Neutral Citation Number: 2013 EWHC 24 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/01/2013

Before :

MR JUSTICE BRIGGS

- -

Between :

MR EDWARD ROCKNROLL	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LTD	**Defendant**

- -
- -

Mr David Sherborne (instructed by **Schillings**) for the **Claimant**
Mr Gavin Millar QC, Mr Desmond Browne QC
(instructed by **Simons Muirhead & Burton**) for the **Defendant**

Hearing dates: 3, 7, 8 January 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BRIGGS

Mr Justice Briggs :

Introduction

1. In July 2010 the claimant Edward RocknRoll attended a private fancy dress party to celebrate the 21st birthday of his then wife's sister at her parents' private estate in West Sussex. A series of photographs ("the Photographs") were taken by another guest at the party, a Mr James Pope, some of which show the claimant partially naked. Subsequently Mr Pope posted the Photographs to his Facebook account where, until (he says) recent changes in his privacy settings, they could be viewed by his approximately 1500 friends, but not by the general public.

2. The claimant and his then wife have since been divorced. After some months' courtship and engagement, the claimant married the well-known actress Kate Winslet at a private ceremony in New York in December 2012. Although the development of a relationship between the claimant and Miss Winslet had by then become the subject of press comment, the wedding itself became a matter of press publicity only a few days after it had occurred.

3. The Photographs came to the attention of the defendant News Group Newspapers Limited in or about the beginning of January this year. The defendant wishes to publish the Photographs, together with a description of their contents, in the Sun newspaper, and notified the claimant of its intention to do so, albeit not the source of the Photographs. The defendant stated that it intended to pixillate the part of any published photographs which showed the lower half of the Claimant's body. After urgent research, the claimant ascertained that Mr Pope was the taker of the Photographs and that they came to the defendant's attention due to being posted on his Facebook site, and due (according to Mr Pope) to a subsequent relaxation of the relevant privacy settings.

4. Having obtained an assignment of Mr Pope's copyright in the Photographs, the claimant now seeks to restrain their publication by the defendant, or the publication of a description of their contents, relying both upon his status as copyright owner by assignment, and upon his rights under Article 8 of the European Human Rights Convention. The claimant's application came before me sitting as vacation judge on 3 January as an opposed application on short notice. I adjourned it for completion of evidence and preparation of legal argument to 7 January, on the basis of an injunction which provided short term protection to the claimant in the meantime, he having come before the court too late on that day to enable me to form any view about whether he would be more likely than not to succeed at trial: see section 12(3) of the Human Rights Act 1998 and *Cream Holdings v Banerjee* [2005] 1 AC 253, per Lord Nicholls at paragraph 22. The defendant would otherwise have published the Photographs, and a description of their contents, in the Sun newspaper on 4 January, and the interim relief granted was the minimum necessary to avoid the claimant's apparently arguable case for an injunction being rendered useless due to the absence of sufficient court time, and preparation by the parties, on 3 January.

5. Putting on one side for the moment the claim based on copyright in the Photographs, a claim to restrain by interim injunction a threatened misuse of private information must be determined in accordance with what are relatively new but well-settled principles. Subject to aspects of the detail, upon which I was addressed at considerable length,

the following general statement of the applicable principles by Ward LJ in *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439, at paragraph 10, will suffice:

> "…
>
> (1) The first stage is to ascertain whether the applicant has a reasonable expectation of privacy so as to engage Article 8; if not, the claim fails.
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> (2) The question of whether or not there is a reasonable expectation of privacy in relation to the information:
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> "…is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher": see *Murray v Express Newspapers* [2009] Ch 481 at [36].
>
> The test established in *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 is to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive.
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> (3) The protection may be lost if the information is in the public domain. In this regard there is, per *Browne v Associated Newspapers Ltd* [2008] QB 103 at [61],
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> "…potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper."
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> (4) If Article 8 is engaged then the second stage of the inquiry is to conduct "the ultimate balancing test" which has the four features identified by Lord Steyn in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at [17]:
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> "First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each." (It should be noted that the emphasis was added by Lord Steyn.)
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> (5) As *Von Hannover v Germany* (2004) 40 EHRR 1 makes clear at [76]:

> "the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."
>
> (6) Pursuant to section 12(3) of the Human Rights Act 1998 an interim injunction should not be granted unless a court is satisfied that the applicant is likely – in the sense of more likely than not – to obtain an injunction following a trial."

