DISPUTES BETWEEN ARTISTS AND THEIR MANAGERS

Undue influence. Agreements between artists and their managers, publishers or record companies are sometimes liable to be set aside on grounds of undue influence. Although the principles applicable are the same as in any other under influence case, the question whether a particular agreement “calls for an explanation” (see Royal Bank of Scotland Plc v Etridge (No.2) [2002] 2 A.C. 773) may require a comparison between the agreement with other agreements of a similar type. Expert evidence may therefore be admitted to show what terms were usual for such agreements at the relevant time. For a recent example of such a case, see Wadlow v Samuel (aka Seal) [2006] EWHC 1492 (QB); [2007] EWCA Civ 155. See also Section 18, above.

The question sometimes arises whether a music industry contract can be enforced against an artist who is under 18 when the contract was signed. Apart from contracts for necessaries, the general rule is that a contract with a minor is binding on the other party but not binding on the minor unless he ratifies it upon his coming of age. Under s.20 of the Infants Relief Act 1974, ratification did not render enforceable any debts incurred under the contract during the minor’s infancy. However, this section was repealed by the Minors’ Contracts Act 1987.

An important exception to the general rule is that a minor may not repudiate a contract which is beneficial to him, such as a contract of apprenticeship or employment. Thus a contract between a group of under-age musicians and their manager, which is analogous to a contract of employment (since without it the group would be unable to make a living), may be held binding, provided the terms are not unfair to the group. However, a covenant in restraint of trade may be held void against a minor even if it would be enforced against an adult.

Management disputes take many forms. Where the manager has been appointed without a written contract, as often happens in the case of newly formed groups which have yet to establish a reputation, disagreements may arise as to whether a binding contract has been made and if so what its terms are. If there is no binding contract, the manager may nonetheless be entitled to a quantum meruit for work done in anticipation that a contract would be entered into later.
If the manager has been dismissed he may claim damages for wrongful termination of his contract. The group may seek to justify his dismissal on the ground of his conduct. The relationship between a group and its manager involves a high degree of mutual confidence, so that a break down in that confidence may justify the manager’s dismissal. Where the breakdown of confidence is the fault of one party alone, there may be a breach of an implied term, but the extent of this implied term has been the subject of some disagreement. In *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] Q.B. 699, Winn L.J. held that there was an implied term that the manager should do nothing which he foresaw or should have foreseen might forfeit the confidence of the group. Salmon L.J., however, thought that went too far:

“I think that almost anything a manager might do, however harmless or trivial, could induce hatred and distrust in a group of highly temperament, jealous and spoilt adolescents. The highest that one could, in my view, put any such implied term would be that [the manager] should take all reasonable steps to retain the group’s confidence” (emphasis added).

**Fiduciary duties.** An artist’s manager, publisher and record company are often said to occupy a fiduciary position vis-à-vis the artist, on account of the control which they exercise over the artist’s livelihood. A fiduciary must act in good faith and must not place himself in a position where his duty and his interest may conflict: *Bristol and West Building Society v Mothew* [1998] Ch. 1 at 18, per Millett L.J. This may occur where, for example, a music publisher pays excessive fees to an associated company acting as a sub-publisher in an overseas territory, which are deducted from the publishers receipts before the artist’s royalties are calculated: see *Elton John v Dick James* [1991] F.S.R. 397.

There has been some uncertainty as to whether a failure properly to account necessarily involves a breach of fiduciary duty. The question may be important for limitation reasons, or because the claimant wishes to claim compound interest. In *Nelson v Rye* [1996] 1 W.L.R. 1378, it was held that a mere failure to account was a breach of fiduciary duty. However, this part of the decision was overruled by the Court of Appeal in *Paragon Finance v DB Thakerar & Co* [1999] 1 All E.R. 400. Even though the accounting party is a fiduciary his duty to account for the money he receives is generally only a contractual duty, to which the usual six-year contractual limitation period will apply.
Also in *Nelson v Rye* the judge held that no limitation period would apply to a claim for breach of fiduciary duty, although such a claim might be defeated by a defence of laches. The Court of Appeal of *Paragon Finance* doubted this part of the case as well, and the deputy judge in *Coulthard v Disco Mix Club Ltd* [1999] F.S.R. 900 declined to follow it. The deputy judge reasoned that a breach of fiduciary duty was the equitable equivalent of fraud at common law, so that the limitation period applicable to torts must be applied by analogy. *Coulthard* has been approved by the Court of Appeal in *Companhia de Seguros Imerio v Heath (REBX) Ltd* [2001] 1 W.L.R. 112.

Where a breach of contract or fiduciary duty has been deliberately concealed, the limitation period may be extended under s.32 of the Limitation Act 1980. “Deliberate concealment” includes the deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time. However, the deliberate commission of a breach of duty excludes a breach of duty which the actor was not aware that he was committing, and likewise for an act or omission to amount to deliberate concealment it must be done with the intention of concealing the relevant facts: *Cave v Robinson Jarvis & Rolf* [2003] 1 A.C. 384. Note that a continuing failure to disclose the relevant facts may itself be a continuing breach of fiduciary duty: *UBAF v European American Banking Corp* [1984] 1 Q.B. 713.

The effect of deliberate concealment is that the limitation period does not begin to run until the claimant has discovered the concealment or could with reasonable diligence have discovered it. Most publishing and similar agreements allow the artist to carry out a periodic audit in order to check that royalties are being properly paid, and such a right is probably implied even when it is not expressed in the agreement. It is not certain to what extent the artist must avail himself of this right in order to show that he has been reasonably diligent for the purposes of s.32.

Where the claim is for breach of fiduciary duty the claimant should ask for compound interest: see *O’Sullivan v Management Agency Ltd* [1985] Q.B. 428. However, in that case compound interest was refused because the defendant’s profits were being used at least in part for the plaintiff’s benefit.

Note that the court has a discretionary power to make an interim order “directing a party to prepare and file accounts relating to the dispute”: CPR r.24.1(1)(n).

