

sections of the Contempt of Court Act should be limited to the minimum absolutely necessary to achieve the required protection of the administration of justice.

#### Discussion of public affairs Section 5

- This clause is designed to allow the free flow of discussion on issues despite the simultaneous progress of various trials related to similar matters. So for instance, a feature on rape in a regional newspaper might unwittingly pose the same questions facing a jury in a local Crown Court trial. The protection is vital to avoid accusations of contempt.
- S.5 states: "A publication made as or as part of a discussion in good faith of public affairs or other matters of general public interest is not to be treated as a contempt of court under the strict liability rule if the risk of impediment or prejudice to particular legal proceedings is merely incidental to the discussion."
- S.5 provides a reliable defence as long as its use is not disingenuous.
- Never link such discussion explicitly to an "active" trial or the defence will be lost.

#### Juries Section 8

- The judicial system is very protective of juries and will push for prosecutions for breaches of s.8.
- S.8 states: "...it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings".
- Do not approach jurors when covering court.

#### Prohibition orders Section 11

- These allow details such as a witnesses name and/or address to be withheld in the interests of justice.
- They are not designed "for the comfort or protection" of defendants.
- The requirements are quite onerous and courts have a tendency to overuse at the behest of defence counsel.
- Be prepared to challenge.

## CHAPTER 5: PRIVACY

### PART ONE: PRIVACY AND CONFIDENTIALITY

So where does the law currently stand in respect of protecting personal privacy? When does an individual have a "reasonable expectation of privacy?" This latter question is critical because if answered positively then the claimant's art.8 rights are engaged. Article 8 of the European Convention on Human Rights states:

Everyone has the right to respect for his private and family life, his home and his correspondence.

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 wellbeing 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.

It then becomes obvious that the exercise of any rights under art.8 is inevitably going to result in conflict with the exercise by the press of its art.10 rights to freedom of expression. One is then entering into the realms of "parallel analysis" to decide which right should prevail over the other. One of the key issues from the media's viewpoint is whether there is a public interest justification that will override the claimant's attempt to keep information private. On occasions, the more lurid revelations of a personal nature will go hand in hand with revelations about abuse of position or resources and a conflict of interest.

The most obvious example is when a senior politician is exposed having an affair. David Blunkett, when Home Secretary, was revealed to have had an affair with Kimberly Fortier, a married woman. The press were able to justify bringing the relationship to the public's attention because it was alleged that he had abused his position in helping Ms Fortier to obtain a visa for her nanny and using taxpayers' money on train travel for his mistress. If there is an obvious public interest element then the press is in a strong position.

However, this kind of situation raises the question: Should personal details remain secret and only the "public interest" element be



reported? This may appear the obvious solution but of course, the story would be virtually meaningless unless the press could provide the full context. And, of course, it would not sell as many newspapers if the identity of the participants were to be kept secret.

Also of importance is the answer to the question: Is any or all of the information that the press wishes to publish already in the public domain? If so then there will be little or nothing to protect by way of injunction.

Another issue to ponder at this preliminary stage is that, in stark contrast to the failure to recognise a tort of privacy, English law has, since 1849, provided an *equitable* remedy for breach of confidence. It will be obvious that much of any "kiss and tell" content will be derived from a relationship that from the very outset the parties wished to keep secret, usually from their partners. It follows that if a relationship were to break down and one party wished to sell their story to a newspaper the other may resort to an action for breach of confidence in order to prevent intimate details entering the public domain. Therefore art.10 rights of the press may be pitted not only against the claimant's art.8 rights but also against any right to confidence.

## 1. Background Information

English common law has never recognised a tort of privacy and there has certainly been limited government enthusiasm for putting forward legislation on the topic.

The fact that English law did not recognise a tort of privacy was graphically illustrated when the Court of Appeal failed to identify a "privacy" remedy for Gordon Kaye in his dispute with the Sport Newspaper over being "ambushed" in his hospital bed whilst recovering from a serious accident.<sup>1</sup> Lord Justice Gildwell left no room for doubt as to the current position within this jurisdiction:

"It is well known that in English law there is no right to privacy and accordingly there is no right of action for breach of a person's privacy.

