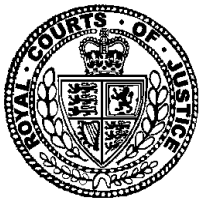

Neutral Citation Number: [2019] EWHC 1650 (QB)

Case No: HQ17M04570

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

Gareth Bull	**Claimant**
- and -	
Donna Desporte	**Defendant**

- -
- -

William Bennett QC (instructed by **Howes Percival**) for the **Claimant**
The Defendant appeared in person

Hearing dates: 25 – 28 March 2019

- -

OPEN JUDGMENT

-

FOR PUBLICATION

If this Approved Judgment has been emailed to you it is to be treated as 'read-only'.
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The Honourable Mr Justice Julian Knowles:

Introduction

1. This is my open judgment in this privacy claim. There is also a full and unredacted judgment which is confidential to the parties.

2. This is a claim for misuse of private information and copyright infringement. The Claimant is Gareth Bull and the Defendant is Donna Desporte. In 2012 the Claimant and his then wife, Catherine Bull, won approximately £41 million on the National Lottery. Their win was the subject of considerable publicity. In due course the Claimant bought a villa in Tenerife, where at the time the Defendant ran a bar. The Claimant's evidence is that he and his wife separated in or around 2016. In October 2016 the Claimant and Defendant met in Tenerife and shortly afterwards began a relationship which continued into 2017. During that period, they flew back and forth between Tenerife and the UK. The exact nature and intensity of that relationship is a matter of dispute between them, but it is agreed that it was a sexual relationship, that they were in regular communication, and that they attended a number of social functions together in Tenerife and the UK. By June 2017 at the latest the relationship had broken down.

3. Following the ending of the relationship the Defendant wrote and published a book entitled '*Google Me No Lies'* (the Book). I will say more about the significance of the title later. The Book appeared first as an Amazon e-book and then in hardcopy form. It was first published in November 2017, and there were several subsequent editions. The title page bore a photograph of the Claimant and the Defendant and was captioned *'The True Incredible Heartbreaking Amazing Story of a Survivor Featuring the Relationship with £41 Million Lottery Millionaire Gareth Bull*'.

4. The claim for misuse of private information arises out of 36 passages in the Book which the Claimant alleges include private information about him and/or his family (the Information). They fall into four categories (as set out in the Particulars of Claim at [8] – [8.4]) and in this judgment I will refer to the relevant categories as follows:

    a. Category (a): details of the sexual relationship between the Claimant and the Defendant;

    b. Category (b): the Claimant's relationship with, and divorce from, his former wife, Catherine Bull;

    c. Category (c): the Claimant's children;

    d. Category (d): the physical health of the Claimant.

5. The passages complained of are contained in a Confidential Annex to my full unredacted judgment, which the parties have. Plainly it would defeat the whole purpose of the privacy claim if they were to be published in this open judgment. The Defendant knows precisely what the Claimant is complaining of in his privacy claim. I am satisfied that these four general headings are sufficient to identify the subject matter of the claim so that the reader of this judgment can understand what issues are in dispute.

6. The copyright claim relates to the inclusion in the Book of four photographs said by the Claimant to have been taken by him and sent to the Defendant privately during their relationship in which he retains the copyright (the Photographs).

7. On 20 December 2017 an interim non-disclosure order (INDO) was made by His Honour Judge Moloney QC restraining publication of the Information.

8. In this action the Claimant seeks a permanent injunction restraining publication of the Information and the Photographs, as well as damages and other relief. The Claimant does not seek to prevent the Defendant from publishing the Book at all, but seeks to prevent her from publishing the identified passages which include the Information and also from publishing the Photographs.

9. Ms Desporte defends the claims on the following grounds. In respect of the misuse of private information claim, she denies that there was a reasonable expectation of privacy in relation to the Information and she denies that the Claimant's rights under Article 8 of the European Convention on Human Rights (the Convention) are engaged. If that is wrong, she maintains that the Claimant consented to publication, and/or it is in the public interest to publish the Information. She says that the restriction on his privacy rights are outweighed by her right to freedom of expression under Article 10 of the Convention. In part, she says that the Information had to be disclosed in order 'to put the record straight' about the nature of her relationship with the Claimant which she believes he has mispresented. She also maintains that the Claimant ought to be denied an injunction because he delayed too long before obtaining the INDO following the publication of the Book in November 2017 and/or consented to its publication. In respect of the copyright claim, she maintains that she had the Claimant's express or implied permission to use the Photographs and denies that the Claimant owns the copyright in them.

10. The Claimant was represented by Mr Bennett QC. Ms Desporte represented herself. I am grateful to her for the clear and, if I may say so, skilful way in which she presented her case orally and in writing.

Hearing in private

11. At the outset of the trial I made an order pursuant to CPR r 39.2(3)(a) that parts of the trial take place in private and I also granted a reporting restriction order pursuant to s 11 of the Contempt of Court Act 1981. When making these orders I had regard to the principle of open justice and the need for derogations from open justice to be strictly justified. However, I was satisfied that to have held the whole trial in public would have defeated the object of the case, given that it includes a claim for misuse of private information and it was necessary during the trial to refer to that information: cf *Khuja v TNL and others* [2017] 3 WLR 351, [14]. Had the material in question been referred to in open court then the Claimant's Article 8 rights would have been lost and the purpose of the claim defeated. In the event, most of the trial took place in public and I am grateful to the parties for conducting the hearing in such a way that that could happen.

Copyright claim: jurisdiction

12. Mr Bennett helpfully pointed out that CPR r 63.13 of the White Book, when read in conjunction with PD63 [16.1], stipulates that claims in copyright 'must be started' in

the Chancery Division, the Intellectual Property Enterprise Court or a Chancery District Registry. The copyright claim in issue was started in the Queen's Bench Division (QBD).

13. However, CPR r 63.13 only stipulates that a copyright claim must be 'started' in one of the named jurisdictions, not that it must be tried in one of them

14. In *DMK v News Group Newspaper Ltd* [2016] 1646 EWHC (QB) Warby J, whilst sitting in the Queen's Bench Division (QBD), concluded that he had the power to make an order in regard to a Chancery claim. The application was made as a matter of urgency on a Saturday. The application also concerned a claim brought in the QBD. He summarised the law regarding his power to make an order in a Chancery Division claim thus:

> "I am assigned to the Queen's Bench Division, and the Chancery Action is proceeding in a different Division, but I made the Inspection Order on the basis that I have power to do so, and it is just and convenient for me to do so. The divisions are for administrative convenience; the jurisdiction of the High Court is, in general, indivisible. Section 4(3) of the Senior Courts Act 1981 provides that "All the judges of the High Court shall, except where this Act expressly provides otherwise, have in all respects equal power, authority and jurisdiction."

15. I am satisfied that it follows from this principle that there is no bar to a High Court Judge sitting in the QBD from trying a matter which would otherwise have been heard in the Chancery Division. It would be just and convenient, and further the overriding objective, to do so especially as this claim is very simple.

Narrative

16. The Claimant and the Defendant both gave evidence and were cross-examined. A statement was also read from Julia Puddepha who is a friend of Ms Desporte's. The following is a summary of the evidence and it contains such findings of fact as are necessary for the determination of the claims before me.

The relationship between the Claimant and the Defendant

17. The Claimant's evidence in chief is contained in his First Witness Statement of 15 December 2017 and his Fourth Witness Statement of 22 August 2018.

18. In January 2012 the Claimant and his then wife, Catherine, won £40,627,241 on the 'Euromillions' lottery. There was extensive publicity. Mr and Mrs Bull gave at least one press conference, and there were many newspaper articles about their win. Sometime later, in November 2014, there was a lengthy interview in *The Telegraph* newspaper in which they discussed the effect of their win on their work and home lives. The central thrust of the article was that although they had both given up work, and there had been some spending on new cars and holidays and the like, they had tried to preserve their former lives as far as possible by, for example, continuing to live in the same house in Nottinghamshire. They also discussed their two sons, Joel and Declan,

who were aged 10 and 8 respectively at the time of the lottery win. The article referred to the two boys doing jobs rather than receiving pocket money. It also mentioned that the couple had recently purchased a villa in Tenerife.

19. I move forward to 2016, which is when the events began with which I am concerned. The Claimant says that he separated from his wife in July 2016 and that in late 2016 to early 2017 he and she were in the early stages of planning their divorce such as the division of assets. He began divorce proceedings in June 2017; they obtained their decree *nisi* in August 2017, and the decree absolute in October 2017. I accept this evidence.

20. I come to late 2016. At the relevant time the Defendant ran a bar called 'The Village' in Puerto Colón, Tenerife. The Claimant met the Defendant at the end of October 2016 when he visited her bar with some friends. A few days later he asked her out for a drink. A sexual relationship began between the two of them at some point thereafter, although exactly when was a matter of dispute between them.