**PARTNERSHIP LAW BETWEEN BAND MEMBERS**
The relationship between members of the band may be governed by an express agreement. This may be a partnership agreement, or, if a company has been formed as a vehicle for the band’s activities, a shareholders’ agreement.

Where the arrangements between the band members are informal, the court may infer a partnership at will. When the partnership comes to an end, either because the band breaks up or because one or more of its members are expelled, there is a presumption that the partnership assets will be divided equally between the partners unless they have agreed otherwise: see the Partnership Act 1890 s.24. The mere fact that some of the band members have made a greater contribution to the band’s success does not displace the presumption of equality: *Joyce v Morrissey* [1999] E.M.L.R. 233.

**OWNERSHIP OF COPYRIGHT**

Normally the copyright in the songs performed by the band belongs to the individual writers (or their publishers), and not to the band as a whole or its corporate vehicle. Typically there is one member of the band who writes most of the songs. However, it is sometimes alleged that the principal songwriter agreed that either the copyright itself, or the income attributable to that copyright, should be shared among all of the band members. Alternatively, the band members other than the principal songwriter may claim a share of the income from the exploitation of the songs on the ground of joint authorship, for example where the “germ” of the song supplied by the principal songwriter has been substantially developed in the recording studio by the collaborative effort of the whole band. Such claims have met with mixed success: see *Stuart v Barrett* [1994] E.M.L.R. 448; *Godfrey v Lees* [1995] E.M.L.R. 307; *Hadley v Kemp* [1999] E.M.L.R. 589; *Beckingham v Hodgens* [2003] E.M.L.R. 376; *Fisher v Brooker* [2007] E.M.L.R. 9. [2007] F.S.R. 12.

Claims for copyright infringement are subject to the usual six-year limitation period but there is no limitation period applicable to claims for recognition as a joint author. In most cases, where joint authorship is proved, the claimant will be entitled to claim a share of royalties back to the time when his claim was first notified (provided that is not more than six years before the issue of the claim form). Up to that time, the Court will generally hold that the defendant’s exploitation of the work without reference to the claimant was impliedly licensed by the claimant.
In a number of joint authorship cases, the defendant has sought to defeat the claim by reference to estoppel, laches, acquiescence or mere delay. In Fisher v Brooker, the organist on Procul Harum’s “A White Shade of Pale” claimed to be a joint author of the song as recorded on the 1968 single (although an earlier version of the song had been recorded as a demo and the copyright in it assigned to the publisher which funded the recording). It was held at first instance ([2007] E.M.L.R. 9) that the claimant’s 38 years’ delay in bringing the claim did not prevent him from asserting his rights, since the defendants had not suffered any detriment as a result, but on the contrary had benefitted from the share of royalties which would have been paid to the claimant if he had brought the claim earlier. The Judge nonetheless declined to grant injunctive relief.

This ruling was largely overturned in the Court of Appeal ([2008] E.M.L.R. 13) who, by a majority, considered that the delay made it unconscionable even in the absence of any detriment to the defendants. But the first instance decision has since been restored by the House of Lords ([2009] U.K.H.L 41; [2010] E.M.L.R. 2).

It remains to be seen whether the courts will now see a substantial increase in claims by band members and session musicians, whose alleged musical contributions to the recorded versions of songs originally written by others have not hitherto been rewarded by publishing royalties.

BAND NAMES

Clearly a band with any significant reputation may prevent another band from using the same or a confusingly similar name in an action for passing-off, even after some time has elapsed since the first band ceased to play together: see, for example, Sutherland v V2Music Ltd [2002] E.M.L.R. 28.

More difficult is the question which of two or more parts of a band that has split up has the right to continue to perform under the original name. It is sometimes said that the former members of a partnership that has been dissolved are each equally entitled to use the partnership name, notwithstanding the obvious inconvenience of such a rule. In Byford v Oliver [2003] E.M.L.R. 20; [2003] F.S.R. 704, however, Laddie J. held that two former members of the heavy metal group Saxon were not entitled to register the name SAXON as a trade mark so as to prevent the remaining members from performing under that name. They had no personal right to use the name but at best only a financial interest in the goodwill of the band to which they had belonged. That interest had been abandoned since their departure, and the goodwill and reputation of the existing band had
been built up by the other partnerships which had performed under the name up to the present time. It should be noted, however, that the reasoning in *Byford v Oliver* will not always assist, particularly when the dispute arises soon after the departure of the leaving members.

The position may be more straightforward where the group operates through a corporate vehicle, such in *Bay City Rollers Ltd v McKeown* Unreported November 22, 1991; but note that the existence of such a company does not necessarily prevent the individual band members from acquiring an interest in the goodwill generated by the band’s activities: see *Fleetwood Mac Promotions Ltd v Clifford Davis Management Ltd* [1975] F.S.R. 150.

Sometimes the band name includes the real or assumed name of one of the band members. In that case the name probably cannot be used after the departure of the named member. An example is *Hines v Winnick* [1947] CH. 708, in which the bandleader known as “Dr Crock” prevented the rest of the band from continuing to use the name “Dr Crock and his Crackpots” after he had ceased to perform with them.

**INVASION OF PRIVACY**

Prior to the coming into force of the Human Rights Act 1988 in October 2000 there was no generally available cause of action for invasion of privacy in English law. See *Kaye v Robertson* [1991] F.S.R. 62, *Wainwright v Home Office* [2004] 2 A.C. 406 at [28]-[35] and *McKennitt v Ash* [2008] Q.B. 73 at [8(i)]. However, in certain circumstances the courts had used the law of confidentiality to restrain the publication of matters such as private etchings (*Prince Albert v Strange* (1849) 2 De G & Sm 652; 1 Mac &25), matrimonial secrets (*Argyll v Argyll* [1967] Ch. 302) and information about sexual relations (*Stephens v Avery* [1988] 1 Ch. 449).

The present position in this rapidly developing area of the law may be summarised as follows:

(i) Following the introduction of the HRA the courts have developed a new cause of action called misuse of private information or unjustified publication of private information. This has been achieved by absorbing the values of arts 8 and 10 of the Convention into the existing cause of action for breach of confidence.
(ii) In addition, art. 8 of the Convention may be enforced directly against public authorities whether or not the invasion of privacy involves the publication of private information.

