aware of these facts'.

[12] At paragraph 8 of the grounding affidavit Mr Winters refers to an e-mail his offices sent to the PSNI dated 24 August 2016 in the following terms:

> "If there is any difficulty or other delay in so proceeding then that increases the potential for a media leak from other unrelated third parties. We appreciate police have an obligation to investigate these serious allegations and at the core of such enquiries are the rights of any alleged victim. However, we simply want to flag up that at this stage we are keen to try and obtain a timescale for the completion of the investigation and in particular if you anticipate any reasons for delay then ask that you share them with us at this stage."

[13] At paragraph 13 of the affidavit Mr Winters avers that 'our offices were informed by Ulster Rugby at around 8pm on the 31 October 2016 about unconfirmed reports indicating the PSNI had issued a statement confirming our client was the subject of arrest and interview about sex allegations'. The affidavit further avers that an officer was unable to confirm this at 9.15pm.

[14] Mr Winters avers at paragraph 16 that 'leaving aside the absence of any public interest in the publications, the failure to afford the plaintiff any right to reply was a clear instance of irresponsible journalism especially in light of the manifest breaches of our clients rights as specified below'. Mr Winters continues by referring to the articles which were first published by the BBC and then by print Irish Sun the next day. Further, he refers to the fact that the BBC online articles encourage readers to share the information via social media including by specific reference to Facebook and Twitter. He states that this sharing led to a situation where the information went viral and that the BBC is responsible for all republication upon these platforms. Mr Winters makes the case that this has resulted in 'trial by media'.

[15] In a separate affidavit of 2 November 2016 Mr Winters refers to a Whats App discussion of the case provided by the first named plaintiff's father which he presents as supporting evidence. In his second affidavit Mr Winters states that the BBC affidavits are incomplete, that further information was required regarding the contact with police, and that broadly the BBC actions were unjustified and outside good journalistic practice particularly as regards a right of reply. The assertion is made that the BBC is responsible for other publication and social media conversations.

[16] The first named plaintiff's father in his affidavit states that 'the BBC article and the widespread republications of its contents have caused our family considerable distress. Whilst the arrest of the first named plaintiff and the accusation of the complaint had itself caused a lot of upset, we had believed that the first named plaintiff was entitled to the presumption of innocence and had been informed that referral of any file to the PPS was months away.' The first named plaintiff's father states that he had not considered it likely that the media would publish an article in the absence of any charge. The first named plaintiff's father describes the distress to his family, the effect on the first named plaintiff and he refers to the fact that the first named plaintiff only told a limited number of persons about his arrest. He refers to the WhatsApp conversations.

Stuart Olding

[17] The second named plaintiff is 23 years of age. He is described as an Ulster Provincial player who has been capped for Ireland on four occasions. He became an established member of the Ulster squad in 2012. He has never captained Ulster. He represented Ireland at Under 18 and Under 20 level. The background to the criminal investigation is exactly the same as with the first named plaintiff. The second named plaintiff was injured since 22 October 2016. There was not the same report in relation to him given this in that he was not available for the Ireland v New Zealand game due to his injury. The second named plaintiff accepts that he was refused a visa to travel to the United States of America also. He had applied in the hope that he may have retained his fitness. If he had been fit it was open that he would be part of the squad.

[18] An affidavit filed by Mr Joe Rice, Solicitor of 10 November 2016 on behalf of the second named plaintiff, replicates that of Mr Winters. At paragraph 27 of that affidavit reference is made to the distinct position of the second named plaintiff in that he was injured and unable to play in Chicago. Mr Rice states that "The plaintiff accepts that, if he had been fit and Ireland wishes to select him then he would have had to withdraw from the squad citing 'personal reasons' because he too could not obtain a Visa due to the criminal investigation." Mr Rice refers to the fact that the omission of the second named plaintiff from the Ireland squad was not the subject of media coverage. An affidavit has also been filed by the second named plaintiff's father setting out the distress caused to the second named plaintiff and his family as a result of publication.

The defendant's evidence upon affidavit

[19] There is an obvious overlap in the defendant's case relative to each plaintiff and so I will not repeat the evidence filed against each plaintiff save as when material. I summarise the evidence filed on behalf of the defendant as follows. An affidavit was filed by Haydn Parry of 7 November 2016. He is described as the output producer for BBC Sport NI. Mr Parry begins his affidavit by referring to the sporting profiles of both the first named plaintiff and the second named plaintiff. In terms of the BBC knowledge of the arrest at paragraph 7 of the affidavit he says:

> "At approximately 18:50 on Monday 31 October 2016 a colleague of mine took a call from a confidential source to the effect that did we know that 'for personal reasons' the plaintiff was not travelling related to him being arrested for sex offences. Almost immediately afterwards we received similar information from another confidential source and I took note of that because there were now two similar pieces of information, both from what we would deem reliable sources."

[20] In this affidavit Mr Parry states that he telephoned the PSNI press office as a result. He states that 'mine was not the first call of this nature' and that the officer dealing with the case was preparing a statement which would issue shortly. Mr Parry states that at 19.46 he received an e-mail from Anna Shiels of the PSNI Media Centre which stated as follows:

> "**Statement**
>
> Police arrested two men aged 24 and one man aged 23 on Thursday 30 June in relation to a number of sexual offences, reported to have taken place at a property in south Belfast, on 28 June.