21. The Claimant's case initially was that they first went out together on the night of 5 November 2016 but she did not stay overnight at his villa and they did not have sex. His case in his evidence in chief was that their sexual relationship did not commence until sometime in December when she visited the UK. However, in cross-examination he accepted they might have had sex on the first night they went out. His case is also that although he spent some nights with the Defendant in a hotel in Tenerife over the Christmas/New Year period of 2016/17, his parents were also staying, and he spent at least some nights at home with them. He accepted that he spent nights with the Defendant in Tenerife and England in early 2017 and attended social functions with her, including the BAFTAS in February 2017. He said that he had recently separated from his wife of 20 years and did not consider himself to be in a serious relationship with the Defendant and did not want at that time to become involved with someone else. He said he did not see it as a serious relationship and he did not regard the Defendant as his girlfriend, or he as her boyfriend. That said, he also made clear he was not sleeping with anyone else at the time.

22. The Defendant's evidence in chief is principally contained in her First Witness Statement of 18 December 2017 and her Fifth Witness Statement of 21 August 2018. I also permitted her to adopt as part of her evidence what she said by way of opening.

23. The Defendant's case differed from the Claimant on the nature of their relationship. In summary, she said that their relationship was much more intense and committed that he was prepared to accept. Her evidence was that when she met the Claimant she was finalising her separation and divorce from her husband, and was cautious about starting another relationship, but that strong mutual feelings of attraction soon developed between them, as did their sexual relationship. Her case was she definitely did stay at his villa on the night of the 5 November and that they did have sex. She also put to him that they spent the period from 28 December 2016 and over the New Year together, and her case was that during that period in particular when she met his parents, they became very close physically and emotionally. There were also other disputes of fact, such as whether he told her he loved her; and whether he genuinely invited her to the BAFTAS in February 2017 as his guest, or whether he only did so because she effectively 'invited herself'.

24. It is unnecessary in this claim to resolve each of these points of dispute. It is clear, and I find, that soon after the Claimant and Defendant first met they began a sexual relationship which lasted some months. It is also equally clear that their relationship was a full adult consensual relationship based upon genuinely mutual feelings of desire and affection. The contemporaneous Facebook Messenger messages between them show that he would call her 'Ducky' and 'Babe' (he denied using the latter term in conversation, but he certainly did so in the messages); she would also call him 'Babe', and that on at least one occasion she told him that she loved him. They regularly exchanged details of their day to day lives, where they were going and who they were seeing, and they would discuss travel and accommodation arrangements for trips to and from Tenerife. They would also exchange photographs (including many 'selfies'). In short, their communications consisted of exactly the sort of friendly and affectionate correspondence one would expect to see between a couple who had recently become intimate and who were finding out about each other.

25. The Claimant was asked by the Defendant in cross-examination how he had regarded their relationship. He said that he had regarded them as having been 'friends'. The Defendant strongly disagreed with that categorisation. I also disagree with it as an accurate description of their relationship, if by it the Claimant meant there was an absence of any romantic affection or feelings on his part and that sex was simply a utilitarian transaction between them (or a 'friends with benefits' arrangement as I believe it is known in modern parlance). There plainly were romantic feelings on both sides. To the extent that they now have a different perception of how serious the relationship was, I consider this to be the fairly typical emotional response of a couple who have broken up in acrimonious circumstances. Both of them honestly believe that their perception of the relationship is the correct one.

26. The Claimant was asked how he had described the Defendant to his wife. He said that he had said that she was a friend but, importantly, he said that he had never denied the nature of his relationship with her, in other words, that it was a sexual one. As I have said, I do not accept as accurate the description of the Defendant as the Claimant's 'friend' but I accept his evidence that his wife knew their relationship was a sexual one and that he did not mislead her about it.

27. Part of the Defendant's case is that the Claimant deceived her about the state of his marriage to his wife, and that he induced her into a sexual relationship on the basis of those deceptions. The Claimant in his witness statement of 22 August 2018 at [27] specifically denied this allegation. I accept his evidence. The Defendant's case to the contrary is entirely based on her own speculation about the state of the Claimant's marriage.

28. There is no doubt that the Defendant enjoyed her social life with the Claimant which, because of his wealth, was marked by a degree of high living. However, I wish to emphasise my finding that the Defendant was motivated to have a relationship with the Claimant because of her genuine feelings of desire and affection for him. I reject any suggestion that she was seeking to benefit from the relationship financially. Indeed, the Claimant was quite clear in his evidence that she never asked him for money and that the only thing he gave her of any value was a signed boxing glove from a well-known boxer for the wall of her bar.

29. As I have said, the Claimant and the Defendant often communicated by Facebook Messenger. It is apparent from their messages that by late March 2017 the relationship was starting to run into problems. For example, on 19 March 2017 the Defendant sent a message to the Claimant, 'I need to speak with you Gareth and NOT on the phone, so I am coming up there to [missing words] or you coming down here ??'. There were then further exchanges along similar lines.

30. In April 2017 there were various press reports that the Claimant had separated from his wife and moved out of the family home. As I have said, his evidence was that the separation had taken place sometime earlier in 2016.

31. The Claimant's evidence is that the Defendant visited him in Derby in March or early April 2017 when she expressed concerns about some photographs of him that she had seen on social media, as well as other matters. He said that after that their messages became sporadic and that he did not contact her when he visited Tenerife in early June 2017. The messages show that she found about his trip and sent him a message telling him that what he had done was 'very hurtful'. I find that the relationship permanently ended around this time.

The Defendant's decision to write and publish the Book

32. On 14 June 2017, shortly after the Claimant had gone to Tenerife without telling the Claimant or contacting her, the Defendant sent the Claimant this message via Facebook, which is relevant to the issues I must decide (sic):

> "… Want to tell you I am meeting someone today to start this book and article about ME not you, but there will be a little bit about you, don't want to create issues for you. But I do want to write this. You can send someone legal if you like or see yourself not bothered. Anyway this will help me deal with mess, dont know what I have done to you to deserve being treated like this."

33. In [1] of her witness statement of 21 August 2018 the Defendant said:

> "In June 2017, I made the decision to start composing the memoirs of my life to date, further to the ending of my relationship with the Claimant, and a number of both incredible and traumatic life-changing events and to put the record straight pursuant to a number of false, misleading damaging lies and deceptions that were circulating about my relationship with the claimant and my previous relationships."

34. Part of the Claimant's case on public interest is that there is and was a need to 'set the record straight' about the nature of the relationship, because she believes the Claimant has misrepresented it. Her case is that she believed him to have described her in offensive terms to his friends. She put to him that she had to write the Book to correct the impression that she 'was an escort or a whore' which she said he had said to numerous people. She also said that the way in which the Claimant had described their relationship in his witness statements in these proceedings (including his witness statement in support of the INDO in December 2017) mischaracterised it in a similar light. For example, she said that the way in which the Claimant had described staying

in hotels with her over Christmas/New Year 2016 made her look like 'free prostitute or escort'. She also referred to an incident in a bar in Tenerife in October 2017 when she and a friend and the Claimant and his friends had been present. She said one of the Claimant's friends had come over and made some lewd remarks to her, and also said that the Claimant had said that she was writing a 'porn book' to blackmail him which had lots of mistakes in it. The friend said that the Claimant had said he had never slept with her. She also complained about various abusive remarks about her (eg that she was a 'gold-digger') which had been posted online following the publication of the newspaper article which I will deal with later.

35. The Claimant strongly denied any suggestion that he had disparaged the Claimant in the way which she alleged. He said he had never described her in the terms she suggested. He said that the way in which he characterised the relationship in his evidence is correct and accurate. He also denied having anything to do with the incident in the bar or being in any way responsible for the online comments.

36. I accept the Claimant's evidence on this point. There is no evidence that he ever described the Defendant in disparaging terms to his friends or anyone else and I find that he did not do so. Indeed, the Defendant admitted in her evidence that she had no evidence that he ever called her a 'gold-digger, whore, or escort'. It is not a fair or reasonable reading of his evidence to suggest that it was intended to, or does, portray the Defendant in the manner suggested. Nor is there any evidence on which I can find that the Claimant was responsible directly or indirectly for what his friend may have said in October 2017, and I find he was not. I accept that there was some sort of incident at the nightclub. But the hearsay evidence involved is far too slender for me to able to conclude that the Claimant said anyone of the things attributed to him. For example, the friend said the Claimant had denied having a sexual relationship with the Defendant. But he has never done so, nor could he sensibly have done so given the extensive social media contact between them which demonstrates the opposite. Nor is there a jot of evidence to support the Defendant's suggestion that he was responsible directly or indirectly for the online postings.