(iii) The Protection from Harassment act 1997 provides a remedy for invasion of privacy which involves harassment causing distress.

(iv) The Data Protection Act 1998 provides remedies where privacy is invalid, with or without publication of private information, by unlawful data processing.

(v) Further development of the common law in cases which do not involve publication of private information, action by public authorities, harassment or data processing is inevitable following the decision of the European Court of Human Rights in Wainwright v United Kingdom (Application No. 12350/04, 26/9/06).

These developing forms of protection against invasion of privacy are not mutually exclusive, and more than one may apply on the facts of a given case. Thus in Naomi Campbell v MGN Ltd [2004] 2 A.C. 457 the claimant ultimately succeeded in claims for misuse of private information and breach of the Data Protection Act 1998. In CC v AB [2007] E.M.L.R. 11 claims were made for misuse of private information and under the Protection from Harassment Act 1997. It is, however, important to consider these developing forms of protection separately since the elements of the causes of action provided by them, and in some cases the remedies available, are different.

In Wood v Commissioner of Police for the Metropolis [2009] EWCA Civ 414; [2010] it agreed, stated at [20] that “the central value” protected by the art. 8 right is “the personal autonomy of every individual”. At [22] Laws LJ. continued:

“This cluster of value, summarised as the personal autonomy of every individual and taking concrete form as a presumption against interference with the individual’s liberty, is a defining characteristic of a free society.”

Laws L.J. then identified three safeguards which prevent the impact of art. 8 from becoming “unreal and unreasonable”. First, that the invasion of an individual’s personal autonomy must attain “a certain level of seriousness” before art. 8 is engaged. Secondly, that art. 8 is only engaged where the claimant enjoys on the facts a reasonable expectation of privacy. Thirdly, in breach of art. 8(1) may in many instances be greatly curtailed by the scope of the justification available to the State.
pursuant to art. 8(2). This presumption and these safeguards, can be seen at work in all of the standards of protection of privacy considered in s.79 of this work.

Misuse of private information/unjustified publication of private information. Article 8 of the Convention provides for the right to respect for private and family life, home and correspondence. Article 10 of the Convention provides for the right to freedom of expression, including freedom to hold opinions and to receive and impart information and ideas. Both of these are qualified rights – see arts 8(2) and 10(2). Article 8 imposes not merely negative but also positive obligations on the State to respect, and therefore to promote, the interests of private and family life. This means that an individual can complain against the State about breaches of his or her private or family life committed by other individuals. Under s.6 of the HRA the court, as a public authority, is required not to act “in a way which is incompatible with a Convention right”. The Courts have responded to this obligation by absorbing the rights which Articles 8 and 10 of the Convention protect into the existing cause of action for breach of confidence, thereby developing a right to protect private information: A v B plc [2003] Q.B. 195 at [4]; Douglas v Hello! Ltd (No. 3) [2006] Q.B. 125 at [53]; McKennitt v Ash [2008] Q.B. 73 at [9]-[11]. The effect of this development is that Articles 8 and 10 are no longer merely of persuasive or parallel effect but “are the very content of the domestic [cause of action] that the English Court has to enforce”. McKennitt v Ash [2008] Q.B. 73 at [11].

The leading domestic case is the decision of the House of Lords in Naomi Campbell v MGN Ltd [2004] 2 A.C. 457 in which a number of identifiable matters of principle and approach were accepted by all members of the House:

(i) The “development” of the existing law of breach of confidence into a cause of action for misuse of private information or unjustified publication of personal information has been achieved by shifting the focus of the cause of action away from the confidential relationship violated by the unauthorised disclosure of private information, and onto the nature of the information disclosed. The development cause of action protects the values absorbed from art. 8 of the Convention, and in particular recognises private information as “something worth protecting as an aspect of human autonomy and dignity” [50]. The developed cause of action also recognises the values absorbed from art. 10 of the Convention. This cause of action may be available even if no publication of the information has occurred or is threatened – see Tchenguiz v Imerman [2011] W.L.R. 592.
(ii) The values absorbed from Articles 8 and 10 are just as applicable in disputes between individuals or between an individual and a non-Governmental body such as a newspaper as they are in disputes between individuals and public authorities [17.50].

(iii) The threshold test of whether art. 8 is engaged by the publication, or threatened publication, of information in any given case is “whether in respect of the disclosed fact the person in question had a reasonable expectation of privacy” [21, 85, 96, 134].

(iv) The publication of a photograph taken in a public street might be actionable under the developing law.

(v) In any case involving disclosure of private information through the media, the art. 10 right to freedom of expression will also be engaged.

(vi) There is no automatic or presumptive priority as between the art. 8 right of the Claimant and the art. 10 of the Defendant – they are both fundamental rights of equal value and importance in a modern democratic society [20, 55, 106, 111, 138].

(vii) Where both the art. 8 right and the art. 10 right are engaged, the balance is to be struck, or the competing requirements reconciled, by the application of the principle of proportionality [20, 55, 139-41]. This requires a focused and penetrating consideration of the value and proposed interference with the art. 8 right if publication occurs without remedy, and the value and proposed interference with the art. 10 right if a remedy is granted. There are different degrees of privacy, just as there are different orders of expression ranging in importance from political expression through educational or artistic expression to commercial expression [117, 144, 148].

(viii) The balance to be struck by the application of the principle of proportionality must afford the journalist or editor in a media case a “margin” or “degree of latitude” in deciding what to include in a particular article [28, 62, 112, 143, 167].

The principles established in Naomi Campbell were neatly summarised by Lord Steyn in the subsequent decision of the House of Lords in S (a child) (identification; restrictions on publication), Re [2005] A.C. 593 at [17]:

The principles established in Naomi Campbell were neatly summarised by Lord Steyn in the subsequent decision of the House of Lords in S (a child) (identification; restrictions on publication), Re [2005] A.C. 593 at [17]:
“What does, however, emerge clearly from the opinions [in Naomi Campbell] are four propositions. 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. For convenience I will call this the ultimate balancing test.”