> The men have been interviewed and released from custody.
>
> A file will be prepared for submission to the PPS.
>
> A fourth man aged 24, will be reported to the PPS in relation to this incident for perverting the course of justice."

[21] At paragraphs 11-23 Mr Parry then sets out the chain of events that led to the first publication of information about the first named plaintiff in the BBC news piece on radio Ulster at 23:55 on 31 October 2016. This involved contact with Shane Glynn, managing editor of productions. He states that further attempts were made to reach Richard Finlay, Chief Press Officer for Ulster Rugby (19:48) and David O Siochain, IRFU Press Officer. He states that contact was made with BBC lawyers at 20:35. Enquiries were made to check the source material. He avers that an unsuccessful effort was made to contact the agent of one of the plaintiffs. He states that Ulster Rugby was contacted and after that the decision was made to publish.

[22] Mr Parry avers that at 23:38 Mr Finlay, Ulster Rugby Press Officer, contacted him asking what would be published. The reply was given and Mr Parry avers that he 'sent him the script'. The next morning Ulster Rugby e-mailed a statement at 8:30am however this was not picked up for the 9:00am bulletin. This reads:

> "The first named plaintiff and the second named plaintiff have been assisting the PSNI with enquiries. The players deny any wrongdoing and have not been charged with an offence. As no charges have been brought forward, it would be inappropriate to comment further."

[23] Shortly after KRW Solicitors issued a statement as follows:

> "We act on behalf of the first named plaintiff. He rejects completely any allegations made against him. The first named plaintiff has cooperated fully with police in their inquiries and we have been liaising with police on his behalf. We are both disappointed and indeed concerned that this information has been leaked to the press before the investigation has concluded and well in advance of any final decision. This has the potential to be prejudicial to our client's interests.
>
> We will not hesitate to take all necessary steps to protect his legal position as he is entitled to the presumption of

> innocence. We urge the media to restrain from any damaging speculation."

[24] Mr Parry concludes his affidavit by denying any intent to interfere with the administration of justice. He states that the bulletin on 31 October was factually accurate, editorially justified and issued after legal advice. He states that the piece carried no imputation of guilt.

[25] Mr Shane Glynn, managing editor of productions also filed an affidavit of 7 November 2016. This affidavit refers to his contact with Mr Shane Logan, CEO Ulster Rugby at 21:45 who he says 'made no attempt to deny or deflect' the information. He states that Mr Logan referred to the fact that a pre prepared statement would be issued by Ulster Rugby in the event of publication.

[26] Ms Kathleen Carragher also filed a number of affidavits. Her first affidavit of 8 November 2016 refers to her position as head of news in BBC Northern Ireland. In this affidavit she refers to the fact that the BBC is subject to published editorial guidelines. At paragraph 9 she states that 'subject to any legal restrictions, the BBC decides on a case by case basis whether it will name an individual on arrest'. At paragraph 15 she states that 'In respect of the current matter, the public interest considerations include the fact that the two people involved were high profile professional sportsmen who enjoy celebrity's status in Northern Ireland. I consider such allegations of a serious criminal nature involving high profile individuals to be in the public interest and the public have a right to be informed'.

[27] At exhibit KC1 Tab 2 of her first affidavit Ms Carragher sets out the current press coverage as of 7 November 2016. This includes widespread report on radio, in local newspapers, national newspapers, televised news bulletins and on the internet. Ms Carragher also exhibits numerous press reports of other individuals who have been arrested and had that fact reported, including with identification in certain cases.

[28] In Ms Carragher's second affidavit of 14 November 2016 she disputes any breach of BBC guidelines. In particular in that affidavit she refers to 'The Editorial Guidelines' and Chapter 6 which refers to rights of reply:

> **"6.2.3**
>
> When our output contains allegations of wrongdoing, iniquity or incompetence or lays out a strong and damaging critique of an individual or organisation, those criticised should normally have a right of reply, unless there is an editorial justification to proceed without it

6.3.1

> Any proposals to broadcast a serious allegation resulting from our own journalism without giving those concerned an opportunity to reply must be referred to a senior editorial figure."

Ms Carragher avers that right of reply whilst important, is not absolute, and that she is a senior editorial figure.

Additional Material

[29] There are some further matters relevant to the chronology of publication which I summarise as follows for completeness sake. Some of this information has been gleaned from the Khanna materials which were supplied by the PSNI:

(i) The IRFU statement:

This is timed as 14:50 on the website on 31 October 2016 and it reads *inter alia*:

> "The Ireland coaching team have confirmed the 27 players that will travel to Chicago today to play against New Zealand in Soldier Field next Saturday…the first named plaintiff, who is unavailable due to personal reasons, will not make the trip to Chicago."

(ii) Referral to the police by the BBC and the Sun.

The chronology of this seems to be as follows:

On 31 October 2016 various calls are logged pre-publication as having been made to the police

19:46 A journalist from the Irish Sun telephoned to say that she had been advised by several sources that the first named plaintiff had been arrested

19:49 A journalist from Northern Ireland office of the Sun makes a similar query

19:50 Haydn Parry from BBC makes enquiry

(iii) The BBC received the police statement on 31 October 2016.