37. The Defendant told me that the use on the Book's cover of a picture of her and the Claimant, and the sub-title I have already quoted, was just 'marketing'. I reject that evidence. Both things accurately reflected what the Book is very largely about and that is why the Defendant chose to use them. Indeed, the Book's main subject is made clear in the few first few paragraphs. Chapter 1 is entitled 'A Date With Destiny'. In the first paragraph the Defendant describes ordering coffee. Then, she wrote:

> "Gazing up at the sky, which was white with dust and sand from the Calima, there was something medicinal and calming about the off-white shade of colour which gave me comfort and strength. It was a far cry from the many nights of champagne and passion spent with Gareth Bull.
>
> It was sometimes so difficult when I was forced by necessity to have to retrace my steps, past the five-star hotels and villas where there had been so much intensity and electricity between us. How on Earth did I get myself into this position? How did I allow this man to have such an influence in my world and over my life! I was always so strong and so self-directed. But this relationship

> was different, the emotional, spiritual and sexual connection between us was extraordinary, almost supernatural! His charms seemed too smash straight through my firewall !! He had entered my system took control and there was nothing that I could do about it, all of my defences were down. But alas it was not always like this. In the beginning it was a very different story. I did actually once have control and management of this situation."

38. The Book then continues for another 300 or so pages, the bulk of which is about the Defendant's relationship with the Claimant. Then, in the third paragraph from the end of the final chapter the Defendant wrote:

> "You could call it envy control. In terms of his personal relationship with females, well, there were, literally, hundreds of females, throwing themselves at him through Facebook and social media, all hoping for a knight in shining armour. But alas, I fear they will all be sadly disappointed. Gareth's human responses are no longer normal. They have changed with his environment and situation. And whilst I think he would like the attention of people messaging him, and chasing him I don't think he took any of these people seriously. He just played the game with them. Plenty more where you came from. Disposable and on with the next. On turnover, as I thought from the very beginning when I met him, which is why I walked away and did not want to get involved. He was obviously going to be trouble, a nightmare. With so many desperate women, throwing themselves at him. Who needs this stress? I didn't, and I really did try and walk away. But fate intervened, and took me down a different path. Always trust your initial gut feelings in these situations."

39. I find that the Defendant's message to the Claimant contained a misleading description of what she intended to write about in the Book. It does not merely contain a 'little bit' about the Claimant. The Book is very significantly about him and his relationship with her, although I accept that there are some parts which deal with other matters, such as the Defendant's former relationships. Even on her own evidence (see [14] of her witness statement of 21 August 2018), 23 of the Book's 38 chapters deal with the relationship or feature the Claimant. However, a brief perusal shows the Claimant also features in other chapters not identified by the Defendant (eg Chapter 38, the final chapter, part of which I have quoted above). Although the Book may not have been written when she sent the message on 14 June, I find that it was, from the outset, the Defendant's intention to write a book which focussed primarily on the Claimant and her relationship with him, and that that is what she did. I also find that her decision to go to the press and to write the Book was prompted by her perception of how the Claimant had treated her. I hesitate to say that she did this out of revenge, but there is no doubt that felt that she had been wronged by him. Indeed, she expressly said so in the final sentence of her message.

40. The Claimant said in evidence that he saw this message and thought it was a hoax. He said that he did not think that the Defendant 'would be interested'. However, he also said that he saw it as a threat about his privacy.

41. On 17 June 2017 an article was published in *The Mirror* newspaper headlined:

> "My fling with married £41 million Lotto winner whose chat-up line was 'Google me ! Google me!'"

42. This article was written at the instigation of the Defendant and with her co-operation. The story was picked up by other news outlets and the information within it was re-reported many times all over the world. Because part of the Defendant's case is that all of the Information complained about in this action has lost its private character because it is in the public domain as a consequence of this article, it is necessary to summarise its contents.

43. The article reported that the Claimant had 'whisked [the Defendant] off her feet in a fling behind his wife's back' telling her to 'Google him' when she doubted he had won the lottery. (This is the explanation for the Book's title). The article said here had been a 'nine-month passionate fling' and that he had 'splashed out on her'. It said that the Claimant had been 'desperate' to keep their 'romance' from his wife. The Claimant was quoted as telling the Defendant that he and his wife were in the middle of a two-year separation and that his wife would 'use' the relationship against him if she found out. It reported how Catherine Bull had seen the Claimant and Defendant on television in the crowd at a high-profile boxing match in the UK, and that he had told his wife that he and the Defendant were just friends and that there had been 'no sex'. The article quoted the Claimant telling the Defendant that he was still married but that he and his wife had split up. It then said that after their first night out together she had stayed for two nights at his villa. She said that she knew loads of millionaires and had not been after the Claimant for his money: 'it was not the primary thing'. The Claimant told her that his wife had really hurt him and had left him twice since the Lottery win. There were further details about the Claimant and Defendant's social life during their relationship. She said he had started to worry 'about people knowing he was having an affair' and that it might cost him money. She said she was not 'an affair'. There were then details of how the relationship soured and he had ended up refusing her calls and messages. She said: 'I'm really upset, I feel used and wounded, really wounded'. The article finished by quoting 'a friend' as saying that the Claimant had moved out of the marital home. Mrs Bull was quoted as having nothing to say. The Claimant said in evidence that he had been approached by a reporter a few days before but had declined to comment.

44. On 30 August 2017 the Defendant posted the following message on Facebook (sic):

> "Legal Notice
>
> Hi everyone as many of you are aware my book is now complete and being edited, proof checked and passing through legals it is not rocket science that when you are writing a true life story it involves writing about real life people and my relationships with them consequently to avoid unnecessary issues or attempts at injunctions, (which would fail in any event as if a statement is true then it is not defamatory, no matter how offensive or embarrassing it may seem) I have been advised to publish an open statement to allow anyone that thinks their privacy maybe unduly affected by the publication of any facts in my memoirs the

> opportunity to raise a request for an edit. Obviously we do not intend to delay publication and accordingly request that any requests for non disclosure or a specific set of facts or edits to be submitted for consideration up to and including 6th September 2017. Send your request by private message to this facebook account or by email to [the Defendant's email address]"

45. The Claimant said that this 'Legal Notice' came to his attention, although he cannot now recall how. He referred the matter to his solicitors.

The publication of the Book

46. It is part of the Defendant's case that because the Claimant took no steps to prevent publication of the Book, and only sought an injunction after it had been published, therefore he consented to its publication and/or is estopped now from seeking a permanent injunction. It is accordingly necessary to set out the correspondence which ensued following this 'Legal Notice'. All quotations are as in the original.

47. On 28 September 2017 the Claimant's solicitors wrote to the Defendant that they were instructed by someone 'with whom you claim to have had a relationship' who had requested that a review be undertaken of the Book 'with specific reference to anything which may have been written about them'. They went on to request a copy of the manuscript.

48. The Defendant replied on 2 October 2017. She said that the deadline for edits had been 6 September 2017. She also said that she was 'unable to advance your request without further particularity in respect precisely whom you represent'. Although the Defendant would not accept it when I put it to her, I conclude that when she received this email she knew very well who it was that the solicitors represented.

49. On 3 October 2017 the solicitors replied saying that they represented the Claimant and they again requested a copy of the manuscript.

50. The Defendant replied the same day, saying that the deadline for edits had passed and that the Claimant had been aware of the Book since early June and had been invited to make representations but had ignored the offer. She therefore declined to supply a copy of the Book. Further she said that:

> "You may reassure your client that the factual content of this book in relation to himself, has already been published by others and is already available in the public domain worldwide."

51. The Defendant made clear to me that this assertion was a reference to the June 2017 newspaper publicity which I summarised earlier. I find that this was a misleading statement by the Defendant. As she well knew, the Information in the Book had not been published in *The Mirror* article, or in any other article. It was not in the public domain and it was not available worldwide.

52. On 4 October 2017 Matthew Talbot, the Head of the Intellectual Property team at Howes Percival, wrote to the Defendant. He requested disclosure of the Book by 8 October 2017 and said that if disclosure was not forthcoming then he was instructed 'to

take whatever steps are necessary to protect my client's privacy and reputation', including an application for pre-action disclosure and/or an injunction to prevent publication.

53. The Defendant replied the same day. She said:

> "2. As previously stated. The material facts in the book relating to your client is already public and known to the world further to publication in various national international newspapers around the world and online in June 2017. The book/extracts from it have already been published and made available online."

54. She went on in her email to query the legal basis of the putative legal challenge, and concluded by asking whether 'your client is denying the existence of the relationship we had together.' Again, I find that the Defendant's response was misleading and she must have realised that it was misleading.

55. Further correspondence between Howes Percival and the Defendant ensued, with Howes Percival requesting a copy of the Book and the Defendant declining to provide one. On 5 October 2017 she wrote:

> "2. You have requested full disclosure of my book in electronic form doing so at a very, very late stage, and in any event after material facts in relation to your client and myself, have already been published both Nationally and internationally, together with extracts of the book online. Your client having previously been invited to provide representation in personal through his elected legal adviser from as early as June 2017, and again in August 2017, these invitations were all ignored.
>
> …
>
> 4. Further to the above, I can confirm that it is physically impossible for me to supply with the full manuscript within those timelines stated, attached is an element of the book pertaining to your client which is currently available electronically online."