Following Naomi Campbell the application of the cause of action for misuse of private information/unjustified publication of private information has been considered by the Court of Appeal on a number of occasions. The most important cases are McKennitt v Ash [2008] Q.B. 73, HRH Prince of Wales v Associated Newspapers Ltd [2008] Q.B. 103, Murray v Express Newspapers [2008] EWCA Civ 446; [2009] Ch. 481, and Tchenguiz v Imerman [2010] EWCA Civ 908; [2011] 2 W.L.R. 592. These cases have all adopted a two-stage analysis, formulated in McKennitt v Ash at [11] as follows:

“Accordingly, in a case such as the present, where the complaint is of wrongful publication of private information, the Court has to decide two things. First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the second question arises: in all 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 ...”.

Stage 1 – is Article 8 engaged? As noted above, the threshold test of whether art.8 is engaged is whether in respect of the disclosed information the person in question had a reasonable expectation of privacy. This question must be considered separately in relation to each item of disclosed information, including any photograph or sound recording. See Campbell v MGN Ltd [004] UKHL 22; [2004] 2 A.C. 457 and MGN v UK App. No. 39401/04 at [147]-[155]. In addition, the manner in which the individual items of disclosed information, including any photograph or sound recording, interrelate may also be important. A number of points which are capable of impacting on the assessment of whether a person has a reasonable expectation of privacy in relation to a particular item of disclosed information have been considered in the cases. The most important of these are as follows:
(i) The nature of the information – some types of information are obviously private (e.g. information relating to sexuality, health, family relationships, personal finances etc.), whereas other types of information may be less obviously private (e.g. appearance, lifestyle, occupation) so that the content and context of the disclosure may be highly significant. In *Mosley v News Group Newspapers Ltd* [2008] E.M.L.R. 20, Eady J. upheld a claim for damages arising out of unauthorised publication of photographs of the claimant engaging in sadomasochistic sexual activities and sexual role play. It was held that art. 8 was engaged as there was a reasonable expectation of privacy in relation to lawful sexual activity between consenting adults on private property, however unorthodox or bizarre those activities were.

(ii) One very important factor will be whether the information has been disclosed in breach of a relationship of confidence or an express obligation of confidence – see *McKennitt v Ash* [2008] Q.B. 73 at [15]-[24]; *Prince of Wales v Associated Newspapers Ltd* [200] Ch. 27 at [27]-[30], [36]; an *Browne v Associated Newspapers Ltd* [200] Q.B. 103 at [25]-[33].

(iii) It has been pointed out that because art. 8 protects “respect for” private life, any interference with private life has to be of some seriousness before art. 8 is engaged – see *M v Secretary of State for Work and Pensions* [2008] Q.B. 103 at [83] and *McKennitt v Ash* [2008] Q.B. 73 at [12]. For this reason trivial or anodyne information may not call for legal protection. However, in *Douglas v Hello! Ltd (No. 3)* [2008] 1 A.C. 1 at [291] Lord Walker observed that “The argument that information is trivial or anodyne carries much less weight in a case concerned with the facts about an individual’s private life which he or she reasonably expects to be kept confidential.”

(iv) Photographs may be particularly intrusive and their disclosure requires separate and specific justification – see, e.g. *Naomi Campbell* at [72]. The same is true in relation to surreptitious tape recordings: *D v L* [2004] E.M.L.R. 1 at [24]. The publication of a photograph or sound recording will not necessarily be justified by factors which would justify a textual description of the image or recording.

(v) The extent to which an item of information is already available to the public is a relevant consideration – see s.12(4) of the HRA 1998 – but is not decisive. The disclosure of
photographs taken in public places has been held to be actionable in Peck v UK (2003) 36 E.H.R.R. 719, Naomi Campbell, and Von Hannover v Germany (2005) 40 E.H.R.R. 1. In Naomi Campbell it was assumed that such a photograph would only be actionable if it showed its subject in a situation of humiliation or embarrassment, or if it was apparent from the photograph or its context that the activity captured in the image was private. However, in Von Hannover it was held that art. 8 required a remedy against unauthorised publication of photographs of individuals, including celebrities, engaging in ordinary activities in public places. In Murray v Express Newspapers Plc [2007] E.M.L.R. 22 Patten J. held that Von Hannover goes further than present domestic law and that in domestic law there remains an area of routine or innocuous conduct in a public place (shopping, riding on buses) which does not raise a reasonable expectation of privacy.

Pattern J. struck out a claim for financial and injunctive relief arising from publication of a photograph taken in a public street in Edinburgh of JK Rowling, her husband and 18 month old son. Patten J. held that art. 8 was not engaged, and that even after Von Hannover “there remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy”. The Court of Appeal allowed an appeal by the claimant: [2009] Ch. 481. The Court of Appeal held that in the light of Von Hannover it was at least arguable that the infant claimant had a reasonable expectation of privacy “in the sense that a reasonable person in his position would feel that the photograph should not be published” [39]. The Court of Appeal regarded the fact that the sole claimant was the young son as a factor of some importance, and confined the attention to the son’s expectation of privacy and not that of his parents or other family members [13]. The Court of Appeal held that the Judge had focused too much upon the parents and not enough upon the child [16]. The Judge was criticised for placing too much emphasis on the taking of the photograph, and not enough upon its publication [17] – although on this point see further Wood v Commissioner of Police for the Metropolis and Reklos v Greece (1234/05) [2009] E.M.L.R. 16 discussed below. The Court of Appeal also considered it important that the defendant must have known that consent for the photograph would have been refused [17], and attached importance to the fact that the unauthorised taking and publication of such a photograph was not an isolated occurrence [18]. The decision of the Court of Appeal shows the effect of Von Hannover on the first stage of the two stage approach. It has extended the reach of art. 8 in domestic law. In Douglas v Hello! Ltd (No. 3) [2008] 1 A.C. 1 all the members of the House accepted that privacy cold be invaded by further publication of information or photographs already available to the public [122, 125].
(vi) The fact that the claimant has already made limited disclosures about a particular area or zone of his or her private life will not necessarily present a claim for further, unauthorised, publication – see, e.g. McKennitt v Ash [2008] Q.B. 73 at [53]-[55]. The reason for this is that it is a matter for the individual to decide what information he or she wishes to make publicly available and the authorised disclosures are an exercise of the individual’s art. 8 rights. However, it is reasonably clear that previous disclosure by the Claimant may limit the scope of the reasonable expectation of privacy in a particular case – see, e.g. X and Y v Persons Unknown [2007] E.M.L.R. 10 and Hutcheson v Newspaper Group Newspapers Ltd [2011] EWCA Civ 80. Certain of the cases suggest that the law will develop in such a way as to provide a kind of image right – the right to control the use of one’s image – see, e.g. Von Hannover at [72] and Douglas v Hello! Ltd (No. 3) in the Court of Appeal at [2006] Q.B. 125 [113].