19:47 The police statement is sent to Hayden Parry

This statement appears from the emails provided to have been prepared in or around 5 October

(iv) Enquiries by the BBC to Ulster Rugby and one of the plaintiff's agents.

This is set out above

(v) At 11:55 on 31 October 2016 the impugned report is posted on the website after a radio broadcast.

(vi) The next day on 1 November 2016 the newspapers, The Irish Sun and The Sun newspapers headline the story.

(vii) The next day a revised version of the media report is provided by the BBC which includes a right of reply in which the plaintiffs deny the allegations.

[30] The material provided by the police also includes the Media Guide which states under the heading Arrests and Charges:

> "Under the Contempt of Court Act, a case becomes active upon an arrest or the issue of a warrant or summons. There is then a legal responsibility on journalists not to publish or broadcast any details which may prejudice a fair trial. It is therefore extremely important that the media are informed as soon as proceedings are considered to be active if the crime has been publicised. Officers should specify whether a person has been arrested or has attended a police station voluntarily.
>
> When a case is active nothing should be released which would create a substantial risk of serious prejudice to a court case, and nothing should be released which identifies a suspect. But do not use the sub-judice rule as an excuse to release nothing - the main facts of the matter can still be given."

Legal Framework

Misuse of private information

[31] This case involves a consideration of the Human Rights Act 1998 which gives effect to the European Convention on Human Rights (ECHR). The Convention rights at issue are Article 8, the right to respect for private life and Article 10, the right to freedom of expression. Article 8 provides as follows:

"**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."

[32] Article 10 provides:

"**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."

[33] Cases involving Articles 8 and 10 also involve a consideration of Section 12 of the Human Rights Act 1998. Section 12 provides as follows:

"(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) 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 interests for the material to be published;

(b) any relevant privacy code."

[34] The approach to be adopted when the two rights are at issue flows from a case of McKennitt v Ash [2008] QC 73. The test is one of two stages. Buxton LJ articulates this at paragraph 11 of that judgement:

> "Accordingly, in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is protected by article 8? If no, that is the end of the case. If yes, the second question arises: in the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the

> publisher by article 10? The latter enquiry is commonly referred to as the balancing exercise, and I will use that convenient expression."

[35] In assessing the first part of the test (i.e. whether the information is private in the sense that it is afforded the protection of Article 8) various authorities have been cited. This stage involves the consideration of whether there is a reasonable expectation of privacy. This enjoins the court to apply an objective assessment of all of the circumstances of a particular case. The approach to be adopted by the court flows from the decision in Campbell v MGN Ltd 2002 EWCA Civ 1373. In the case of Murray v Express Newspapers plc 2008 EWCA Civ 446 the Court of Appeal referenced factors to be taken into account in this consideration at paragraph 36 namely the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence or otherwise of consent, the effect upon the claimant, the circumstances in which and the purposes for which the information came into the hands of the publisher.

[36] The jurisprudence in this area illustrates the broad sweep of factual circumstances that may arise in these types of cases and so the court cannot be constrained by a rigid checklist or a hierarchy in terms of the factors. It seems to me that the court must conduct an overall view at each stage. There is also an obvious overlap between the factors that feed into the first part of the test and the factors that require to be balanced at the second stage if that point is reached.

[37] In terms of the characteristics of each right, Article 8 is a right to respect for private and family life. It is however a qualified right. The nature of the protection Article 8 affords is found within the Article and is in keeping with its overall aims. The ECHR cases have consistently stressed that interpretation of Article 8 should not be trammelled by definitions but that it includes a person's physical and psychological integrity. The guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference of the personality of each individual in his relations with other human beings. High on the list of protection in relation to Article 8 is private sexual behaviour.

[38] The essence of Article 10 is described in the case of Axel Springer AG v Germany [2012] 32 BHRC 493 at paragraph 78 and 79 as follows.

> "The court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nonetheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest. Not only does the press have the task of

> imparting such information and ideas; the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."

[39] This was a majority decision of the Grand Chamber. It is a case which involves criminal behaviour. The court set out factors to be taken into consideration where the right to freedom of expression is being balanced against the right to respect for family life. They are stated as: the contribution made by photos or articles in the press to a debate of general interest; the role or function of the person concerned and the nature of the activities that were the subject of the report and/or photo; the conduct of the person concerned prior to publication of the report or the fact that the photo and the related information had already appeared in an earlier publication; the way in which the information was obtained and its veracity; the way in which the photo or report was published and the manner in which the person concerned was represented in the photo concerned or the report; the severity of the sanctions imposed.

[40] The issue of public figures and privacy has been dealt with in a large number of cases which have come before the courts. In terms of sporting figures Tugendhat J made comment in a case about a 17 year old rugby player in Spelman v Express Newspapers [2012] EWHC 355 at paragraphs 44-52. That case involved issues of health but some more general comments are made. The judge draws on the dicta of Baroness Hale in Campbell v MGN [2004] UKHL 22. At paragraph 49 the judge refers to the test of contribution to a debate of general interest and citing from the Parliamentary Assembly of the Council of Europe on the right to privacy he states that it includes the following:

> "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."

[41] Paragraph 90 of Axel Springer further reiterates that '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.'

[42] In Spelman, Tugendhat J refers at paragraph 70 to the issue of privacy:

> "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."