56. For the reasons already given this was the third misleading statement by the Defendant.

57. The 'element of the book' which the Defendant referred to was a one page extract in which she described how she and the Claimant had been at the Hard Rock Hotel in Tenerife enjoying a drink by the pool when he spotted a couple from Mansfield who were friends of his and his wife's. According to the Defendant, the Claimant became very anxious about being seen with her, and she asked him whether he had been lying about being separated from his wife and whether she was 'an affair'. He denied both matters. The passage which the Defendant supplied did not contain any of the information which the Claimant complains about. Although it mentioned the Claimant, it was not representative of the sort of intimate details which the Claimant had included in the Book.

58. On 1 December 2017 Howes Percival sent the Defendant a letter before action. By then the Book had been published as an ebook via Amazon's Kindle Store and the Claimant had obtained a copy and read it. The letter complained that 'The Work contains a great deal of information, both real and fictitious, about our client's private and family life'. The letter complained in particular about five categories of private information in the Book; these have since been refined into four categories for the purposes of this claim. The letter demanded *inter alia* that the Book be withdrawn from sale.

59. The Defendant replied on 2 December 2017. She contended *inter alia* that:

> "… your client has been deceptive about his conduct and used the tools of deceit, and thus consequently it is in the public interest for the real truth to be disclosed."

60. Howes Percival replied on 13 December 2017. They informed the Defendant that they would shortly be applying for an interim injunction and they supplied particulars of the pages complained of from the ebook edition. By then the Book had also been published in paperback. This was identical to the ebook version save that the page numbering was slightly different. This was also sold by Amazon.

61. On 20 December 2017 His Honour Judge Moloney QC (sitting as a judge of the High Court) granted the INDO and a reporting restriction order following an *inter partes* hearing at which the Defendant represented herself. Except in the circumstances specified, the injunction restrained the Defendant *inter alia* from publishing or communicating or disclosing any information or purported information contained in the Book or similar information concerning physical details of the sexual relationship between the Claimant and the Defendant; the Claimant's relationship with and divorce from his former wife; the Claimant's children; and the physical health of the Claimant. It provided, for the avoidance of doubt, that the further publication by or on behalf of the Defendant of the Book would be in breach of the injunction insofar as it contained any of the prohibited information.

62. On 3 January 2018 the Defendant published a 'redacted' version of the Book as an ebook and in paperback form. The redactions were not sophisticated. The Defendant merely changed the Claimant's name to 'Gary Ball' and the names of his ex-wife to 'Claire' and his eldest son to 'James'. I note that the initials of the substituted names match those of the Claimant and his wife and son, and I conclude that that was done deliberately by the Defendant. The Information was still included. It is obvious that any reader of the redacted version could, with a few clicks on Google, discover that the £41 million lottery winner Gary Ball described by the Defendant was, in fact, the Claimant, Gareth Bull.

63. The redacted version was sold by Amazon but, as a result of letters sent by the Claimant's solicitors, it was withdrawn from sale.

64. The Defendant then published what she called the 'USA Edition' of the Book. Despite its name, it was published in this jurisdiction and could be purchased here. In this version the Defendant replaced 'Gary Ball' with 'John Smith'. The Information

was still included and, for the reasons I have already given, the Claimant was still readily identifiable.

Claim for copyright infringement

65. I turn to the Photographs and to the evidence concerning the Claimant's claim for copyright infringement. The claim involves the Photographs which were included in the initial hardcopy edition of the Book but not in the redacted version or the USA Edition. They consist of a photograph of a fireplace and three photographs of the Claimant.

66. The Claimant's evidence is that the fireplace photograph is of his home in Mansfield that he rented following his separation from his wife. He says he took it in October 2016 and sent it to the Defendant by Facebook Messenger in December 2016. He says the three photographs of himself were 'selfies' taken on his mobile phone at various places in December 2016 (two photographs) and January 2017 respectively, and that they were sent to the Defendant by Facebook Messenger around the time they were taken. He says that the Photographs were sent as part of private conversations with the Defendant and that he never gave her permission to use the Photographs or publish them. In his oral evidence he said if the Defendant had asked whether she could use them he would have refused.

67. The Defendant's evidence is that the Claimant gifted her the Photographs without any restriction on their use. She also suggested to the Claimant in cross-examination that the Photographs had been posted to his Facebook 'wall' (ie, published and available for viewing by his Facebook 'friends'), and that the fireplace photograph had been taken by someone else.

68. I accept the Claimant's evidence that he took the Photographs and sent them to the Defendant during private Messenger conversations. I find that he did not give her permission to use them, and I find that no such permission can be inferred from the circumstances in which they were sent, namely, private social media conversations between two people involved in an intimate sexual relationship.

The Defendant's proposed witnesses

69. During the trial the Defendant sought leave to call two witnesses namely Liz Nicholls, a winners' advisor with the lottery operator Camelot, and the Claimant's ex-wife Catherine Bull. She said Ms Nicholls could speak to the publicity surrounding the Claimant's lottery win in 2012 and that there was a public interest in her giving evidence because public money was involved. She wished to call Mrs Bull in order 'to clarify the true nature of what was going on' in her marriage to the Claimant, as the Defendant put it.

70. Mr Bennett objected *inter alia* on the grounds that no witness statement or witness summary had been served for either witness and hence, by CPR r 32.10, neither witness could be called to give oral evidence without my permission. As to that, he pointed out that witness statements were to have been served by 22 August 2018 and that because the Defendant had not advanced any reason why she was not able to comply with that deadline, there was no good reason why the Defendant should be granted relief from sanctions on the *Mitchell/Denton* principles (see *Mitchell v News Group Newspapers*

Ltd (Practice Note) [2014] 1 WLR 795 and *Denton v TH White Ltd (Practice Note)* [2014] 1 WLR 3926)). He also said that there was no issue about the publicity surrounding the Claimant's lottery win, and that he could be cross-examined about it, and that it would be intrusive for Mrs Bull to be called given the nature of the real issues in the case.

71. I refused the Defendant's application primarily for the reasons advanced by Mr Bennett. Also, it seemed to me that neither witness could have anything relevant to say, given the nature of the issues in the action.

Legal principles

72. I turn to the relevant legal principles. They are not controversial.

Misuse of private information

73. Article 8 of the Convention provides:

> "*Right to respect for private and family life*
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

74. Article 10 provides:

> *"Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

> disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

75. Where a court is considering a claim for misuse of private information it has to decide two issues, which should be kept separate. In *McKennitt v Ash* [2008] QB 73, [11] the two issues were described in the following terms:

> "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 ?"

76. In *Murray v Express Newspapers Limited* [2009] Ch 481, [35]-[36] Sir Anthony Clarke MR explained the first question in the following way

> "35 … The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell v MGN Ltd*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said, at para 99: "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.
>
> 36. As we see it, the question whether there is a reasonable expectation of privacy 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."

77. If this question is answered positively then the court has to go on to consider the second question. This requires the application of Article 8(2), and when freedom of expression is involved (as it is in this case, because the alleged misuse arose as a consequence of the publication of a book), the court must undertake a balancing exercise to decide whether in all the circumstances the interests of the owner of the private information (in this case, the Claimant) must yield to the right to freedom of expression conferred on the publisher (in this case, the Defendant) by Article 10.

78. How this balancing exercise is to be carried has been explained in a number of cases. In *Re S (A Child)* [2005] 1 AC 539, [17], Lord Steyn said:

> "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."

79. In *PJS v News Group Newspapers* [2016] AC 1081, [20], Lord Mance summarised the relevant principles as follows:

> "(i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see eg *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, per Lord Steyn, with whom all other members of the House agreed; *McKennitt v Ash* [2008] QB 73, para 47, per Buxton LJ, with whom the other members of the court agreed; and *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) at [28] per Eady J, describing this as a 'very well established' methodology. The exercise of balancing article 8 and article 10 rights has been described as 'analogous to the exercise of a discretion': *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 at [8]."

80. Also of assistance is Baroness Hale's analysis in *Campbell,* supra, at [140]-[141], where she explained that when two Convention rights are in play 'the proportionality of interfering with one has to be balanced against the proportionality of restricting the other.' This involves:

> "… looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each."

81. In conducting this balancing exercise, it is clear that it is not sufficient simply to consider whether publication is in 'the public interest' in some general sense. I must balance the public interest in favour of publication against the public interest in maintaining the right to privacy by reference to the specific facts in question and the nature of the public interest said to justify publication.

82. The vast majority of the passages which the Claimant complains of in this case concern alleged sexual activity with the Defendant. The cases show that where the publication concerns details of an individual's private sex life then there is little or no public interest in publication.

83. In *Mosley v United Kingdom* [2012] EMLR 1, [114], the European Court of Human Rights reiterated that:

> "…there is a distinction to be drawn between reporting facts—even if controversial—capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life (see *Armonienė*, para 39). In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life: *Von Hannover v Germany* (2004) 40 EHRR 1, para 65; *Hachette Filipacchi Associés (ICI PARIS) v France* (Application No 12268/03) (unreported) given 23 July 2009, para 40; and *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, para 143. Such reporting does not attract the robust protection of article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation: see *Société Prisma Presse v France* (Application Nos 66910/01 and 71612/01) (unreported) 1 July 2003; *Von Hannover*, cited above, para 66; *Leempoel & SA Ed Ciné Revue v Belgium* (Application No 64772/01) (unreported), given 9 November 2006, para 77; *Hachette Filipacchi Associés (ICI PARIS)*, cited above, para 40; and *MGN Ltd*, cited above, para 143."