6. Consistent with recently developing practice, and in accordance with the requirement that litigation be conducted in public so far as is possible, it has through the parties' sensible co-operation been possible for all but a very short part of the hearing of this application to be conducted in public, and for all but a small part of the evidence to be treated similarly. In particular, the claimant has been prepared to disclose from the outset both his identity and the fact that the Photographs show him partially naked, engaged in what he has described as "rather silly, schoolboy-like behaviour".

7. The confidential evidence (which has nonetheless been disclosed to the defendant) includes, of course, the Photographs themselves, an explanation from the claimant about the circumstances in which he came to behave as depicted in the Photographs, and particulars from Miss Winslet of her concern that the publication of the Photographs, or a description of their contents, will cause real harm and distress to her two children.

8. I have set out in a confidential appendix to this judgment a brief description of the Photographs, the content of the confidential evidence, and the limited parts of my reasons for the conclusion which I have reached on this application which cannot be set out in public without undermining the relief which the claimant seeks. I made it clear to the parties at the end of the hearing of the application, on 8th January, that I had decided that an injunction broadly as sought should be granted to the claimant pending trial, and that my reasons for that decision would be given in a reserved judgment as soon as possible thereafter. This I now do.

9. The claimant's case may be summarised very briefly indeed, even though Mr Sherborne's skeleton argument occupied some 44 pages (of which I make no complaint). It is that:

> (1) The claimant had a reasonable expectation of privacy in relation to the Photographs and their content since they were taken, albeit with his consent, at a private party on private premises and showed him behaving in a manner which a reasonable person of ordinary sensibilities, placed in the same situation, would consider it offensive to have disclosed to the general public in a national newspaper.
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> (2) Neither the Photographs nor their contents would, if published, contribute anything of substance to any

debate of general interest in a democratic society in the sense explained in *Von Hannover v Germany* [2005] 40 EHRR 1.

(3) Publication of the Photographs, or of their content, would risk causing real harm and distress, both to him, to his new wife and to her children of whom he is now the step-father and whose day to day care he shares with Miss Winslet.

10. The defendant challenges every aspect of that case. Mr Desmond Browne QC submitted, in summary:

(1) The claimant has both before and by reason of becoming married to Miss Winslet made himself a "public figure in the social sphere" with an accordingly restricted expectation of privacy.

(2) The claimant has waived any rights to privacy in relation to his life with his former wife by courting and being paid for national publicity in connection with his marriage to her in 2009, which was blessed at a party at the very same premises less than a year before the party at which the Photographs were taken.

(3) The Photographs have come into the public domain by their being posted by Mr Pope to his Facebook account. The Photographs were, at least on 2 January this year, capable of being viewed there not merely by Mr Pope's friends, or even the friends of his friends, but by any member of the public with a Facebook account. The Photographs were taken with the claimant's consent rather than covertly.

(4) The balance between the vindication of the defendant's Article 10 rights and the claimant's Article 8 rights should be resolved in the defendant's favour, because the conduct of the claimant revealed by the Photographs, and their posting on Facebook, were matters which, although not unlawful, the public, or a section of the public, could legitimately criticise, so that the Photographs and their contents did contribute to a matter of legitimate public debate.

(5) Against those decisive considerations, the speculative risk of harm to Miss Winslet's children could not tip the balance the other way.

Stage 1: does the claimant have a reasonable expectation of privacy, so as to engage Article 8?