[43] In PJS v News Group Newspapers Ltd [2016] 2 WLR 1253 the Supreme Court was clear that even at an interlocutory stage, neither Article 8 nor Article 10 of the Convention had preference over the other, and where their values were in conflict, an intense focus was required on the comparative importance of the rights being claimed in the individual case, with the justifications for interfering with or restricting each right being take into account and that a proportionality test applied. That case also illustrates how difficult and finely balanced decisions in this area are.

[44] Section 12 of the Human Rights Act 1998 also applies as a statutory guide. The application of this section involves consideration of whether a permanent injunction would succeed at trial which in turn involves the consideration of the adequacy of damages as a remedy. Section 12 also requires a consideration of the extent to which material has or is available to the public and the issue of public interest and relevant privacy codes.

[45] The particular issue in this case of the plaintiffs being involved in only an arrest stage is important in terms of context. The jurisprudence is relatively limited in this area but three cases were referred to me as follows. The first decision is PNM v Times Newspapers Ltd [2014] EWCA Civ 1132. This was a case involving court proceedings where the claimant whilst not charged was referred to in relation to an investigation into child abuse. On my reading of the case, the dominant theme is open justice rather than the issue of arrest however at paragraph 41 Sharp LJ states that various materials such as police guidance, the Leveson materials and judicial papers, were provided which consider whether the police should publish the name of someone who has simply been arrested. She says that 'I accept this material provides some support for the proposition that there should be a more careful consideration of such person's rights than might have been in the past'.

[46] In ERY v Associated Newspapers Ltd [2016] EWHC 2760 Nichol J also refers to the College of Policing Guidance following the report of the Leveson Enquiry and quotes from this at paragraph 57. Nichol J continues to refer to some judicial support for this approach quoting from Sharp LJ in PNM. This case is again fact sensitive where there was publication of the fact that the company was being investigated for fraud.

[47] The third case in this area is the decision of Mann J in Hannon v News Group Newspapers [2015] EWHC 1580. It must be borne in mind that this was a strike out application. The issue is however referenced at paragraphs 92-96 the nub of Mann J's analysis is found at paragraph 96 where he says:

> "For present purposes it is sufficient for me to observe that the key authority relied upon by Mr White (Alex Springer) does not support an absolute right of the press to have and to publish the fact of an arrest and its circumstances. At most it supports a submission that, if the facts justify it, that right exists and the countervailing privacy rights do not. As with a large number of disputes under Convention rights, that is a question of fact of degree and is highly fact sensitive."

[48] Having considered these three cases, I can see that they are used by the plaintiffs in aid of their argument about arrest but none of the cases provides a definitive statement on the issue. The outcome of the evaluative exercise will depend upon the facts of each case. The circumstances of the arrest are significant as the Axel Springer case illustrates. Of particular importance whether it was public as in that case where the claimant was arrested in a Munich beer hall or whether the circumstances can be said to be private. Tugendhat and Christie, The Law of Privacy, refers to this issue at paragraphs 5.75-5.77. At paragraph 5.77 the learned authors state that:

> "The present approach recognises that whether the fact of arrest is private in a particular case is a highly fact sensitive question of fact and degree and a key consideration will be the circumstances, public or otherwise, of arrest."

[49] The cause of action is in tort for misuse of private information. It is recognised and reiterated by PJS that this tort is concerned not simply with confidentiality but also with intrusion. The law therefore provides a remedy in relation to confidentiality but also in relation to intrusion even when the story is already known. The PJS case illustrates the difference between confidentiality and intrusion in this sphere. If information is already in the public domain the confidentiality aspect is diminished because the story is known. However, that is not the end of the matter because as PJS demonstrates a tort may arise on the basis of ongoing intrusion. Whether that necessitates an interim injunction will depend on the facts of a particular case. To each of the two rights at play a test of proportionality must be applied. It follows that there is no immutable standard by which to judge an application for an interim injunction.

[50] A significant characteristic of this case is that information has already been published. The applications for injunctions pending trial are to prevent further intrusion. However, there must be a purpose to interim restraint. Ultimately an injunction is a discretionary remedy. The words of Eady J in Moseley v News Group Newspapers Ltd [2008] EWHC at paragraph 34 have been quoted in terms of a utilitarian approach to this issue:

> "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 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."

[51] In any application for an interim injunction the test of likelihood of success at trial applies. This has been explained in Re Guardian News Media & Others [2010] 2 AC 697. That was a case about the anonymity of terrorist suspects and the role of the press in printing factual information. This case reiterates another important theme in prior jurisprudence in relation to the presumption of innocence. At paragraph 66 Lord Rodger refers to the following;

> "…the law proceeds on the basis that most members of the public understand that, even when charged with an offence, you are innocent unless and until proved guilty in a court of law. That understanding can be expected to apply a fortiori, if you are someone whom the presenting authorities are not even in a position to charge with an offence and bring to court."

The Data Protection Act 1998

[52] There was no substantial argument about the applicable legal principles in relation to this cause of action. There was no issue that the claimants are data subjects within the meaning of section 1 of the Act. There was also no issue that the publication involved sensitive personal data within section 2. The information was clearly processed. If processed, it must be in accordance with the principles under the Data Protection Act. The real point was whether the processing was for a special purpose namely journalism as defined in Section 3(a). The 'journalism exemption' in Section 32 was relied upon. This reads as follows:

> "32 Journalism, literature and art
>
> (1) Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—
>
> (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.