84. In *Couderc v France* [2016] EMLR 19, the Court said, at [100]-[101]:

> "100. The court has also emphasised on numerous occasions that, although the public has a right to be informed, and this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well known that person might be, cannot be deemed to contribute to any debate of general interest to society: see *Von Hannover*, cited above, para 65; *MGN Ltd v United Kingdom* (2011) 53 EHRR 5, para 143 and *Alkaya v Turkey* (Application No 42811/06) (unreported) given 9 October 2012, para 35."
>
> 101. Thus, an article about the alleged extra-marital relationships of high-profile public figures who were senior state officials contributed only to the propagation of rumours, serving merely to satisfy the curiosity of a certain readership: see *Standard Verlags GmbH v Austria (No 2)* (Application No 21277/05) (unreported) given 4 June 2009, para 52. Equally, the publication of photographs showing scenes from the daily life of a princess who

> exercised no official functions was aimed merely at satisfying the curiosity of a particular readership: see *Von Hannover*, cited above, para 65, with further references. The court reiterates in this connection that the public interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism."

85. *PJS*, supra, concerned an injunction restraining alleged private sexual activity by two well-known persons in the entertainment business. Having set out the passages quoted at [82] and [83], Lord Mance concluded at [24]:

> "In these circumstances, it may be that the mere reporting of sexual encounters of someone like the claimant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under article 10 at all. But, accepting that article 10 is not only engaged but capable in principle of protecting any form of expression, these cases clearly demonstrate that this type of expression is at the bottom end of the spectrum of importance (compared, for example, with freedom of political speech or a case of conduct bearing on the performance of a public office). For present purposes, any public interest in publishing such criticism must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of outweighing such article 8 privacy rights as the claimant enjoys."

86. I turn to the issue of truth and falsity. As I have said, there is a dispute between the parties as to precisely what occurred during their relationship. The Claimant denies the truth and/or accuracy of a lot of the Book including (but not limited to) some or all of the passages complained of, in particular those in Category (a). For example, as well as saying that the acts of sexual intercourse between him and the Defendant were far less frequent than she alleges, and that he does not recognise her depiction of them, he also says that some of the dialogue ascribed to him on other occasions has been made up by the Defendant in order to convey a depth of emotion between them which in his view was not present.

87. The truth or otherwise of allegedly private material is not relevant in a claim for its alleged misuse. What matters is whether there is a reasonable expectation of privacy in the information complained of, whether true or false. This was made clear by Longmore LJ in *McKennitt*, supra, [86]:

> "The question in a case of misuse of private information is whether the information is private, not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry."

88. More recently, in *Cooper v Turrell* [2011] EWHC 3269 (QB), [102], Tugendhat J said:

> "Damages for defamation are a remedy to vindicate a claimant's reputation from the damage done by the publication of false statements. Damages for misuse of private information are to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false."

89. Drawing these threads together, in relation to the claim for misuse of private information, the principles which apply are as follows:

    a. I first have to decide whether there is a reasonable expectation of privacy in relation to the information in question. This is to be assessed objectively. The question is what a reasonable person of ordinary sensibilities would feel if s/he was placed in the same position as the Claimant and faced with the same publicity. If that question is answered negatively, then the claim fails in relation to that information. In considering this I must also consider the Defendant's argument that any such reasonable expectation was lost by the Claimant's consent to publication or by the fact (she says) the material was in the public domain at the time the Book was published. If it is answered positively then I must go on to consider the next issue.

    b. In relation to the information in question, I must undertake a balancing exercise to decide whether in all the circumstances the interests of the owner of the private information (in this case, the Claimant) must yield to the right to freedom of expression conferred on the publisher (in this case, the Defendant) by Article 10.

    c. In conducting that balancing exercise, where the information concerns private sexual activity, the right to this type of expression is at the bottom end of the spectrum of importance of issues protected by Article 10 and any public interest in publishing such criticism must, in the absence of any other, legally recognised, public interest, be effectively disregarded in any balancing exercise and is incapable by itself of outweighing such Article 8 privacy rights as the Claimant enjoys.

    d. The truth or falsity of the information in question is irrelevant to whether it is private, but it may be relevant in the public interest balancing exercise.

Copyright infringement

90. Copyright is a property right which subsists in, among other things, an original artistic work: s 1(1)(a) of the Copyright, Designs and Patents Act 1988. A photograph is an original artistic work irrespective of any artistic quality: s 4(1)(a).

91. In his capacity as the photographer, the Claimant is the first owner of the photograph: s11(1). As the owner of the copyright, the Claimant has the exclusive right to issue copies of the work to the public: s16(1)(b). The issue to the public of copies of the Photographs is restricted: s18(1).

Discussion

The claim for misuse of private information

(i) Is there a reasonable expectation of privacy in relation to the four categories of Information ?

92. I begin with Category (a), namely details of the sexual relationship between the Claimant and the Defendant.

93. In his evidence the Claimant described the Book as being partly 'soft core porn'. The Defendant strongly objected to that characterisation. I accept that the passages of the Book relating to sex between the parties were not written for the primary purpose of inducing sexual excitement in the reader, which is the hallmark of pornography. However, there is no doubt that the many of the passages could be described as graphic, if not explicit.

94. There are numerous cases which establish both that sexual behaviour is an aspect of private life and that it is high on the list of matters protected by Article 8. In one such case, *Mosley v News Group Newspapers Limited* [2008] EWHC 1777 (QB), [98]-[100], Eady J said:

> "98. In deciding whether there was at stage one a reasonable expectation of privacy generalisations are perhaps best avoided, just as at stage two, and the question must be addressed in the light of all the circumstances of the particular case: see e.g. *Murray v Big Pictures* [2008] EWCA Civ 446 at [35]-[39]. Nevertheless, one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults (paid or unpaid).
>
> 99. There is now a considerable body of jurisprudence in Strasbourg and elsewhere which recognises that sexual activity engages the rights protected by Article 8. As was noted long ago in *Dudgeon v UK* (1981) 4 EHRR 149, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of Article 8(2) because sexual behaviour 'concerns a most intimate aspect of private life'. That case concerned the criminal law in the context of buggery and gross indecency (in Northern Ireland). It was said at [60] that Article 8 rights protect in this respect 'an essentially private materialisation of the human personality'.
>
> 100. There are many statements to similar effect, the more lofty of which do not necessarily withstand rigorous

> analysis. The precise meaning is not always apparent. Nevertheless, the underlying sentiments are readily understood in everyday language; namely, that people's sex lives are to be regarded as essentially their own business – provided at least that the participants are genuinely consenting adults and there is no question of exploiting the young or vulnerable."

95. In *Contostavlos v Mendahun* [2012] EWHC 850 (QB), [25], Tugendhat J said at [25]:

> "Details of a person's sexual life have thus been recognised for very many years as high on the list of matters which may be protected by non-disclosure orders."

96. Hence, there is no doubt that the Claimant has a reasonable expectation of privacy in relation to all of the passages falling within Category (a). Whether they are true or false (and, as I have said, that is not a relevant consideration) they contain deeply personal and intimate information concerning the Claimant's sex life with the Defendant.

97. I can take Category (b), (the Claimant's relationship with, and divorce from, his former wife, Catherine Bull) and Category (c) (the Claimant's children) together because they both relate to aspects of family life.

98. Details of a family's lifestyle within a household, and in particular the circumstances of a child's upbringing, are capable of falling within Article 8 and carry a reasonable expectation of privacy. In *A Local Authority v A Mother* [2011] EWHC 1764 (Fam), [64], Baker J said:

> "… the lifestyle within the household, and the circumstances in which the children were being brought up, are clearly aspects of family life which in most cases are kept shielded from public gaze."

99. The matters complained of falling within Categories (b) and (c) plainly carry a reasonable expectation of privacy on the part of the Claimant. A reasonable person of ordinary sensibilities placed in the same position as the Claimant and faced with the same publicity would expect that the information sought to be published would remain private. The information concerns his separation and break-up from his wife of many years, and the mother of his children, and it was confided to someone with whom he was in an intimate relationship on terms which plainly indicated he was speaking to her confidentially. The information contains intimate details in relation to the breakdown of his relationship and his feelings about it, the progress of the divorce (including financial matters) and the arrangements he and his wife were making at the time for the care and upbringing of their children. I consider that the last thing which the notional reasonable person would have expected is that this information would be published to the world, with the resulting embarrassment and distress for the Claimant and for his children.

100. Finally, I turn to Category (d) (the physical health of the Claimant). There is only a single passage in this category.