11. It is convenient to start with the ECHR's general description of the concept of private life protected by Article 8, in the *Von Hannover* case, at paragraph 50, since that decision has been identified as definitive of this aspect of the English tort of misuse of private information, by the Court of Appeal in *McKennitt v Ash* [2006] EWCA Civ 1714, at paragraphs 58 to 59 per Buxton LJ. The ECHR said this: (at paragraph 50):

> "The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's name, or a person's picture.
>
> Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Art.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. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"."

12. In my judgment the claimant's Article 8 rights are plainly engaged by the defendant's threat both to publish the Photographs, and (whether together or separately) to publish a description of their content. My reasons follow. First and foremost, the Photographs show the claimant in the company of his family and friends at a private party on private premises. Not least because of his partial nakedness they show him behaving in a manner in which he would be entirely unlikely to behave in public.

13. Secondly, there is nothing in the point that the photographs were taken with his consent. The claimant's evidence is that he had no idea that Mr Pope would post the photographs on his Facebook account, or make them available any more widely than to their mutual friends. I consider it most unlikely that, at trial, the defendant would establish that in consenting to the taking of the Photographs, the claimant intended to consent to their publication in a national newspaper. Mr Pope's evidence is broadly to the same effect, namely that it did not occur to him, when posting the Photographs on his Facebook account, that they would come to be accessible by the general public due to a later change in privacy settings. Mr Browne suggested that I should treat Mr Pope's evidence about privacy settings with real scepticism, because of his apparently bungled attempts to remove the Photographs from his Facebook account on 2nd January. He may indeed have been careless and incompetent, but I consider it unlikely that at trial the defendant will establish that Mr Pope anticipated, when posting them in 2010, that the Photographs would become accessible to anyone with a Facebook account, let alone to a national newspaper.

14. Thirdly, there is nothing of substance, either in fact or in law, in the defendant's submission that the claimant has deprived himself of what would otherwise be a reasonable expectation of privacy relating to his conduct at a private party, either by being a public figure, or by contributing for reward to publicity about his first marriage. As to the facts, Mr Browne relied upon the claimant's former employment

(which ceased in about 2010) as head of marketing, promotion and astronaut experience at Virgin Galactic, a company owned by his uncle Sir Richard Branson. Secondly, he relied upon the claimant's evident co-operation in the substantial publicity given by the Hello! Magazine to his first marriage in 2009, to which he contributed a press interview including verbatim comments, for some financial reward.

15. Taking those points separately, the claimant's employment with Virgin Galactic comes nowhere to placing him in that narrow category of persons who, although engaged in no public office, may be regarded as having reduced expectations of privacy due to their important role in national affairs. They may include the chairmen of major public companies, and the captains of national sporting teams, but the claimant was, so far as the evidence goes at this stage, no more than a not very conspicuous middle manager in his uncle's private business empire. In any event, that role ceased some two years ago.

16. As to the claimant's participation in publicity about his first marriage, the evidence clearly shows some active participation when it took place, but falls far short of any general case that, other than on that single occasion, the claimant has enjoyed, let alone courted, publicity as a prominent member of the "social sphere", as identified in the *Von Hannover* case. In particular, he appears to have done nothing to seek publicity about his relationship with Miss Winslet. Notwithstanding the defendant's case to the contrary, none of the pictures of the claimant and Miss Winslet together which the defendant has been able to find suggest that any of them were posed. Furthermore, their private wedding appears to have taken place without the press even being aware of it at all until some days thereafter. The claimant has, inevitably, briefly become something of a public figure as a result of his relationship with, and now marriage to, Miss Winslet. To some unavoidable degree this has led to published photographs of them together, but not so as to place the claimant in the public sphere in his own right.