(2) Subsection (1) relates to the provisions of—

(a) the data protection principles except the seventh data protection principle,

(b) section 7,

(c) section 10,

(d) section 12, and

(e) section 14(1) to (3).

(3) In considering for the purposes of subsection (1)(b) whether the belief of a data controller that publication would be in the public interest was or is a reasonable one, regard may be had to his compliance with any code of practice which—

(a) is relevant to the publication in question, and

(b) is designated by the [F1 Secretary of State] by order for the purposes of this subsection.

(4) Where at any time ("the relevant time") in any proceedings against a data controller under section 7(9), 10(4), 12(8) or 14 or by virtue of section 13 the data controller claims, or it appears to the court, that any personal data to which the proceedings relate are being processed—

(a) only for the special purposes, and

(b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before

the relevant time, had not previously been published by the data controller,

the court shall stay the proceedings until either of the conditions in subsection (5) is met.

(5) Those conditions are—

(a) that a determination of the Commissioner under section 45 with respect to the data in question takes effect, or

(b) in a case where the proceedings were stayed on the making of a claim, that the claim is withdrawn.

(6) For the purposes of this Act "publish", in relation to journalistic, literary or artistic material, means make available to the public or any section of the public."

The submissions of the parties

[53] Mr White QC, on behalf of the first named plaintiff, principally relied on a cause of action pursuant to the claimant's Article 8 privacy rights. Reference was also made in argument to the provisions of the Data Protection Act 1998 although this argument was a subsidiary to the claim in tort. Mr White did not pursue the claims of contempt or harassment in oral argument. In summary he submitted as follows;

(i) Stage 1 of the test was satisfied as there was a reasonable expectation of privacy on the facts when assessing the nature, place, purpose, consent and effect of the arrest.

(ii) The Leveson report and policy guidelines are significant. They had been referred to in three arrest cases cited and they pointed strongly to this information being private and the direction of travel in this area.

(iii) You do get to stage 2 in this case. Celebrity of the applicants is irrelevant. This publication was not about sport it was about their sex lives.

(iv) This case passes the Section 12 test. The dam has not burst and an injunction is necessary to restrain further intrusion.

(v) The direction of travel is to protect the identity of those arrested flowing from the jurisprudence.

(vi) There was a passing reference to the interests of the alleged victim but this was not well developed and it is not a factor that I take into account in my consideration

[54] Mr Millar QC on behalf of the BBC replied with the following points which I summarise as follows:

(i) The principle of open justice must apply in this case. The orders granted on an interim basis were not established and should be discharged. In any event they exceed permissible width.

(ii) The press followed good journalistic practice in this case.

(iii) Other media outlets such as the Sun published in this case.

(iv) You cannot patrol social media comment on this story as demonstrated by postings and other social media exchanges.

(v) It is significant that no personal affidavits were sworn setting out the effect of the press story upon the applicants.

(vi) These are public figures and this case involved a public debate and was not simply about curiosity.

(vii) There is no reasonable expectation of privacy for these two public figures and so this case falls at the first hurdle.

(viii) If the facts of the case get over the first hurdle they fail on the balancing exercise.

(ix) The case for an injunction would not be likely to succeed at trial. Mr Millar posed the question - why ban people from knowing what is common knowledge?

(x) The Data Protection Act claim is not made out.

(xi) The futility of the claim in the second named plaintiff's case is starkly illustrated by the fact his solicitor has been and continues to publish articles on their own website.

[55] Mr Girvan for the second named plaintiff adopted the submissions of Mr White and also indicated:

(i) The second named plaintiff does not have the same public profile yet there was merging in the story and there is no justification of that in relation to him.

(ii) Given that there was no pre-emptive IRFU statement in relation to the second named plaintiff the story in relation to him cannot be directly related to sport at all and a distinction should be drawn.

Consideration

Context

[56] There are a number of distinguishing features which set the context for this consideration. The PJS case makes it clear that there are two elements to the tort of invasion of privacy. The first is confidentiality which does not apply in this case because the story is known. This would be a different case if it were simply about confidentiality. The second category is intrusion which is an ongoing state as further tortious acts may take place which are unwarranted. This may necessitate an injunction pending trial notwithstanding previous publication.

[57] In determining whether an injunction is justified in an intrusion case it seems to me that consideration must be given to the intrusion that has already occurred, what the future intrusion would be and the effects upon the claimants in this context. I note that at its heart PJS was a case about whether an injunction made by the Court of Appeal should be discharged on the basis of information in the public domain. In that regard the facts are different but there is a clear symmetry in terms of the issue of intrusion.

[58] In PJS at paragraph 35 Lord Mance expresses this in terms of a qualitative analysis. The criticism of the Court of Appeal was that it did not give due weight to the qualitative difference in intrusiveness and distress likely to be involved in what was proposed by way of unrestricted publication by the English media in hard copy as well as on internet sites. The potency of hard copy lurid 'kiss and tell' stories is clearly in the mind of the Supreme Court with the consequent invasion of privacy. Lord Neuberger refers to this in PJS as the prospect of 'eye catching headlines' in sensationalist terms.