101. There is ample Strasbourg authority for the proposition that the privacy of information about health lies at the heart of the protection afforded by Article 8: see eg *Z v Finland* (1998) 25 EHRR 371, [95]:

> "95. In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (art. 8). Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general …"

102. It is beyond argument that the Claimant has a reasonable expectation of privacy in relation to the matters referred in the passage complained of. It is right to note that he denied in evidence having any such health issues, but as I have said that enquiry is not relevant to the claim in issue. This information is plainly private.

(ii) Has the Claimant lost his reasonable expectation of privacy by reason of him having consented to publication of the Information, or because the Information is in the public domain ?

103. I reject the Defendant's arguments that the Claimant consented to publication, so that his reasonable expectation of privacy about the Information has been lost. A defence of consent would require there to have been informed consent to the publication of the Information. *Tugendhat and Christie*, The Law of Privacy and the Media (3rd Edn), [11.10] states:

> "The general rule is that consent will only be established where the claimant agreed to the publication of substantially the same matter as was in fact published."

104. Hence, in my judgment Mr Bennett was right in his submission the defence of consent is unsustainable in this case because the Claimant did not know what the Defendant was going to publish and did not give blanket consent to the publication of any of his private information.

105. The starting point is the Defendant's Facebook message to the Claimant of 14 June 2017 in which she said the Book was only going to be 'a little bit' about the Claimant. As I have already found, that message was misleading, intentionally or otherwise. The Defendant's misleading of the Claimant about the Book's subject matter does not provide a firm basis for her argument that he consented to its publication.

106. The Defendant asserts in her witness statement of 21 August 2018 that because the Claimant did not try to prevent the publication of the story published by *The Mirror* and

chose not to deny the story when it was put to him prior to publication, this means that gave the Defendant permission to publish (or she was entitled to assume that he would not sue her if she did). She also argues that because the Claimant knew that the Defendant was going to publish a Book from June 2017 onwards but did not try to prevent her from doing so (at least until the application for the INDO on 20 December 2017), he consented/acquiesced to publication of the Information. She points in particular to a letter from the Claimant's solicitors of 27 October 2017 in which they indicated they would wait for publication but reserved the Claimant's rights to seek relief once they had seen the Book ('… take such action as appropriate when he is aware of the content') .

107. It seems to me that these matters do not take the Defendant's case much further forward. The fact is that *The Mirror* did not publish any of the Information. Its focus was on the *fact* of the relationship between the Claimant and the Defendant and not the *detail* of what occurred between them, and it is the latter which the Claimant complains of. The bare fact of a sexual relationship between two persons, certainly if carried out in public, does not raise the same privacy issues as intimate details of sexual activity do, as I shall explain later.

108. As to what the Claimant did or did not do after June 2017, the communications that I have set out show that through his solicitors the Claimant was actively trying to ascertain whether the Defendant was going to publish his private information. In the face of her refusal to provide an advance copy of the Book, I consider that he had no choice but to take action only after publication (ie, after he knew that his private information had been published). I also accept the Claimant's evidence that he received legal advice and took a considered decision not to pursue an application for disclosure. I accept Mr Bennett's submission that an application for pre-action disclosure of the manuscript would very likely not have succeeded (cf *Leary v British Broadcasting Corporation*, Unreported, 29 September 1989 (CA)). Certainly, I do not consider that the Claimant can be taken to have consented to publication because he did not make such an application. This conclusion is reinforced by the fact, as I have already found, that the Defendant misled the Claimant three times (once in June and twice in correspondence with his solicitors) as to what was in the Book when she said it was only a 'little bit' about the Claimant and only contained material in the public domain, when she knew neither of those matters was or would be true.

109. I therefore reject the Defendant's consent defence.

110. As to the Defendant's public domain defence, I have already found that the Information had not been included in the press reporting about the relationship before publication of the Book in November 2017 and that it was not therefore in the public domain. It had not therefore lost its private character for that reason.

111. I will consider the Defendant's public domain defence post-publication of the Book when I come to consider the question of a permanent injunction. As *PJS*, supra, makes clear, the extent of widespread post-publication reporting of private information goes to the question of whether an injunction should be granted.

(iii) The balancing exercise

112. I turn to the second of the *McKennitt*, supra, questions. I must decide whether in all the circumstances the interests of the owner of the private information (in this case, the Claimant) must yield to the right to freedom of expression conferred on the publisher (in this case, the Defendant) by Article 10. I have already set out the methodology involved in determining this issue.

113. The starting point is the recognition that the private information in question ranks highly in the hierarchy of protection afforded by Article 8. I have cited the relevant case law concerning sexual relations and health matters which make good this principle. The impact on the Claimant's children of the revelations about their father's sex life at a time when he was still married to their mother is also something to which great weight must be attached. In *K v News Group Newspapers Ltd* [2011] 1 WLR 1827 the Claimant sought to prevent the publication of information concerning an extra-marital affair. Ward LJ held that weight was to be given to the rights of his children ([14]). It would be inevitable that the children would be harmed by disclosure because it would 'undermine the family as a whole and expose them to playground ridicule' ([17]).

114. Similarly, in *PJS*, supra, the Supreme Court found the interests of PJS' children were an important factor in deciding to continue the interim injunction. At [72-74] Lady Hale made clear that although not 'a trump card' the privacy rights of the children deserved close attention:

> "… not only are the children's interests likely to be affected by a breach of the privacy interests of their parents, but the children have independent privacy interests of their own."

115. She said, looking beyond the interim injunction application:

> "… at trial, the court will have to consider carefully the nature and extent of the likely harm to the children's interests which will result in the short, medium and longer terms from the publication of this information about one of their parents." [73].

116. In the present case the Claimant has set out evidence about the impact the Book has already had on his children, and his fears of the further harm which might ensue if publication of the Information is not restrained. In [22]-[23] of his 15 December 2017 witness statement he said:

> "22. Since the Publication, I have been trying to avoid people as much as possible because I am deeply embarrassed about the Publication and do want to draw any attention to it or myself. I am spending as much time as possible away from the United Kingdom and my wider circle of friends at the moment in order to avoid speaking to people about the book.
>
> 23.Since the Publication, I have spent a lot of time reassuring anyone who asks me about the Publication that it is mainly made up. I know that my eldest son (who is 16 years old) is particularly affected by the Publication and that he sometimes looks up the Respondent on Facebook. I do not know whether

> he has read the Publication yet, although he has not told me if he has. I do not want him, or my younger son who is (who is 14 years old) to read such intimate details of the supposed sex life of their father. Nor would I wish their friends to get hold of the book, as that could well lead to embarrassment and teasing for my children. Nor should, I believe, the boys have to suffer the disclosure of the way in which their parents' marriage was breaking up during the period in question, and how my former wife and I were looking after then at that difficult time."

117. At [24] he also sets out the adverse effects which the Book's publication has had for him personally in terms of his mental health.

118. In his Fourth Witness Statement of 22 August 2018 the Claimant referred to an email which his wife sent him on 18 November 2017 shortly after the Book was published:

> "I've got Joel at home in a really bad way. He's had a bit of a breakdown because he's just found out about Donnas book being out. It's been released days but he's looked on fb profile tonight and seen it for himself. He's absolutely broken. He gone too bed now but I thought you should know being his dad.
>
> I've read the first three chapters and its heartbreaking, I'll do what I can to make sure he doesn't read it bit he's been at debdale drinking today and is threatening to kill her and all sorts.
>
> Joel is our child and he needs us both at the moment as he's really struggling with his life. Please please put him first as I don't want us to be the next Rob Cooke !! [who apparently was a pupil who committed suicide] I'm not exaggerating either, the boy has been crippled tonight.
>
> Please put our differences aside for the sake of Joel. He's been through enough. This isn't about us Donna etc it's about Joel and he's struggling with all aspects of his life and I'm worried sick and he needs us."

119. Overall, I consider that publication of the Information represents a serious infringement of the Claimant's Article 8 rights and those of his ex-wife and children. That is by reason of the nature of the information in question, and also the level of detail contained within the Information. I find that even its limited publication to date has caused serious distress and harm to the Claimant and at least one of his children.

120. I turn to the asserted public interest in publishing the Information and the restriction on the Defendant's Article 10 rights.

121. The starting point is that, as I have already said, there is no legally cognisable public interest in the Defendant writing about her sexual relationship with the Claimant. That was made expressly clear in *PJS*, supra, at [24]. Thus, any public interest in publishing such criticism must, in the absence of any other, legally recognised, public interest, be

effectively disregarded in any balancing exercise and is incapable by itself of outweighing the Article 8 privacy rights which the Claimant enjoys.

122. Earlier, at [15] Lord Mance referred to the part of the Court of Appeal's judgment which referred to 'kiss and tell' stories in the following terms:

> "15 The Court of Appeal went on to identify the well-established principle that 'kiss and tell' stories which do no more than satisfy readers' curiosity about the private lives of other persons, however well known to the public, do not serve any legally recognised public interest: see eg *Couderc v France* [2016] EMLR 19 , paras 100–101 and *Axel Springer AG v Germany* [2012] EMLR 15 , para 91. The Supreme Court will revert to this principle in paras 22–25 below."