17. As to the law, it is well established that public figures are entitled to the enjoyment of Article 8 rights of privacy on the same basis as anyone else: see in particular *Craxi v Italy (No 2)* (2004) 38 EHRR 47, at paragraph 65, the *Von Hannover* case, at paragraphs 73-75, and the *McKennitt* case at paragraphs 62-64, in which the Court of Appeal described the analysis in *Von Hannover* as having superseded a superficially less favourable view about the Article 8 rights of public figures in *A&B plc* [2003] QB 195.

18. The question whether a person has waived his privacy rights by courting publicity about some aspect of his life calls for a fact-intensive evaluation in any case in which it is asserted, rather than for the application of some general principle: see per Eady J in *X&Y v Persons Unknown* [2006] EWHC 2783 (QB) at paragraph 28. In the *McKennitt* case, Buxton LJ said this at paragraph 55:

> "If information is my private property, it is for me to decide how much of it should be published. The "zone" argument completely undermines that reasonable expectation of privacy."

The zone argument of which the Court of Appeal there disapproved was that once a person had courted publicity about some aspect of his life, then he permanently waived privacy in relation to that aspect of his life thereafter.

19. In my judgment the defendant's reliance upon the claimant having courted publicity on the occasion of his first marriage is no more than an example of that discredited zone argument. To suggest that he thereby waived his right to privacy in respect of whatever thereafter occurred during that marriage, or at the same private premises as those upon which the marriage was originally blessed, is in my view wholly unrealistic. The position might be different if some aspect of the conduct now sought to be made public were such as to undermine the sentiments attributed to the claimant in the earlier publicity. But there is no suggestion that it did. This is not in any sense what may be classed as a hypocrisy case: compare and contrast *Ferdinand v MGN Limited* [2011] EWHC 2454 (QB).

20. I was initially inclined to think that there was considerably greater substance in Mr Browne's submission that the posting of the Photographs to Mr Pope's (eventually) unrestricted Facebook account meant that they and their contents had come into the public domain so as to be beyond recall. If their content had consisted of commercially sensitive trade secrets, their having become publicly accessible in that way might well have given rise to such a loss of confidentiality. But the law relating to the misuse of private information has travelled down a different path, notwithstanding Ward LJ's reference to "the public domain" as a convenient label in point (3) of his summary of the relevant principles in the *ETK* case.

21. A series of authorities have established that, in relation to the misuse of private information, the relevant equivalent to the public domain defence is that an injunction may be refused if the defendant can show that there is no longer anything by way of privacy left to be protected.

22. The starting point lies in the observation of Lord Keith in *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 260 F that:

> "It is possible, I think, to envisage cases where, even in the light of widespread publication abroad of certain information, a person whom that information concerned might be entitled to restrain publication by a third party in this country. For example, if in the *Argyll* case the Duke had secured the revelation of the marital secrets in an American newspaper, the Duchess could reasonably claim that publication of the same material in England would bring it to the attention of people who would otherwise be unlikely to learn of it and who were more closely interested in her activities than American readers. The publication in England would be more harmful to her than publication in America. Similar considerations would apply to, say, a publication in America by the medical adviser to an English pop group about diseases for which he had treated them."

Although the *Spycatcher* case was truly about secrets, Lord Keith's examples lie firmly in the realm of private information.

23. In the *McKennitt* case (at first instance) [2005] EWHC 3003 (QB), at paragraph 81, Eady J said this:

> "Even where material has been revealed to the public, or to a section of the public, in connection with a sensitive topic (such as bereavement), it is important to recognise that the approach of the courts towards personal information differs somewhat from that adopted in connection with commercial secrets. In the latter context, judges are ready to take a once-for-all approach, since information is either secret or it is not. In the light, especially, of remarks by Lord Keith in *Att. Gen v Guardian Newspapers (No 2)*, at page 260, there are grounds for supposing that the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected. For example, it does not necessarily follow that because personal information has been revealed impermissibly to one set of newspapers, or to readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations. Fresh revelations to different groups of people can still cause distress and damage to an individual's emotional or mental well-being. In view of Lord Keith's remarks (and to some extent also the decision in *R v Broadcasting Complaints Commission, ex parte Granada TV* [1995] EMLR 16) I am inclined to take the same approach as in *WB v H Bauer Publishing Ltd* [2002] EMLR 145, to which Mr Browne drew my attention:
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> > "It may be more difficult to establish that confidentiality has gone for all purposes, in the context of personal information, by virtue of its having come to the attention of certain readers or categories of readers".
>
> One could do worse than set out the test applied by Lord Goff in the passage cited above; that is to say, to ask whether "the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential."