The facts of the present case are a graphic illustration of the desirability of Parliament considering whether and in what circumstances a statutory provision can be made to protect the privacy of individuals."

Other judges supported this assessment of the law. Bingham L.J. said that the case highlighted the failure of both the common law and statute to "protect in an effective way the personal privacy of individual citizens."

<sup>1</sup> [1991] F.S.R. 62.

In 1991 the Human Rights Act was a long way from the statute book. With its introduction into law in October 2000 a new dimension was introduced into the battle to assist individuals in seeking to protect their "privacy" from unwanted intrusion from the media, particularly the tabloid media. The Act ensured that provisions of the European Convention on Human Rights would be brought under the scrutiny of UK judges for the first time in legal history. This fact has had a profound effect over the past decade in helping to define the protection on offer to claimants who seek injunctions or occasionally damages against the media for what is incorrectly called breach of privacy. The remedies available result from alleged media misuse of private information.

The background to this statement of principle is to be found in the leading case of *Campbell v Mirror Group Newspapers Ltd* [2004].<sup>2</sup> The newspaper had surreptitiously taken photographs of supermodel Naomi Campbell leaving a branch of Narcotics Anonymous. She brought a claim for damages against the newspaper alleging wrongful use of private information an action that had to be based upon the only remedy available: breach of confidence. Lord Nicholls who delivered the leading speech summed up the legal position at the time with these words:

"In this country unlike the United States of America, there is no overarching, all embracing cause of action for 'invasion of privacy'. . . the present case concerns one aspect of invasion of privacy: wrongful disclosure of private information."<sup>3</sup>

He goes on to point out the fundamental nature of the clash between two articles of the European Convention, the right to respect for family, home and correspondence (art.8) and the right to freedom of expression (art.10). It will be recalled that in the case of *Reynolds v Times Newspapers* [1999] Lord Nicholls had referred to freedom of expression as a "fundamental right."<sup>4</sup> He points out, and this is still the case, that neither right takes automatic precedence over the other. However important freedom of expression is to a modern democratic state, privacy also "lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the wellbeing and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state."<sup>5</sup>

The action for breach of confidence has its foundations in the improper use of information disclosed by one person to another in confidence. A key question to be answered was whether the information possessed the characteristics of being of a confidential nature. This in turn was based upon whether a legally recognised relationship existed

<sup>2</sup> [2004] UKHL 22.

<sup>3</sup> Paras 11 & 12.

<sup>4</sup> [1999] 3 W.L.R. 1010.

<sup>5</sup> per Lord Nicholls at para.12.



between the parties. This was clearly a constraining factor preventing the development of the law beyond those involved in such relationships. In *Stephens v Avery* [1988]<sup>6</sup> the Court of Appeal removed this restricting factor and emphasised that in future a duty of confidence would be created whenever the recipient of information knew or ought to have known what was reasonably to be regarded as confidential. Lord Nicholls in the *Campbell* case was adamant that:

"Information about an individual's private life would not in ordinary usage, be called 'confidential.' The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."<sup>7</sup>

Lord Nicholls' conclusion was that the time had come to recognise that the values enshrined in arts 8 and 10 were now part of the cause of action for breach of confidence. This perhaps was the inevitable conclusion given that the case was presented throughout exclusively on the basis of breach of confidence. In other words the competing claims of arts. 8 and 10 were to be assessed as part of an action for misuse of private information in the context of an action for breach of confidence.

In any challenge to the media's actions in exposing the private lives of individuals the label "misuse of private information" is probably an adequate form of words to describe the nature of the revelations. However the words are not wide enough to describe other aspects of a breach of art.8 rights, for example, behaviour that causes humiliation or distress such as constantly being followed by the paparazzi in search of that "exclusive" photograph or to use Lord Nicholls' own example taken from the *Wainwright* case<sup>8</sup>—being stripsearched.