[59] The fact that this case involves arrest is also significant. The general policy of the police is not to identify arrest suspects. This is replicated in the policing guidelines and extracts from the Leveson report referred to. The reasonable expectation of privacy in an investigation is dealt with in the various cases I have referred to. Mr White submitted that the direction of travel is to preserve the privacy of arrest suspects and that that should apply to the media. He relies on the three cases I have mentioned.

[60] There is clearly an ongoing debate to be had in relation to arrest cases. Indeed at the heart of this case is the issue as to whether arrest suspects should be identified. The competing arguments are stark. On the one hand naming an arrested person may encourage more witnesses and victims to come forward and therefore assist the administration of justice. On the other hand the naming of an

arrested person may cause untold reputational damage which can never be erased even if the person is entirely innocent. In the absence of specific legislative provisions, applying the law as it stands, the most that I think can be said, flowing from the dicta in Axel Springer is that there is no absolute rule regarding publication of arrest. However, care and attention must be taken, clearly by police in relation to publication and then by the media in publishing identities of those arrested. The facts of the case will determine how each body should approach the matter. The facts surrounding the arrest are particularly important.

[61] In this case the arrests took place on 30 June 2016. They were private and known to few. The claimants continued in their day to day lives and sport. Nothing was published about them. Both claimants applied for visas to travel to the USA and as part of that the criminal investigation was disclosed. I accept the different circumstances of the second named plaintiff in that he suffered an injury. However, it seems to me that public comment could well be contemplated because there would have to be an explanation as to why the players were not playing. Indeed, if the players had not applied for visas and simply ruled themselves out the same question would probably have been asked. So either way it was inevitable in my view that there would be a query.

[62] The real issue is whether or not the application at trial is likely to succeed in terms of a permanent injunction being made. The grant of an injunction must also be a proportionate response in each case. The plaintiffs make a case against this one defendant amid the fact that many other forms of publication have taken place in local and national print press and on the internet. Indeed, from the PSNI records, enquiries were made by the Irish Sun prior to those of the BBC. The BBC pressed ahead wanting to have the scoop in the context of a competitive media world. The argument is made that the BBC started the chain of events and that has led to a significant intrusion. That is factually correct however I consider that there is some force in the argument that no other organisations were brought before the court for take down applications or for injunctive relief.

Reasonable expectation of privacy

[63] With these contextual comments in mind, I begin by applying the principles from the jurisprudence to the facts of this case. Firstly, I have to look at whether the claimants have a reasonable expectation of privacy. This is an objective test. The question is fundamentally whether the information at issue is private. I have been enjoined to look at other cases in terms of their reasoning. Whilst helpful, these cases do turn on their own facts. For instance in the case of Axon v Ministry of Defence [2016] EWHC 787 a finding of gross misconduct had already been made against the claimant who was in a prominent public position as a Royal Navy Commander. It was determined that he had no reasonable expectation of privacy. Some of the cases are not injunction cases at all.

[64] In relation to attributes, both claimants are young adults. They are both professional rugby players. They are both well-established in Ulster rugby. They have chosen that career. The first named plaintiff has a greater international profile than the second named plaintiff. However, it seems to me that both are well-known sportsmen within Northern Ireland. In my view that is significant. Whilst Mr White may be correct that to describe these two men as having 'celebrity status' goes too far, they are public figures. I consider that they have a status and that they are role models. In my view that is not irrelevant as has been suggested and it has a consequence in terms of their privacy. In other words they can expect media attention. As a result they may enjoy lesser protections in relation to their privacy. But that does not result in an unconstrained licence to publish all information about them.

[65] I then turn to the nature of the activity. The nature of the activity engaged in seems to me to comprise two important strands. Firstly, it was private behaviour of a sexual nature. However, that is not the end of the matter. Secondly, it has resulted in a complaint that it may have amounted to criminal conduct so it is not simply behaviour akin to adultery or consensual sexual behaviour between adults.

[66] In terms of the place, the behaviour was in private. There was no public element to this. The arrest was also in private and so I accept it should attract a considerable degree of protection.

[67] As regards the nature and purpose of the intrusion, this is a case where this issue is known because the information has already been published. There was reporting by this defendant in various media about the arrests. The nature of the intrusion by the defendant was by means of radio and internet report. The first radio and internet report drew on the police statement but included the names of the first named plaintiff and the second named plaintiff. The police statement was a factual statement. It did not refer to anything other than the fact of an arrest and the consequences of that. The press report built on the police report by referring to the names of the first named plaintiff and the second named plaintiff. The purpose was to identify the arrested persons. The report of that was factual. It came after the IRFU statement referring to the first named plaintiff.

[68] It is clear that neither the first named plaintiff nor the second named plaintiff consented to the dissemination of this information. I should say that I do not accept the argument that by their conduct the applicants created such a public profile by virtue of which they could expect such intrusion into matters relating to sexual behaviour. The argument was made that particularly in relation to the first named plaintiff by virtue of his social media profile he could have expected this type of information to be disseminated. I do not accept the substance of this argument.