24. In *Green Corns Ltd v Claverley Group Limited* [2005] EWHC 958 (QB) Tugendhat J upheld a claim for an interim injunction to restrain disclosure of the addresses of the claimant's care homes, even though they were all publicly accessible at HM Land Registry. Relying upon the *Spycatcher* case, *Venables v News Group International* [2001] Fam 430 and *X & Y (Children) Re* [2004] EWHC 762 he held that theoretical accessibility was not the correct test, but rather the question was whether an injunction to prevent publication or re-publication would serve no useful purpose.

25. Applying those principles to the present case I consider that it is very unlikely that the defendant will be able to establish at trial that no useful purpose would be achieved by a restraint on publication of the Photographs or their contents, or that there is no longer anything by way of privacy left to be protected. The evidence shows that the Photographs have at least now been withdrawn from Mr Pope's Facebook account.

There is no evidence to suggest that there had by that time been widespread public inspection of Mr Pope's photo albums on his Facebook account, in which the Photographs were to be found. No internet search of the claimant by his name would have revealed them, nor even a simple search or inspection of the wall-page or home-page of Mr Pope's Facebook account. The probability is, on the present evidence, that the Photographs would only have been found either as the result of very expert, expensive and diligent research, or as the result of a tip-off by someone who knew about them and about their whereabouts. The defendant has, understandably, declined to reveal the method by which it became aware of the Photographs. On the present evidence, a tip-off appears to be the most likely source of its information as to their existence and whereabouts.

26. Section 12(4)(a)(i) of the 1998 Act requires the court to have particular regard to the extent to which the material in question "has, or is about to, become available to the public". In my judgment this creates no separate or different test from that which I have just described, at least where (as here) there is no suggestion that the material is about to become available to the public. In this case it is common ground that the photographs have now been removed from Mr Pope's Facebook account. It is no more than speculation whether they may yet remain accessible on some other Facebook account to which they may have been transferred.

27. Considering all those matters together, I consider that, on the evidence as it presently stands, the claimant has a substantially better than even chance of establishing at trial that he has a reasonable expectation of privacy in relation to the Photographs and their contents, privacy that is from publication in a national newspaper, despite the limited circulation which they may already have achieved on Facebook, so that his Article 8 rights are engaged by the publication threatened by the defendant.

28. In that context I would add that, on well settled authority, Article 8 privacy rights are particularly likely to be engaged by a threat to publish photographs: see *Theakston v MGN Ltd* [2002] EMLR 398, per Ouseley J at paragraph 78, and *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, at paragraphs 84-90. But the same considerations do not apply to information contained in a photograph, notwithstanding Mr Sherborne's submission to the contrary. I am nonetheless satisfied that the claimant will probably succeed at trial in establishing a reasonable expectation of privacy both in relation to the Photographs and to any description of their contents going beyond that which he has been prepared to reveal about them in open court on this application.

29. Finally under this heading, my confidential judgment provides further reasons leading to the same affirmative conclusion in relation to this part of the claimant's case.