(vii) In some situations the fact that an experience was shared with another person or persons may limit the reasonable expectation of privacy in relation to that experience. This was considered important in the case of transient sexual encounters in A v B Plc [2003] Q.B. 195 at [43(iii)]. However, the same approach will not apply to information communicated during marriage or even a friendship: McKennitt v Ash [2008] Q.B. 73 at [28]-[32]. For an appropriate form of order where one party does not wish to have information about a transient sexual encounter published, see NEW v Wood [2011] EWHC 1972 (QB).

(viii) There is no bright line between personal information and business information, and information relating to an individual’s working life may be protected in appropriate circumstances: Browne v Associated Newspapers Ltd [2008] Q.B. 73 at [34]. In The author of a blog v The Times Newspapers Ltd [2009] E.M.L.R. 22 Eady J. refused to grant an injunction restraining the newspaper from identifying the claimant as the author of a blog by a serving police officer. The primary reason for refusing the injunction was that publishing a blog “is essentially a public rather than a private activity”, and therefore the claim failed at stage 1 [11].

(ix) Unauthorised disclosure of personal information may be actionable even if the claimant contends that some or all of the information is false – see McKennitt v Ash [2008] Q.B. 73 at [78]-[80], [86]. However, if the allegedly false personal information is defamatory the Court might refuse to grant an interim injunction if it thought that the application was an
attempt to avoid the rule in *Bonnard v Perryman* [1891] 2 Ch. 269 that an injunction will not usually be granted to restrain the publication of defamatory allegations which the Defendant intends to justify – see *McKennitt v Ash* at [79]. The recognition of "false privacy" means that in practice it may be possible to combine claims for invasion of privacy and defamation in relation to the same publication.

**Stage 2 – the balancing exercise.** On the art. 8 side of the scales the nature and value of the privacy interest and the extent of the interference or proposed interference must be assessed,

When weighing the free expression interests on the art. 10 side of the scales the Court will take into account the nature of the speech involved, which may range from political speech which merits a high degree of protection to "vapid tittle-tattle" which merits very little. This approach is particularly evident in *Von Hannover v Germany* (2005) 40 E.H.R.R. 1 where it was said that “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” [76]. Elsewhere in the judgment a debate of general interest was described as “a debate in a democratic society relating to politicians in the exercise of their functions”, a “political or public debate”, and a “debate of general interest to society” [63]-[65]. This approach was specifically adopted in domestic law by the Court of Appeal in *McKennitt v Ash* [2008] Q.B. 73 at [58]-[64].

A factor which is always of importance in the balancing exercise is the extent of any public interest which favours disclosure. Although there is a public interest in the preservation of confidences and the protection of privacy that public interest may be outweighed by countervailing public interests which favour disclosure. See *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 A.C. 109 at 282. The first aspect of the public interest in favour of disclosure will always be the public interest in freedom of expression itself. This is recognised, for example, in s. 12(4) of the HRA 1998 and in para. 2 of the PCC Code. In *London Regional Transport v Mayor of London* [2003] E.M.L.R. 4 at [55] Sedley L.J. identified a “public interest in the free flow of information and ideas”. In addition to this general public interest in freedom of expression the courts have identified particular situations where there can be a strong public interest in favour of disclosure, including (although these are only examples):

(i) The disclosure of iniquity such as fraud or other illegal conduct – see, e.g. *Gartside v Outram* (1856) 26 L.J. Ch. 113 (defrauding of customers), *Initial Services Ltd v Putterill* [1968] 1 Q.B.

(ii) Exposing hypocrisy or false image. In Naomi Campbell v MGN Ltd [2004] 2 A.C. 457 the Claimant’s false public denials that she had taken drugs gave rise to an entitlement on the part of the media to correct the false image so presented. Other examples include Beckham News Group Newspapers (April 24, 2005, unreported, Langley J.) where an Injunction to restrain publication of material communications was dismissed in part on public interest grounds on the basis that the information tended to correct a false image portrayed by the Beckhams of their marriage and private life, and Harrods Ltd v The Times Newspapers Ltd [2006] E.M.L.R. 13 where the information tended to correct an allegedly false public image as a benign employer. In McKennitt v Ash [2008] Q.B. 73 at [69] the Court of Appeal suggested that a very high degree of misbehaviour must be demonstrated in order to justify the disclosure of private information on the basis that the information tends to expose hypocrisy or a false image.

(iii) Exposing conduct of public figures relevant to a debate of general interest. Following Von Hannover v Germany (2005) 40 E.H.R.R. 1 this aspect of the public interest will only arise where the public figure is a politician or someone who carries out public duties or functions, but even these individuals have a right to some “private space”. In Saaristo v Finland App. No. 184/06, the Strasbourg Court took a similar approach to a press officer for a political campaign. In Prince of Wales v Associated Newspapers Ltd [2008] Ch. 57. 139 the Court of Appeal upheld the Judge’s rejection of the newspaper’s argument that there was a public interest in disclosing the private musings of the heir to the throne in his personal travel journals.