123. Hence, in order to establish a public interest, the Defendant must rely on something other than the sexual behaviour of the Claimant, albeit that she claims that it took place in the course of a relationship in which she was wronged by him.

124. The Defendant relies on the supposed need to 'set the record' straight about what happened between her and the Claimant and also to rebut defamatory allegations made against her.

125. Her case in summary is that by reason of the evidence put forward by the Claimant in this litigation (after the Book's publication), she needs to set the record straight to contradict some of what was said in a letter sent to the Defendant by his solicitors and in his witness evidence about the relationship. Also, she says that by reason of alleged statements made by the Claimant to a handful of third parties (including his wife), a book published to the world at large is required to set the record straight. She claims that these statements in combination have made her look like (in her words) a 'whore' and a 'gold-digger' and she should be entitled to show by writing the Book that this is not the case.

126. In my judgment neither strand of this argument provides any basis for concluding that there is a legally cognisable public interest which requires the publication of the Information. Even if such an argument is capable of engaging the public interest in a legally cognisable way (which I assume but do not decide), the Defendant's case fails on the facts.

127. From [6] to [24] of her witness statement of 21 August 2018 the Defendant set out a narrative of her relationship with the Claimant. She contended that in his witness evidence the Claimant wrongly portrayed their relationship as being solely sexual whereas there was also a romantic element. Therefore, her case is that she needs to set the record straight and needs to tell the truth in order to defend herself against being slandered. This argument is flawed because the portrayal of the relationship by the Claimant which the Defendant objects to was made *in this claim*, not prior to the publication of the Book. The Claimant's First Witness Statement was signed on 15 December 2017 and deployed in court on 20 December 2017 at the application for the INDO, ie, after the Book had been written and published.

128. Hence, the Claimant's claim is a reaction to the publication of the Book, not the other way around. It was not until the Claimant saw a copy of the Book, that he was prompted to apply for an interim injunction. At the time she published the Book, this so-called record did not exist to straighten.

129. As to the second aspect of the Defendant's argument, I have already found that the Claimant did not make false statements about the Defendant or portray her in the way that she believes that she had been portrayed, or that the Claimant deceived the Defendant about the state of his marriage in late 2016 and early 2017.

130. The Defendant's case therefore fails on the facts.

131. But it is also flawed because, as Mr Bennett points out, the Claimant is not trying to prevent the Defendant from writing a book making clear that while it lasted, their relationship was (as I have found) a sexual one based on mutual feelings of romantic affection and that it was not as she feels the Claimant has characterised it. The Claimant does not agree it was as intense as she asserts, and to him it was more casual. But he accepts that he cannot properly prevent the publication of a book asserting that they had a sexual relationship. I think he is right to accept that on the facts of this case. The mere fact of a sexual relationship between two people may or may not, depending on the facts, carry a reasonable expectation of privacy: cf *Goodwin v News Groups Newspapers Ltd* [2011] EWHC 1437 (QB), [9], [102]. In this case the relationship was conducted openly and a court would, in my view, be unlikely to hold that the mere fact of it attracted an expectation of privacy (as opposed to the intimate details of what went on in private during the relationship). What the Claimant is seeking to do is to prevent her from writing such a book which includes intimate, private and personal information which violates the Article 8 rights of him and his ex-wife and children. The public interest which the Defendant says is served by the publication of the Book could be equally well-served by a book focussing on the romantic aspects of her relationship with the Claimant but which does not include this intimate and private information.

132. I have so far focussed on Category (a). I can see no conceivable public interest argument in favour of the publication of the other three categories of private information.

(v) Misuse of private information: conclusion

133. In my judgment the balancing exercise in this case plainly comes down in the Claimant's favour. Publication of the Information has caused and will cause a violation of his and his family's Article 8 rights with serious harm and distress as a consequence. The nature of the rights involved (relating as they do to sexual relations, family and child matters, and health) are particularly worthy of protection On the other hand there is very little, or no, public interest in the publication of Information. Put another way, it would be a more disproportionate infringement of the Claimant's (and his family's) Article 8 rights to allow publication than it would be to restrict the Defendant's right to publish under Article 10.

134. The Claimant's claim for misuse of private information therefore succeeds.

The claim of copyright infringement

(i) Discussion and conclusion

135. I have already found as a fact that the Claimant took the Photographs in question and sent them to the Defendant in circumstances which did not amount to a grant by him of permission to publish them to the world. It follows that the claim for copyright infringement succeeds.

Remedies

136. In respect of both causes of action the Claimant seeks (*inter alia*) damages and a permanent injunction. I will consider each separately.

Misuse of private information

137. I begin with the question of damages.

138. The leading authority on the assessment of damages in privacy claims is *Gulati and others v Mirror Group Newspaper* [2016] FSR 12, [108] *et seq* which concerned widespread phone hacking and the publication of private material in newspaper articles obtained from that hacking. In a lengthy judgment in which he reviewed much authority, Mann J held that damages in privacy claims could be awarded for distress and injury to feelings and also for the victim's loss of privacy or autonomy caused by the misuse of their private information (see at [111], [113], [134] and [168]).

139. In this case, the Claimant claims damages under both of these heads. He also claims aggravated damages by those actions of the Defendant which were not caused directly by the wrongdoing, including what he says was the breach of the INDO by the Defendant in the form of the Redacted and USA Versions of the Book.

140. In *Gulati*, supra, at [170] *et seq* earlier awards of damages in breach of privacy cases were considered by Mann J. They range from the low thousands (eg *Cornelius v Taranto* [2001] EMLR 329) to £60,000 (*Mosley*, supra, where the judge said that Mr Mosley's life had been 'ruined' by the publication of articles and photographs about his sadomasochistic activities at a sex party). The sums which Mann J awarded by way of damages in *Gulati* itself ran, in some cases, to the hundreds of thousands of pounds (see eg [364] where the claimant Robert Ashworth was awarded £201,250). However, Mann J explained at [184(iii)] that the scale of the invasion of privacy in those cases was much more serious ('on a grand scale') than in any of the earlier cases he considered.

141. In determining the appropriate level of quantum, I have taken the following particular matters into account.

142. First, publication has caused the Claimant considerable distress both directly, as a consequence of the Information relating to him, and also indirectly because of the effect it has had on his family.

143. Second, the nature of the private information involved is, as I have said, at or towards the top end of the scale in terms of the protection to be afforded to it under Article 8. Also, a considerable quantity of information is contained in the 36 passages.

Overall, there has been quite a serious invasion of the Claimant's privacy and personal autonomy. The principles set out by Mann J in *Gulati*, supra, at [229] are relevant here. There, he said, 'The subject matter of the disclosure is not a rigid guide to the amount of compensation. However certain types of information are likely to be more significant than others.'

144. On the other hand, publication of the Information has been quite limited. I will address this further in relation to the claim for injunctive relief, but in summary there have been hardcopy sales of the books of around 100 or so copies, and some ecopies, although the figure cannot be precisely determined.

145. In my judgment, the appropriate figure by way of damages for the misuse by the Defendant of the Claimant's private information is £10000.

146. I turn to aggravated damages. The relevant principles were set out in *Gulati*¸ supra, at [204] et seq. These are as follows. Aggravated damages are compensatory in their nature. They are not punitive. They may be given where the conduct of the defendant has increased the loss beyond that which would have existed in the absence of that conduct. Lord Reid put it thus in *Broome v Cassell (No 1)* [1972] AC 1072 at 1085:

> "It has long been recognised that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a highhanded, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation."

147. The topic was reviewed by Underhill J in *Commissioner of Police for the Metropolis v Shaw* [2012] ICR 464, which establishes the following points:

a. Aggravated damages are compensatory, not punitive.

b. They are, at least usually, an aspect of injury to feelings. The aggravating factors cause greater hurt, and thus increase the damages.

c. There are typically three aspects of conduct of the defendant which are capable of triggering an aggravated damages award - the manner in which the wrong was committed, motive and subsequent conduct.

d. The third of those factors can include the manner in which the trial (and *a fortiori* the litigation as a whole) is conducted by the defendant.

e. A separate figure for aggravated damages can be given; or it can be wrapped up in one overall figure. Underhill J tended to favour the latter course.

148. In *Gulati*, supra, at [206] Mann J added that the amount of aggravated damages is a matter for the court assessing general damages. There is no conventional award. It is conceptually possible for aggravation to double the non-aggravated damage, though in Mann J's view that was likely to be rare.

149. Part of the Claimant's case is that he ought to be awarded aggravated damages because the Defendant flouted the INDO made on 20 December 2017. He relies on the following points, all of which I am satisfied are correct.

150. He relies on the fact that after the INDO the Defendant published the Redacted Version. This involved the Defendant merely changing the name Gareth Bull to Gary Ball and the names of the Claimant's wife and sons. The Claimant's Photographs were removed. In all other respects, the Book remained unchanged and the Claimant was still readily identifiable because 'Gary Ball' was still described as having won over £40 million on the European Lottery because the Defendant had already been widely identified as having had a relationship with the Claimant by *The Mirror* and MailOnline.