Lord Nicholls alluded to the possibility that the recognition that an action for breach of confidence could now incorporate an assessment of art.8 of the European Convention on Human Rights might not be the end of the story. Referring to the case of *Hoskins v Runtig* [2004]<sup>10</sup> he said that "... protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions ... in this country development of the law has been spurred by enactment of the Human Rights Act 1998."

In deciding whether a cause of action for breach of confidence based upon misuse of private information was to be progressed Lord Nicholls considered that there should be a preliminary to be decided. He asked "... what was the ambit of an individual's private life in particular

<sup>6</sup> [1988] 2 All E.R. 477.

<sup>7</sup> See Lord Goff of Chieveley in *Attorney-General v Guardian Newspapers Ltd (No2)* [1990] 1 A.C. 109.

<sup>8</sup> per Lord Nicholls at para.14.

<sup>9</sup> *Wainwright v Home Office* [2003] 3 W.L.R. 1137.

<sup>10</sup> [2004] NZCA 34.

circumstances ...?"<sup>11</sup> He answered his own question by declaring that a "threshold test" should be applied and that should involve deciding whether the "... person in question had a reasonable expectation of privacy."<sup>12</sup> If the answer to the question is "yes" the case can proceed to trial or settlement out of court. If "no" the case ends at that point. Therefore to take the *Campbell* facts as an example it was decided that she had a reasonable expectation of privacy when visiting Narcotics Anonymous and was photographed leaving the building. If the photographs had been taken without her knowledge a few minutes later when she was in a public place then the decision would in all likelihood have been different. However such photographs would have been of little value to the newspaper as they would not have proved that she had visited the treatment centre, i.e. supported the print version of the story. The question in the aftermath of the *Campbell* decision was whether there would remain one single cause of action, i.e. breach of confidence or whether as the law developed a second cause of action would be needed reflecting the head-on clash between art.8 and art.10 rights.

This was alluded to by Lord Phillips M.R. in *Douglas & Others v Hello Ltd & Others* [2005].<sup>13</sup> He posed the question: What is the United Kingdom's Convention obligation in respect of privacy? At the heart of the question is whether a state is required under the Convention to provide a private remedy against private actors, as opposed to state interference with a person's private life. The answer for Lord Phillips was provided by the decision of the European Court of Human Rights in the case of *von Hannover v Germany* [2004].<sup>14</sup> As Lord Phillips said:

"It follows that the ECtHR has recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way that will achieve that result."<sup>15</sup>

The position in 2005 appears to have been that the cause of action is breach of confidence but that "within" that action the courts should:

"... develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights ..."<sup>16</sup>

However the Master of the Rolls concluded that it could not be concluded that "we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion." The issue in the

<sup>11</sup> at para.21.

<sup>12</sup> at para.21.

<sup>13</sup> [2005] EWCA 595.

<sup>14</sup> [2004] ECHR 294.

<sup>15</sup> [2004] ECHR 294 at para.49.

<sup>16</sup> [2004] ECHR 294 at para.53.



Douglas case was the unauthorised photography at their wedding. The couple had taken the whole of a floor at the Plaza Hotel in New York and had strict security measures in place to ensure that only invited guests were allowed in. As the court implicitly acknowledged if one were pinning a notice at the entrance to the floor it would in all probability read "Private Function" not "Confidential Function."

In *Ash v McKennitt* [2006]<sup>17</sup> Buxton L.J. summarised the position in respect of what he called the "taxonomy of the law of privacy and confidentiality."<sup>18</sup> The following are what he considered to be "straight forward matters":

"There is no English domestic law tort of invasion of privacy. In developing a right to protect private information, including the implementation in the English courts of articles 8 and 10 the European Convention on Human Rights, the English courts have to proceed through the tort of breach of confidence, into which the jurisprudence of Articles 8 and 10 has to be 'shoe-horned'."