The decision of Eady J. in The author of a blog v The Times Newspapers Ltd [2009] E.M.L.R. 22 provides an illustration of the public interest in disclosing wrongdoing on the part of the public officials. In that cases the evidence suggested that the claimant had acted in breach of the relevant Police (Conduct) Regulations, and his public law duty as a constable, by disclosing in his blog confidential information which came into his possession in the course of carrying out his duties as a police officer. At [20] Eady J. observed:
There is much force in the argument that any wrongdoing by a public servant (save perhaps in trivial circumstances) is a matter which can legitimately be drawn to the attention of the public by journalists. There is a growing trend towards openness and transparency in such matters.

In *Mosley v News Group Newspapers Ltd* [2008] E.M.L.R. 20 the newspaper failed to establish that publication of the photographs was in the public interest. In particular, the newspaper failed to establish that its allegations of Nazi role play and mockery of Holocaust victims were true. Eady J. took the view that if the newspaper had been able to establish the truth of those allegations there could have been a public interest in at least limited disclosure [122]. Eady J. went on to consider, obiter, whether it might make a difference if the newspaper had published the articles in the genuine and reasonable belief that they were in the public interest. At [135] and [137] he held that on the current state of the authorities it is for the Court to decide whether a particular publication was or was not in the public interest, and that there was little if any scope for considering the defendant’s state of mind “because it is only the Court’s decision which counts on the central issue of public interest”. He held that in any event the judgment of the journalists in the instant case was not reasonable but had been arrived at in a manner which could be characterised as casual and cavalier [170]-[171]. This approach to the relevance of a reasonable belief that publication is in the public interest may require further consideration. In the field of regulation of misuse of personal data by media defendants Parliament has expressly provided that the test of liability should be whether the media defendant acted in the reasonable belief that it’s processing of data was in the public interest, and not on whether it actually was in the public interest. See s.32 of the Data Protection Act 1998 and the recent amendment to s.55 of that Act introduced by s.78 of the Criminal Justice and Immigration Act 2008. These sections provide that in the case of both civil and criminal liability a media defendant may escape liability if it acts in the reasonable belief that in the particular circumstances of the case disclosure of the information in question was justified as being in the public interest. Since in these sections Parliament has struck a balance between arts 8 and 10 it seems surprising that the Judge made law of privacy should strike the balance differently in the same field.

A further factor of importance in the balancing exercise in the existence of a confidential relationship or an express obligation of confidence. See *Prince of Wales v Associated Newspapers Ltd* [2008] Ch. 57 at [67-9]. In such a case the pre-existing relationship or obligation of confidence is a “significant element to be weighed in the balance” and “it is not enough to justify publication that
the information in question is a matter of public interest”. The court must ask itself whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. See also *Browne v Associated Newspapers Ltd* [2008] Q.B. 103 at [48] where the relationship of confidence was said to be “central to the question whether Article 8 was engaged in respect of particular items of information and how the balance between the Claimant’s rights under Article 8 and the newspaper’s rights under Article 10 should be struck”.

Remedies. If the claimant can establish that he or she has a reasonable expectation of privacy in relation to information which has been, or is about to be, disclosed, and that the art. 8/art. 10 balancing exercise favours the protection of privacy, the available remedies are compensation, injunctive relief, and declaratory relief.

In the reported cases to date awards of compensation have been low. Naomi Campbell was awarded £3500. Lady Archer was awarded £2500 in a claim against her former secretary and PA: *Lady Archer v Williams* [2003] E.M.L.R. 38. Michael Douglas and Catherine Zeta-Jones were each awarded £3750. Lorena McKennitt was awarded £5000. Aggravated damages may also be available in an appropriate case – see *Naomi Campbell* in the Court of Appeal at [2003] QB 633. It is likely that the level of awards will rise in the future. A claim by Sara Cox arising out of the publication of surreptitious photographs taken of the DJ and her husband naked in the grounds of their honeymoon villa at a secluded island resort in the Seychelles was settled, with some publicity, for £50,000.

The judgment following trial in the *Mosley* case at [2008] E.M.L.R. 20 awarded the claimant damages for invasion of privacy in the sum of £60,000.

Where an application is made for an Injunction to restrain publication of private information it is for the claimant to establish, in respect of each category of information, that he is likely to establish at trial that publication should not be allowed. This is the effect of s.1(3) of the HRA 1998 as interpreted by the House of Lords in *Cream holdings Ltd v Banerjee* [2005] 1 A.C. 253 at [22] and *Browne v Associated Newspapers Ltd* [2008] Q.B. 103 at [43]. In *Browne* the Court of Appeal explained the general approach to interim injunctions in privacy cases as follows:

“... it [is] for the Claimant to persuade the Judge, in respect of each category of information, that his prospects of success at the trial are sufficiently favourable to justify
such an Order being made in the particularly circumstances of the case, the general approach being that the Court should be “exceedingly slow” to make interim restraint orders where the applicant has not satisfied the Court that he will probably (“more likely than not”) succeed at trial. By “succeed at trial” we ... mean that the Claimant is likely to succeed after the Court has carried out the relevant balance between the Claimant’s rights under Article 8 and the newspaper’s rights under Article 10.”

This burden on the claimant may be particularly significant where there is a factual dispute about the truth of an allegation which the defendant intends to publish.

In Mosley v News Group Newspapers Ltd [2008] EWHC 687 (QB) (the decision on the application for interim injunctive relief in the Mosley litigation) Eady J. drew a distinction between two elements of the claim. The first was the complaint about publication of photographs of the claimant engaging in sexual activity. The second was the complaint that the newspaper had falsely published allegations of Nazi role play. In relation to the first of these the Judge applied the approach to injunctive relief laid down by the House of Lords in Cream holdings Ltd v Bannerjee [2005] 1 A.C. 253 discussed in the text. However, in relation to the second the Judge applied the traditional approach to Injunctions restraining publication of defamatory allegations which the defendant intends to justify [15]-[17].