Balancing between Articles 8 and 10

30. The starting point is that Article 10 protects freedom of speech across a broad spectrum, including not merely inoffensive information or ideas, but also that which may offend, shock or disturb: see the *Von Hannover* case at paragraph 58; and even that which is trivial or banal: see *Ferdinand v MGN Ltd* [2011] EWHC 2454 (QB) per Nicol J at paragraph 62. Nonetheless, both European and domestic authority shows that there is what is sometimes described as a hierarchy of different types of speech, which attract the protection of Article 10 to differing extents. At one end of the spectrum is information, the disclosure of which contributes to genuine public debate

in a democratic society: see the *Von Hannover* case at paragraph 63. At the other end there is what the ECHR has described as tawdry allegations about an individual's private life or press reports concentrating on sensational and, at times, lurid news, intending to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life: see *Mosley v UK* [2011] ECHR 774 at paragraph 114. In relation to the former, the press has a pre-eminent role as a public watchdog, so that if it can be shown that this role would be hampered by the enforcement of Article 8 privacy rights against the press in a particular case, this may be a decisive factor against granting relief: see again the *Von Hannover* case at paragraph 76, followed and applied in relation to the English tort of the misuse of private information by the Court of Appeal in the *ETK* case at paragraph 23.

31. Nonetheless, the possibility that this factor may be decisive does not excuse the court from an intense focus upon the facts, or from the application of the proportionality test: see *Axel Springer AG v Germany* [2012] EMLR 15, at paragraphs 89-95, in which additional factors such as the public profile of the claimant, his conduct prior to the threatened publication, the manner in which the information about his private affairs was obtained, the content, form and potential for harm of the publication, and the severity of the sanction proposed were all matters to be taken into account, in addition to the contribution which the publication might make to genuine public debate. The relevance of those considerations was repeated in very similar terms in *Von Hannover v Germany (No 2)* [2012] EMLR 16, at paragraphs 108 – 113.

32. There are numerous warnings in the reported cases against judges applying their own standards of public or private morality in their evaluation of the question whether a particular publication would contribute to a genuine public debate: see for example *Terry v Persons Unknown* [2010] EWHC 119 (QB) per Tugendhat J at paragraphs 101-105 (obiter), described (again obiter) as "a powerful passage" by Gross LJ in *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808. Furthermore, a margin of appreciation is to be allowed to journalists in deciding where to draw the line; see *Campbell v MGN* [2004] 2 AC 457, per Lord Hope, at paragraph 120. Clearly, publication of conduct may contribute to genuine public debate even though the conduct is not unlawful, but it by no means follows that the court must abdicate any attempt to assess, on the facts of a particular case, whether publication is sought genuinely to inform public debate, or rather merely to titillate the undoubted interest of a section of the public in the sexual or other private peccadillos of prominent persons. The two categories are not necessarily exclusive, as the *Profumo* scandal vividly illustrates.

33. On the facts of this case, I am not persuaded that the defendant has anything like a better than even chance of persuading the court at trial that publication of the Photographs or a description of their contents will contribute anything to public debate about matters of genuine public interest. I have reached this conclusion on partly objective, partly subjective grounds. The objective grounds appear largely in the confidential appendix to this judgment, which necessarily looks closely at the precise subject matter of that which the defendant wishes to publish. For present purposes I merely state my conclusion, which is that nothing in the conduct of the claimant which the Photographs portray gives rise to any matter of genuine public debate, however widely drawn is the circle within which such matters may genuinely

arise. As the claimant himself publicly admits, the conduct in question may fairly be described as the product of foolishness and immaturity. It is common ground that nothing unlawful occurred. Even during the period when the court sat in private so that submissions could be made about the conduct revealed by the Photographs, Mr Browne made nothing more than a purely formal attempt to suggest that the conduct involved what could sensibly be described as immorality rather than merely immature stupidity. In the words of Eady J in *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), at paragraph 30: "the only reason why these pictures are of interest is because they are mildly salacious and provide an opportunity to have a snigger at the expense of the participants".