[69] In terms of effect, this case is unusual in that the effect upon the claimants is not averred personally by them. I am not entirely convinced by the explanation given for this as I find it difficult to see how the claimants would incriminate

themselves by describing distress. Mr Millar made much of this omission which he said has been fatal in other privacy cases. I can accept the force of this argument because the first named plaintiff and the second named plaintiff as claimants have not personally averred the effect upon their lives. That may include their daily lives and their sporting career. However, I am not prepared to hold that this in itself is fatal to their claim at an injunction stage. The situation would be different at trial. In these proceedings the personal effect is averred by each plaintiff's father. There has been an argument made about the limited circle who knew about the arrest. I accept that and the argument that the effect flows not just from the arrest itself but from publication of that fact. The affidavits from the fathers describe adverse consequences upon the claimants and their family and adverse social media reactions.

[70] The circumstances in which the information came into the hands of the publisher are also clear in this case. The information was obtained by way of various sources. The police information was non-identifying in keeping with police protocol. The identities came from what are described as reliable sources. The publisher has also averred that efforts were made to contact agents for a right of reply before issue of the press report. It has been argued that the obtaining of the information was in accordance with good journalistic practice.

[71] In terms of the types of information involved it was from the police report combined with the information from various sources. This became then a report on the internet and radio. This led to substantial publication in the print press including in particular the Irish Sun.

[72] Having considered all of the above, in the particular context of this case, I have decided that both plaintiffs have established a reasonable expectation of privacy, likely to succeed at trial. I reach this decision principally because this is a case about arrests which occurred in private and it relates to sexual conduct in private. I summarise my reasons as follows:

(i) It must be significant that police did not release the identities of those arrested. That accords with protocol. I accept that the media is not so bound however the principle remains of general application.

(ii) The arrest was private and related to matters of private sexual conduct and so the imperative to protect such matters from intrusion under Article 8 is high.

(iii) Whilst the plaintiffs are public figures, that does not reduce entirely their right to privacy.

(iv) There was a limited circle of persons who knew about the arrest.

(v) I accept that this intrusion had an adverse effect upon both plaintiffs.

The balancing exercise

[73] Having found that the claimants' Article 8 rights are established I have to consider whether interference is justified. The balancing is between the privacy rights of the claimants and the freedom of expression of the defendant. The question I derive from established jurisprudence is whether in all the circumstances the interest of the owner of the information must yield to the right of freedom of expression conferred on the publisher by Article 10. This involves a discretionary balancing of factors and it is also an exercise in proportionality.

[74] In conducting this evaluative exercise I start by examining the nature of the Article 8 rights. Firstly, the subject matter of the arrest is a strong factor in their favour bearing as it does to matters of sexual conduct. The argument is made that the IRFU statement referring to personal reasons does not automatically remove the privacy attached to private information regarding sexual behaviour. The argument is also made that the platform has nothing at all to do with the second named plaintiff and thereby the justification is diluted in relation to him. Such private matters are high on the list of protections afforded by Article 8. The conduct in question and the arrest took place in a private place. An arrest is not the same as a judicial fact such as conviction or charge. In this case there is no determination in relation to the facts as yet. The plaintiffs are entitled to the presumption of innocence.

[75] The arrest itself clearly had adverse effects. I am prepared to accept the adverse effect of publication upon the plaintiffs notwithstanding the absence of personal affidavits. In terms of the effects of further intrusion there are no children directly involved in this case. However, I accept the adverse effects upon family members. All of these points are in favour of the plaintiffs.

[76] I then turn to the defendant's position and the nature of the Article 10 right. Having analysed the press reporting by the defendant it was clearly factual. It was not sensationalist. It did not infer any guilt on the part of the plaintiffs.

[77] I accept that the claimants are public figures by virtue of their sporting status. I note some differences between the achievements of these claimants but I do not consider that I should make a particular distinction. The next question is whether the domain of private sexual affairs and a private arrest should become part of a public interest debate. The issue of public interest is referred to in a legal sense from the dicta of Lord Mance in PJS. The plaintiffs say this case is about the plaintiffs' private lives and as such there is no public interest. The defendant says that the public have a right to know about the circumstances of these sporting figures. Reliance is placed upon the Axel Springer case which expresses the importance of the press in a democratic society and the watchdog role.

[78] On balance, I consider that the defendant has established a case in relation to public interest in the legal sense. The subject matter involves a serious criminal

matter in relation to these well-known sports men. This story cannot be divorced from the professional lives of the plaintiffs. There is a connection to rugby illustrated by the fact that the arrest affected selection for the team. In my view this extends to both players albeit in different ways. There is a clear connection in the case of the first named plaintiff. However, the second named plaintiff also applied for a visa and accepts that he would have cited personal reasons for not travelling to Chicago had he been selected. In essence this game brought the private information into the public domain. In my view there is a valid argument that this places the story beyond prurience or curiosity and into a public debate. The protection afforded to such information cannot be without limit. All of these points are in favour of the defendant.

[79] Having reached this stage, given the arguments on both sides, I must turn to Section 12(4)(a)(i) of the Human Rights Act 1998. This section is particularly relevant on the facts of this case. The information is in the public domain having been broadcast and published in print and on the internet. The story was covered not simply by the defendant but by many news outlets and it remains available to the public. It has been disseminated by the print press. It was the subject of front page headlines. It is on the internet and the original article was taken up by other organisations and replicated and remains available.