Miscellaneous points of practice and procedure. The developing cause of action in misuse of private information/unjustified publication of private information is not a tort. It is an equitable cause of action. This is the result of using the existing cause of action in breach of confidence to develop remedies for the protection of private information. See Douglas v Hello! Ltd (No. 3) [2006] Q.B. 125 at [96]. Despite this ruling, which was not affected by the appeal to the House of Lords in that case, some judges continue to refer to the developing cause of action as a tort – see e.g. McKennitt v Ash [2008] Q.B. 73 at [11] and Browne v Associated Newspapers Ltd [2008] Q.B. 103 at [22].

It is unclear whether privacy rights under the developing law should be regarded as property rights capable of transmission to a third party. In Douglas v Hello! Ltd (No. 3) [2006] Q.B. 125 the Court of Appeal decided that such rights are not proprietary in nature [126]. It is unclear whether this ruling survived the appeal to the House of Lords ([2008] 1 A.C. 1) where the majority of Their Lordships proceeded on the basis that the obligation of confidence imposed on the wedding guests was transmissible by contract.
In cases where private information is obtained abroad but published in this country English law will apply to determine whether such publication is lawful – see *Douglas v Hello! Ltd (No. 3) [2007]* 2 W.L.R. 920 at [126].

Summary judgment may be available in privacy claims in appropriate cases. See *P v Quigley [2008]* EWHC 1051 (QB) and *Imerman v Tchenguiz [2011]* 2 W.L.R. 592.

Where a defendant contends that publication is justified in the public interest he will, in an appropriate case, be able to obtain Orders for Disclosure and/or the provision of further information by the claimant to support his case. See *Harrods Ltd v The Times Newspapers Ltd [2006]* E.M.L.R. 13. This may assist a defendant in establishing that the claimant is guilty of the misconduct which the defendant claims to be entitled to expose.

The claimant in a privacy action should take care to avoid disclosing through the court proceedings the information he or she wishes to keep private. The claimant should consider applying to the court under CPR 39.2 for the hearing to be held in private. This course was approved and applied in *McKennitt v Ash [2007]* 3 W.L.R. 194 and *Browne v Associated Newspapers Ltd [2007]* 3 W.L.R. 289. The claimant should also consider whether the parties, or some of them should be anonymised and referred to by initials. This course is frequently taken in privacy claims brought in *Browne v Associated Newspapers Ltd* at [3] the Court of Appeal indicated that this should “be avoided unless justice requires it”. The court will also, in an appropriate case, make Orders restricting the entitlement of third parties to see the evidence relied on in applications for privacy injunctions – see CPR 25 PD 9.2. The court may also be prepared to order that the claimant need not disclose information contained in confidential schedules to pleadings and orders – see CPR 32.13(3)(d). For detailed guidance of the anonymisation of orders and judgments in privacy cases, see *H v News International Group Newspapers ltd [2011]* 1 W.L.R. 1645 and the Master of Rolls Practice Guidance published in August 2011.

**Direct enforcement of Article 8 against public authorities.** Claims for breach of art. 8 may be brought against public authorities under ss.6-8 of the HRA 1998. See Section 64 of this work for a commentary and precedents.

For an example of a successful claim against a public authority for breach of art. 8 arising out of the disclosure of false private information about a stepfather’s relationship with his stepdaughter see *W
v Westminster City Council [2005] 4 All E.R. 96. The Court held that an intense focus on the
importance of the specific right claimed was required and that any interference must be necessary
and proportionate.

Wood v Commissioner of Police for the Metropolis [2010] 1 W.L.R. 123 provides a good example of
the approach taken in such cases. The claimant complained that his photograph had been taken by
the police as he left a protest meeting in central London. The photographs were retained and stored
on police computers. The Court of Appeal held that the claimant’s art. 8 rights had been infringed.
Although the mere taking of the photographs is incapable of engaging art. 8 in the absence of
aggravating circumstances [36], the taking of the photographs with the intention of retaining and
storing the same did engage art. 8 [46]. The photographs were taken and stored in pursuit of a
legitimate aim [48, 79], but the inference with the art. 8 rights was disproportionate since the
photographs were stored for more than a few days when there was no real basis for suspecting that
the claimant was likely to commit offence in the future [89, 97].

Harassment. The law relating to harassment may also provide a remedy for invasion of privacy in
certain circumstances. See Section 63 of this work for a commentary and precedents.

At common law intentional harassment which results in a recognised psychiatric injury may give rise
to a remedy in tort. See Wilkinson v Downton [1897] 2 Q.B. 57 as explained in Wainwright v Home
Office [2004] 2 A.C. 406 at [41]-[47]. However, where intentional harassment results in distress or
anxiety short of a recognised psychiatric injury the common law provides no remedy. See Wong v
Parkside Health NHS Trust [2003] 3 All E.R. 932, Wainwright v Home Office at [41] and Mbasogo v
Logo Ltd [2007] 2 W.L.R. 1062 at [90]-[100]. An attempt by the Court of Appeal in Khorsandjin v
Bush [1993] Q.B. 727 to fashion a tort of causing distress by harassment through the development of
the cause of action in private nuisance was overruled by the House of Lords in Hunter v Canary

The inability of common law to provide a remedy for harassment causing distress was remedied by
the enactment of the Protection from Harassment Act 1997. This Act provides that a person must
not pursue “a course of conduct” which amounts to harassment of another, and which he knows or
ought to know amounts to harassment of that other. “Harassment” is not defined by the Act but
includes alarming another person or causing that person distress. A course of conduct must involve
conduct on at least two occasions. The provisions of the 1977 Act apply to the news-gathering
activities of journalists, and also to the publication of articles. See *Thomas v News Group Newspapers Ltd* [2002] E.M.L.R. 4. In that case Lord Phillips M.R. identified the concept of “harassment” as conduct targeted at an individual which is calculated to produce the consequences of alarm or distress and which is oppressive and unreasonable [30].