34. Mr Browne sought to suggest, in his public submissions, that the very fact that the Photographs had been posted on Facebook was of itself a matter for genuine public debate, pointing to the fact that the Facebook standard terms and conditions prohibit the posting of content that contains nudity. I reject that submission. The question is whether the publication of the Photographs, or of a more detailed description of their contents than the fact that the claimant is depicted partially naked, would add anything beyond mere titillation. In my judgment it would not.

35. My subjective reason for reaching the same conclusion, namely that publication of the Photographs or their contents will not contribute to any genuine public debate, is derived from the timing of the defendant's threat to publish the Photographs. It comes very shortly after the belated discovery by the media of the claimant and Miss Winslet's recent marriage, at a time when the claimant finds himself in a temporary blaze of largely reflected publicity. I was specifically invited by Mr Gavin Millar QC, who appeared for the defendant last Thursday when the matter first came before the court, to give directions to ensure that the matter be resolved, albeit on an interim basis, as soon as possible, because of his client's wish to publish the Photographs as soon after the media reporting of the marriage as possible. Far from pointing to any desire on the part of the defendant to contribute to a public debate, that desire to publish as soon as possible tends to confirm the impression which I have gained from a review of the whole of the evidence, including the confidential material, namely that the defendant's wish is simply to satisfy the interest of its readership in the private peccadilloes of the rich and famous or (in this case) of those associated with them, rather than to contribute, as watchdogs, to public debate.

36. By contrast, as appears again from the confidential part of this judgment, there is in my view good reason to suppose that, if the Photographs or a description of their content were published in a national newspaper with the circulation of the Sun, there is real reason to think that a grave risk would arise as to Miss Winslet's children being subjected to teasing or ridicule at school about the behaviour of their newly acquired step-father, within a short period after his arrival within their family, and that such teasing or ridicule could be seriously damaging to the caring relationship which, on the evidence, the claimant is seeking to establish with them.

37. Mr Browne sought to persuade me, by reference to evidence of pictures available on the internet of Miss Winslet's appearances, scantily clad, in films, that this would not be a new or therefore particularly upsetting experience for her children. I am entirely un-persuaded by that submission. Whatever may be the difficulties facing a mother in bringing up children while, at the same time, pursuing a career as an actress, whether on stage or in film, that provides no possible reason for exposing her children to a real

risk to additional embarrassment or upset from the nationwide publication of photographs (or their contents) depicting their other carer behaving in a foolish and immature manner when half naked.

38. Notwithstanding my conclusion that what the authorities describe as the decisive aspect of the balancing exercise is likely to be resolved at trial in favour of the claimant, I have also considered the other matters referred to in the *Axel Springer* case. As I have already concluded, the claimant is not, at least in his own right, a person with a substantial public profile. His work at Virgin Galactic never justified that conclusion, and his social profile arises from nothing more than making two marriages which have, for different reasons, attracted public attention and media comment. Nothing in the conduct disclosed by the Photographs substantially undermines such limited public profile as the claimant actually has, still less does it gainsay anything which the claimant has allowed to be published about himself. I acknowledge that, on the available evidence, the manner in which the Photographs have come to the attention of the defendant involves no misconduct either by the defendant or anyone from whom the defendant has obtained that information, in sharp contrast with cases such as *Douglas v Hello!*, or *Campbell v MGN Ltd* [2004] 2 AC 457. But the absence of misconduct by the defendant is not a factor which counts positively towards a conclusion that its Article 10 rights should prevail over the claimant's Article 8 rights, even if a finding of such misconduct might tend the other way.

39. Finally, I have indeed concluded that the consequences of publication, in terms of risk of harm and distress to Miss Winslet's children, are matters tending towards a conclusion that the claimant's privacy should prevail in the present case. Mr Browne submitted that such considerations, affecting persons who are not parties to the proceedings, could not as a matter of principle tip a balance otherwise inclined the other way. I disagree. The ratio of the Court of Appeal's decision in the *ETK* case is telling authority that the risk of harm to children may indeed tip such a balance. If I had concluded that, leaving aside the risk of harm to Miss Winslet's children constituted by the threatened disclosure, the balance between the parties' respective Article 8 and Article 10 rights was even, I would have concluded that the real risk of harm to those children was sufficient to tip it in the claimant's favour.