[80] The case was made that the BBC should be responsible for social media traffic since the broadcast. That argument faced some foundational difficulties in that Mr White could not say whether the WhatsApp conversation was pre or post publication. That is illustrative of the wider problem of restraining social media networks. I simply do not accept that the defendant in this case can be responsible for the actions of others disseminating the information on social media.

[81] I take into account the submission that damages may be an adequate remedy in this case. There was no argument that the plaintiffs' particular characteristics militate against this.

[82] The burden is upon plaintiffs to satisfy me that an interim injunction should be made/continue. This involves a high threshold. It has been explained as a situation where 'courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably (more likely than not) succeed at trial' in obtaining a permanent injunction.

[83] This injunction application is not about preserving confidentiality as the arrest is known. This sets the context for the particular Article 8 claims. I am dealing with an interim injunction which is to prevent further intrusion. I have carefully considered the fact that the information is in the public domain and that adverse effects have already been occasioned, applying a qualitative analysis. These are the most important factors for me in determining the balancing exercise. There was also no argument that if the injunction is lifted that information will be published in a different medium with different consequences. This case is very different from the

PJS case where the removal of an injunction was likely to cause what was described as a media storm, where there had not been the extent of printed media intrusion in the same jurisdiction as here, where further intrusion would have caused particular distress to the children of the family as well as the claimants and where the adequacy of damages was questioned given the particular circumstances of the claimants.

[84] I entirely accept that any further intrusion would be upsetting however I have to consider the case in the context of what has happened to date and what might happen if the injunction is lifted. In this case the story has broken and the criminal investigation is ongoing. The eye catching headlines have already been published in print. It appears clear to me that this reporting has caused adverse effects the liability for which is a matter for trial.

[85] It is important to note the stage reached in this case in that the file is now with the PPS. This has a bearing on the likely nature and effect of further intrusion. Any further reporting would have to accord with proper journalistic standards. That may of course involve vindication for the plaintiffs if no charges are brought or a report on charges if they are brought. The course to be taken remains to be seen. The public clearly have an interest in being informed about either eventuality. There was no argument made about other categories of information which may be published now that the arrest is known which would cause a particular issue. For instance there was no argument made that further details of the alleged incident will be reported. Of course the media cannot publish material that would prejudice a fair trial otherwise there is a potential for contempt. The defendant's affidavits clearly point to an appreciation that nothing should be published which would impede the administration of justice.

[86] The plaintiffs also made a case that they were not given enough time for a right of reply. That is a factual dispute which may be progressed at trial. If this argument succeeds the unlawful conduct was remedied when the publication was amended to include the replies on 1 November 2016. There is one day when the report did not contain the denial. It was not suggested that there were other particular and specific breaches of the code of journalistic practice other than the case made about a breach of confidentiality at the outset and consequent distress.

[87] I have considered the differences between the first named plaintiff and the second named plaintiff. The IRFU statement does not refer to the second named plaintiff at all and so the argument was made that he was unjustifiably merged into the story. This argument did have an initial attraction to me however on reflection I cannot accept that I should make any distinction between the two players. They were both involved in the activity. They are both part of the squad. It would have been entirely artificial to report on one and not the other.

[88] Having conducted the balancing exercise, I cannot conclude that the plaintiffs are more likely than not to succeed in obtaining a permanent injunction at trial to protect the Article 8 rights at issue. I summarise my reasons as follows:

(i) It is a fact that the information about the plaintiff's arrest is out in the public domain, in many media formats including the printed press and internet.

(ii) It is clear that significant intrusion has already occurred associated with publication of the arrests and the need for an injunction must be viewed through that prism.

(iii) I cannot see that an injunction is an effective remedy given what has happened and the stage reached in this case or that it is proportionate. I consider that damages are an adequate remedy.

[89] In terms of the claim under the Data Protection Act 1998 there was no dispute in relation to the fact that the BBC is a data controller and that the publication involved sensitive personal data. This information was clearly processed under the Act. As a data controller the defendant can only process in accordance with the provisions in the Act. The main argument was in relation to the journalistic exemption. This was considered in Campbell v MGN and given a broad interpretation. In summary, the journalists must establish that they could reasonably believe publication to be in the public interest. Given my conclusions in relation to the privacy claim I do not consider that the plaintiffs have established a case which would be any more likely to succeed than this argument.

[90] I remind myself that this is an application for an interim injunction. There are potentially issues about the extent of the notice given pre-publication that may be raised at trial. In Mosely v News Group Newspapers Ltd [2008] EWHC 1777 there was such an issue about compensation for distress caused by the process. However, I do not consider that a restraining injunction is appropriate under this head of claim. In any event, applying section 32(4) the most that can be argued for is a stay.

[91] I do not consider that any of the other claims made by the plaintiffs in their written arguments can form the basis for making an interim restraining injunction.

Conclusion

[92] Accordingly, I refuse the applications for interim injunctions in both cases. It follows that the interim injunction in the first named plaintiff's case should be discharged. I will hear counsel in relation to the issue of any stay.

[93] In refusing the applications I stress that I am not determining the actions. These were interlocutory applications which I have decided on a particular basis. This decision should not be considered as a licence to anyone to publish whatever they choose about these plaintiffs. Any publication which offends the law may

result in an award of damages at the trial in due course. This may involve a consideration of a range of categories of damages.

[94] I will hear from counsel as to the practicalities, timing and form of publication of this decision and any other matters that occur to them.