In *Merelie v Newcastle Primary Care Trust* [2004] EWHC 2554 (QB) Eady J. identified certain characteristic elements of the statutory tort of harassment namely:

(i) a course of conduct (i.e. conduct on at least two occasions) that is targeted at the claimant;

(ii) such conduct being calculated to cause alarm or distress to the claimant; and

(iii) such conduct being, objectively judged, oppressive and unreasonable.

A course of conduct consisting of intrusive questioning and unwanted touching which invades a person’s privacy may amount to harassment for the purposes of the 1997 Act – see *KD v Chief Constable of Hampshire* [2005] EWHC 2550 (QB).


The Data Protection Act 1998 provides extensive protection against interference with private information both in situations which involve publication of the information and in situations which do not. A complex interlocking set of “data protection principles” govern the “processing” of “personal data”. The Court of Appeal has given the concept of “personal data” a narrow interpretation in *Durant v Financial services Authority* [2004] F.S.R. 28 – essentially holding that information has to be biographical in nature and relate to the data subject’s life events. “Processing” is defined extremely widely to embrace the obtaining, recording or holding of information or data as well as the organisation, adaption or alteration, retrieval, consultation or use of the information or data and its disclosure. All “data controllers” have a statutory duty to comply with the “data protection principles” in relation to all of these operations: s.4(4).
“Processing” includes the publication of personal data through the print media – see Naomi Campbell v MGN Ltd in the Court of Appeal at [2003] Q.B. 633. Note, however, that in a set of operations comprising the retrieval of information from a computer, review and assessment of the information retrieved, and the recording of the outcome of the review and assessment on a computer, the review and assessment stage did not amount to processing for the purposes of the Act – see Johnson v Medical Defence Union Ltd (2007) 96 B.M.L.R. 99.

See above in relation to the recent amendment to s.55 of the ct by s.78 of the Criminal Justice and Immigration Act 2008.

The Court of Appeal in Murray v Big Pictures (UK) Ltd [2009] Ch. 481 allowed an appeal against the striking out of the DPA claim, holding that all issues in relation to that claim should go to trial.

The eight “data protection principles” are set out in Part 1 of Schedule 1 to the Act as follows:

(i) Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless

(a) at least one of the conditions in Schedule 2 is met; and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

(ii) Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any matter incompatible with that purpose or those purposes.

(iii) Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

(iv) Personal data shall be accurate and, where necessary, kept up-to-date.

(v) Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.
(vi) Personal data shall be processed in accordance with the rights of data subjects under this Act.

(vii) Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of or damage to, personal data.

(viii) Personal data shall not be transferred to a country or territory outside the European economic area unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.

The Data Protection Act 1998 may provide a remedy for the unauthorised publication of private information where there is no tenable public interest justification for the publication. This is likely to apply to articles which include “kiss and tell” allegations and/or surreptitiously obtained photographs. The trial judge’s finding of liability for breach of the Data Protection Act was restored by the House of Lords in Naomi Campbell v MGN Ltd [2004] 2 A.C. 457. Where there is a public interest justification for the publication of personal information s.32 of the Act provides an exemption from liability both before and after publication. See the decision of the Court of Appeal in Naomi Campbell at [2003] Q.B. 633.

Given the width of the definition of “processing” the Data Protection Act 1998 can also provide a remedy for interference with private information short of publication.

The remedies available for breach of the Act include compensation (including compensation for distress where the processing is for the purpose of journalism), an injunction, and rectification, blocking, erasure or destruction of data. See ss.13 and 14.

In recent cases allegations of breaches of the Data Protection Act have been relied on in applications for Norwich Pharmacal relief (see e.g. Hughes v Carratu International Plc [2006] EWHC 1791 and Nikitin v Richards Butler LLP [2007] EWHC 173 (QB)), and an application for delivery-up of a laptop computer which had been wrongfully removed and retained (L v L [2007] EWHC 140 (QB)).

Further developments at common law. On September 26, 2006 the European Court of Human Rights ruled in Wainwright v The United Kingdom (Application No. 12350/04) that a strip search of prison visitors which took place prior to the coming into force of the HRA 1998 had involved a violation of art. 8, and that as English law did not make available a means of obtaining redress for
the interference with the rights under art. 8, there had also been a violation of art. 13 of the
Convention. This ruling is likely to be of particular significance in privacy cases where the defendant
is not a public authority (so there can be no direct enforcement of art. 8 under ss.6-8 of the HRA
1998), the invasion of privacy complained of does not involve the publication or other misuse of
private information, there is no course of conduct amounting to harassment under the Protection
from Harassment Act 1997, and no processing of data. In such cases the common law will need to
be further adapted to provide a remedy. Whether this will require legislation remains to be seen.

In Reklos v Greece [2090] E.C.H.R. 200 the European Court of Human Rights held that the mere
taking of a photograph of an infant in a hospital setting without consent could amount to a violation
of art. 8. As noted above, in the most recent domestic authority, Wood v Commissioner of Police for
the Metropolis, it was held that the mere taking of a photograph in a public place would not engage
art. 8 in the absence of aggravating circumstances [36]. Reklos suggests that the mere taking of a
photograph in a place in which there is a reasonable expectation of privacy will engage art. 8. The
extent to which “aggravating circumstances” may be present in a particular case remains to be
explored. In Wood Laws L.J. gave the following example of a case in which there would be such
aggravating circumstances:

“I would certainly acknowledge that the circumstances in which a photograph is taken in a
public place may of themselves turn the event into one in which Article 8 is not merely
engaged but grossly violated. The act of taking the picture, or more likely pictures, may be
intrusive or even violent, conducted by means of hot pursuit, face-to-face confrontation,
pushing, shoving, bright lights, barging into the affected person’s home. The subject of the
photographers’ interest – in the case I am contemplating, there will usually be a bevy of
picture takers – may be seriously harassed and perhaps assaulted. He or she may certainly
feel frightened and distressed. Conduct of this kind is simply brutal. It may well attract
other remedies, civil or criminal, under our domestic law. It would plainly violate Article
8(1), and I can see no public interest justification for it under Article 8(2).”

Further cases arising out of facts similar to those envisaged by Laws L.J. are likely to be brought.