Proportionality

40. There is in my view nothing disproportionate in permitting a derogation from the defendant's Article 10 rights by enforcing the claimant's Article 8 rights in the present case. This appears likely to be a case where at trial it will be shown that the defendant's Article 10 rights are at the weakest end of the hierarchy to which I have referred, whereas the claimant's Article 8 rights are powerfully engaged.

Conclusion on Article 8

41. Looking at the matter as a whole, and taking fully into account the uncertainties arising from the early interlocutory stage at which this application has to be decided, I have nonetheless come to the clear conclusion that this is a case in which the claimant is more likely than not to succeed at trial in vindicating his Article 8 rights as against

the defendant's Article 10 rights. For completeness I should add that I have, as required by section 12(4)(b) of the 1998 Act, had regard to relevant provisions of the Press Complaints Commission Code of Practice, at section 3, headed Privacy. It added nothing of significance to the above analysis.

Copyright

42. Despite my invitation, counsel did not address in any depth the quite separate balancing question which arises where a claim for an injunction to restrain a threatened infringement of copyright would adversely affect the defendant's Article 10 rights of freedom of expression. Not having had the time to conduct independent research, it may be that there is little authority on the point. Ownership of copyright is a private intellectual property right which is not, as is Article 8, expressly qualified. In *Appleby v UK* (2003) 37 EHRR 38, at paragraphs 41–48, the ECHR considered how to balance the private property right of a landowner to exclude political demonstrators from his land against the demonstrators' right to express political views under Article 10. Although it was held that there had been no positive obligation on the state to restrict the landowner's property rights on the facts, it was recognised that enforcement might need to be restrained if it would completely have prevented any effective exercise by the demonstrators of freedom of expression.

43. It is in theory possible that the propensity of an injunction restraining a threatened breach of copyright to impinge upon a defendant's Article 10 right to freedom of expression might occasionally incline the court, on particular facts, to decline the discretionary remedy of an injunction, and leave the claimant to a claim in damages. In a case where the claim was pursued for purely commercial reasons, damages (perhaps on a royalty basis) might well be an appropriate remedy.

44. Nonetheless, the present case may illustrate that this is unlikely frequently to arise. The claim in copyright would merely prohibit the actual copying of the Photographs, rather than the publication of a description in words of their content. In those circumstances an injunction merely to restrain copying of the Photographs would constitute no disproportionate fetter upon the defendant's Article 10 rights, which could sufficiently, albeit not fully, be vindicated by a description of their contents. The statutory requirement in an Article 10 context for an applicant for interim relief to demonstrate a probability of success at trial is nonetheless as applicable to a claim in copyright as it is to a claim to restrain misuse of private information. Applying that test, I am satisfied that, on the evidence as it stands, the claimant has a much better than even chance of obtaining an injunction to restrain the breach of copyright inherent in the threatened publication of the Photographs as such. In particular, its evidence that the standard terms and conditions of Facebook provide for a non-exclusive transferrable licence in favour of Facebook in respect of material accessible to its account-holders affords no basis for a conclusion that the claimant lacks the ordinary entitlement, as copyright owner by assignment, to restrain breach by the defendant. No transfer of Facebook's rights to the defendant has been alleged, and it seems very unlikely that the proprietors of Facebook would think it in their interests to do so in the future, at almost any price.

45. For all those reasons this application succeeds. The defendant is to be restrained until trial of this matter, or further Order in the meantime, from publishing or copying the Photographs and from publishing or otherwise communicating a description of their

contents. Furthermore, the restrictions on disclosure of the evidence contained in the interim orders made on 3 and 7 January are also to continue until trial, subject to the usual liberty to apply.