151. Following complaints made on the Claimant's behalf that he was still being identified and therefore the Information was still being published, the Defendant then published a further amended version (sometimes called the 'USA Edition' although it was published in the jurisdiction). The only change to the Redacted Version was to refer to the Claimant as 'John Smith'. Everything else remained the same. For reasons I have given the Claimant remained identifiable. Furthermore, the web page which advertised the US Edition showed a photograph of the Claimant with the Defendant.

152. In my judgment, these matters justify an award of aggravated damages. The Defendant well understood what she was doing and that it was in breach of the INDO. She acted as she did in order to continue to sell the Book containing the Information and so to benefit economically. On the other hand, as I will explain below, the actual number of copies of the Book sold following the INDO was modest.

153. I assess aggravated damages in the sum of £2500.

Injunction

154. I turn to the question whether I should grant a permanent injunction to restrain publication of the Information.

155. I have concluded that there is a reasonable expectation of privacy in regard to the Information and that the Defendant's Article 10 rights do not outweigh the Claimant's Article 8 rights. Mr Bennett therefore submits that because there is a risk of further publication of the Information, a permanent injunction ought to be granted.

156. I am satisfied that this is a proper case for the grant of a permanent injunction to restrain publication of the Information. That is because, firstly, damages would plainly not be an adequate remedy for the violation of the Claimant's Article 8 rights. Also, secondly, it is plain from her evidence that unless an injunction is granted, the Defendant will seek to publish the Information very widely including by having television adaptations made of the work: see her witness statement of 21 August 2018, [69] – [70], where she refers to having had the Book published by an American publisher, Lulu, *after* the INDO had been granted on 20 December 2017. There are also emails in the bundles from March 2018 between the Defendant and publishers in which she offers to email a copy of the Book to them.

157. The Defendant argues that the Information is in the public domain as a consequence of the Book's publication in its various editions and so no permanent injunction should be granted. She asserted at [67] of her witness statement of 21 August 2018 that:

> "Prior to the book being withdrawn from sale the e-book had been purchased or borrow (*sic*) through Amazon's book club over five thousand times, in December 2017 with over 100 copies of the book paperback being sold as such the book was and still is already classed as being in the public domain, as such the information the claimant is seeking to still injunct and call private, was not and is not private information. One can not claim misuse of private information for information that is no longer private so on that basis it is also contended that the claimant is not entitled to the continuation of the said interim injunction"

158. Before turning to the evidence about the Book's sales, I need to consider to the relevant legal principles. *PJS*, supra, considered the operation of the public domain argument made by the Defendant. In that case, the identity of the claimants (both of whom were famous) was readily capable of discovery through various media and social media channels outside of England and Wales, including through the internet accessed from England and Wales. One issue before the Supreme Court was whether an injunction should be refused on that basis. At [45] Lord Mance concluded that the claimants probably would obtain a permanent injunction following a trial notwithstanding what he called 'the significantly uncontrollable' world of the media and social media. Lord Neuberger reached the same conclusion at [58] – [66]. The point made in the judgments is that whilst widespread general knowledge of the subject matter of an injunction may render a claim in confidentiality so weak that an injunction might be refused (see eg at [57]) claims based upon privacy do not depend upon confidentiality or secrecy alone but have as a component the need to restrain 'unwanted access to private information' (see at [58]). Thus, republication of private information can, notwithstanding that it might already be known by many, constitute further tortious conduct capable of being permanently restrained by way of an injunction (see at [32(iii)]).

159. By s 12(4) of the Human Rights Act 1998, because I am being asked to consider granting relief that might affect the exercise of the Convention right to freedom of expression, I have to consider the extent to which the material has or is about to become available to the public (s 12(4)(a)(i)). I have already held that there is no, or very little, public interest in the Information being published (s 12(4)(a)(ii)). It therefore seems to me that in order for Defendant's public domain argument to succeed, the Book would have to be so widespread that a permanent injunction would not be merited by virtue of s 12(4)(a)(i) despite the Defendant having been responsible for putting the Information into the public domain.

160. I turn, then, to the evidence concerning the extent to which the Information has been published. At an early stage the Claimant requested details from the Defendant about how many copies of the Book had been sold in its various formats. In total the Defendant disclosed three documents containing statistical graphs from Amazon. The

Book was available in hardcopy form from Amazon and also as an ebook for reading on the Kindle electronic reading device. One of the documents disclosed by the Defendant shows a graph which recorded 'Kindle Edition Normalized Pages (KENP) Read from KU and KOLL. KU stands for 'Kindle Unlimited' and KOLL standards for 'Kindle Owners Lending Library'. The graph shows that just over 5000 (KENP) from the Book were read in December 2017 and approximately 500 in January 2018.

161. Amazon explains what KENP are is in a web page which is in evidence (https://kdp.amazon.com/en_US/help/topic/G201541130). The first sentence under the heading *Kindle Edition Normalized Page Count (KENPC v3.0)* explains that because some pages in ebooks will contain more words than others, depending on format, line spacing and so on, KENP is a uniform way of measuring what constitutes a page. A book is given a KENP number.

162. This is done for the purposes of paying royalties to authors. The calculation of KENP is important because Amazon does not pay an author a full royalty every time a book is downloaded by a subscriber. Instead it pays the author a royalty linked to the number of KENP actually read by the subscriber for the first time. KENP is essentially Amazon's way of distributing royalties fairly to authors based on the number of pages.

163. The documents supplied are not easy to interpret. However, the ebook was 322 pages long. What its KENP was, was unknown. However, it is known that the number of KENP downloaded was approximately 5500. If it is assumed that its KENP was 250 which were all read, that would mean no more than 22 ecopies of the book could have been read (5500 divided by 250).

164. As for hardcopies, the Defendant asserts at [67] of her witness statement of 21 August 2018 that 'over 100 copies' of the paperback have been sold.

165. Given the paucity of the evidence, it is difficult to reach any firm conclusions as to precisely how many copies of the Book have been downloaded or purchased in any form, but I am satisfied the figure is modest, stretching into the tens of copies, perhaps reaching over a hundred in both the UK and the United States. I am satisfied, however, that the Defendant's claim in [67] of her 21 August 2018 witness statement that the KENP figure of 5500 of thereabouts means that the Book has been purchased or borrowed over 5000 times, is wrong, and that the real figure is far lower.

166. Overall, I am satisfied, even taking the Defendant's case at its highest, that the Information has barely entered the public domain and therefore that the very limited extent to which the Information is known is not grounds for refusing an injunction. In *PJS*, supra, at [57] Lord Neuberger noted the evidence that 25% of the population of England and Wales (in other words, millions of people) knew who PJS was but that was not sufficient to justify refusing an injunction for infringement of privacy. This case is a world a way from that state of affairs.

167. The Defendant also resisted the grant of an injunction on the grounds of delay, and that the Claimant did not have clean hands because he and those acting for him misled the judge on the application for the INDO.

168. As to the first point, the judge who granted the INDO commented on the period of time it took to make the application, but he nevertheless granted the INDO. He therefore concluded that the delay was not a bar to granting the injunction. From that moment onwards, delay was no longer an issue. I need not say anything on the second other than that there is no basis for concluding that the judge was in any way misled.

169. For these reasons, I am satisfied that the Claimant has made out his claim for a permanent injunction to restrain publication of the Information.

Copyright claim

Damages

170. Mr Bennett submitted that I could direct an inquiry as to damages or an account of profits, perhaps following transfer to the Intellectual Property Enterprise Court. Alternatively, he said I could determine damages on the user principle, namely a sum equivalent to the notional licence value of the Photographs, and he referred me to a number of such cases where modest awards in the hundreds of pounds have been made on that basis for the unauthorised use of photographs, for example, *Pablo Star Media Limited v Richard Bowen* [2107] EWHC 2541 (IPEC) where an award of £250 was upheld for the unauthorised use of a photo of Dylan Thomas.

171. Given the modest nature of the copyright infringement claim and its very much subsidiary status in the litigation overall, it would be disproportionate to direct a damages inquiry, or an account, and I decline to do so. Taking matters in the round, and in the absence of any evidence of the commercial value of the Photographs in question, I assess damages for their unauthorised use at £50.

Injunction

172. The Claimant seeks an injunction to prevent republication of the Photographs and relies on *Laddie*, The Modern Law of Copyright (5th Edn), in support of the proposition that a claimant who has succeeded is generally entitled to an injunction.

173. In her witness statement of 21 August 2018 at [72] the Defendant has indicated that although she denies breach of copyright, '… without prejudice the defendant is happy to withdraw them and not use them in any event …'

174. On that basis, I will adjourn the claim for an injunction. Provided that the Defendant is willing to give undertakings to the court in the form of an order not to use the Photographs in any future edition of the Book, the need for an injunction will fall away. If not, the Claimant has liberty to restore the claim for an injunction.

175. I invite the parties to draw up a suitable form of order reflecting this judgment.