That feeling of discomfort arises from the action for breach of confidence being employed where there was no pre-existing relationship of confidence between the parties, but the "confidence" arose from the defendant having acquired by unlawful or surreptitious means information that he should have known he was not free to use.

At least the verbal difficulty referred to in footnote 3 has been avoided by the rechristening of the tort as misuse of private information.

The complaint here is of what might be called old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply the purloining of private information.<sup>19</sup>

So within the ambit of the action for breach of confidence the courts have "absorbed" the rights which arts 8 and 10 of the Convention seek to protect.<sup>20</sup> It must be remembered that despite the wording of art.8 that suggests the protection offered should be against state intervention into private life European jurisprudence has resulted in the acceptance that individuals can complain about breaches of private and family life committed by individuals and private organisations such as newspapers. Article 8 is deemed to impose not just negative but also positive obligations on the state.<sup>21</sup>

At this point in the chronology the language of the law became a little confused. The cause of action still lay in the action for breach of confidence but the essential approach to determining the issue stems from answering the question "Was there a reasonable expectation of

<sup>17</sup> [2006] EWCA Civ 1714.

<sup>18</sup> [2006] EWCA Civ 1714 at para.8.

<sup>19</sup> [2006] EWCA Civ 1714 at para.8.

<sup>20</sup> *Lord Woolf in A v B plc* [2003] Q.B. 194.

<sup>21</sup> See *Marckx v Belgium* (1979) 2 EHRR 330 and Buxton L.J. in *Ash v McKennitt* [2006] EWCA Civ 1714 at para.9.

privacy?" Eady J. put it this way in *Lord Browne of Madingley v Associated Newspapers* [2007]:<sup>22</sup>

"It has long been recognised that intimate personal relationships, including those of a homosexual nature, can in themselves give rise to obligations of confidence (and correspondingly to a "reasonable expectation of privacy") in respect of information gained in the course of them."

In December 2010 Eady J. described a claim in these terms:

"The claim is based upon apprehended infringements of rights of confidence and/or privacy based upon Article 8 of the European Convention on Human Rights and Fundamental Freedoms."<sup>23</sup>

In the *Lord Browne* case the Court of Appeal<sup>24</sup> acknowledged there had been "considerable" development of the principles applicable to cases of this kind and went on to agree with the analysis conducted stated by Buxton L.J. in the *Ash v McKennitt* case.<sup>25</sup> It will be clear that in many cases such as *Browne* and *McKennitt* a breach of trust is evident.

That was also the case when the Prince of Wales took action against *Associated Newspapers* in 2006 to prevent information in his private diaries from being published.<sup>26</sup> Information from one of his journals related to the time he represented the Queen at the handover of Hong Kong to China and had already been published by the *Mail on Sunday*. The *Mail* had copies of eight other journals written by the Prince and he commenced legal action to obtain an injunction to prevent the material from entering the public domain.

It transpired that copies of the journals had been copied by a secretary in his private office and supplied to the *Mail on Sunday* through an intermediary. As the case report indicates "she had given the usual undertaking of confidentiality ... and had not been authorised to make typed copies of the journals or to remove photocopies of them from the Private Office."<sup>27</sup> The Prince obtained his injunction despite the robust denial of wrongdoing by the newspaper. It had contended that the information in the Hong Kong journal was not confidential and there was no reasonable expectation that it would be kept from the public. This argument was based on the fact that the contents did not amount to "intimate personal information ... but information relating to the

<sup>22</sup> [2007] EWHC 202 (QB) at para.11.

<sup>23</sup> per Eady in *CDE & Another v MGN Ltd & Another* [2010] EWHC 3308.

<sup>24</sup> [2007] EWCA Civ 295.

<sup>25</sup> [2006] EWCA Civ 1714 at para.8.

<sup>26</sup> [2006] EWHC 522 (Ch).

<sup>27</sup> [2006] EWHC 522 (Ch) at para.50.