Neutral Citation Number: [2023] EWCA Civ 523

Case No: CA-2023-000381

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, KING'S BENCH DIVISION, MEDIA AND COMMUNICATIONS LIST
Mr Justice Johnson
[2023] EWHC 232 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE MALES
and
LORD JUSTICE ARNOLD

- -

Between :

(1) RICHARD STOUTE **(2) SARAH STOUTE**	**Claimants/ Appellants**
- and -	
NEWS GROUP NEWSPAPERS LIMITED	**Defendant/ Respondent**

- -
- -

William Bennett KC and Victoria Jolliffe (instructed by **Simon Burn Solicitors**) for the **Appellants**
Adam Wolanski KC and Hope Williams (instructed by **Wiggin LLP**) for the **Respondent**

Hearing date : 10 May 2023

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Approved Judgment

Lord Justice Arnold:

Introduction

1. The principal issue on this appeal is whether the Claimants ("Mr and Mrs Stoute") have a reasonable expectation of privacy in respect of photographs taken of them by paparazzi on a public beach and published by the Defendant ("NGN") in *The Sun on Sunday*. Mr Justice Johnson held for the reasons given in his judgment dated 17 January 2023 [2023] EWHC 232 (KB) that Mr and Mrs Stoute were unlikely to establish that they had a reasonable expectation of privacy, and he therefore refused Mr and Mrs Stoute's application for an interim injunction to restrain further publication of the photographs pending the trial of Mr and Mrs Stoute's claim for misuse of private information. Mr and Mrs Stoute appeal with permission granted by Warby LJ.

The facts

2. The following account of the facts is taken largely from the judge's judgment, which in turn was based on two witness statements made by Mrs Stoute and the correspondence between the parties, NGN not having filed any substantive evidence. I have added a few details from Mrs Stoute's statements.

3. Mrs Stoute was formerly a nurse. In 2002 Full Support Health Care Ltd ("FSH") was incorporated by Mrs Stoute and her parents to sell personal protective equipment ("PPE") to NHS and private hospitals. It is now owned and run by Mr and Mrs Stoute. In the accounting period to March 2019, FSH's profits were just over £800,000. In March to July 2020 there was a huge demand for PPE as a result of the Covid-19 pandemic. FSH secured government contracts worth about £2 billion.

4. Mrs Stoute's evidence is that, since 2021, there has been a lot of press interest in her, Mr Stoute and FSH, and that they have worked hard with their lawyers to protect their privacy. She says that, prior to the events giving rise to the present dispute, there were only a few photographs of them available online from the FSH website, from when she gave evidence to the Public Accounts Committee and in an article in *The Sunday Times*.

5. In late 2021 Mr and Mrs Stoute bought a second home which abuts a public beach in Barbados. They also bought a boat. Mr Stoute's family is from Barbados. Mr and Mrs Stoute have three children now aged 16, 18 and 23. On 26 December 2022 Mr and Mrs Stoute went to stay at their second home, together with their children, several adult friends and their friends' children.

6. On 27 December 2022 Mr and Mrs Stoute and their eldest child, whose birthday it was that day, were sitting on sunbeds on the beach in the front of their property when two women walked past them. The women were holding umbrellas over their faces and one of them was pointing a phone at the claimants. It was obvious that the women were either photographing or filming them. Mr and Mrs Stoute's house manager went to speak to the women and recognised them as local paparazzi. One was holding a long lens camera. Shortly afterwards, a third photographer arrived by jet ski and a fourth photographer was spotted by the entrance to the house. Mr and Mrs Stoute's friends and their school age children were photographed while boarding the boat. This

continued despite Mr and Mrs Stoute's head of security asking the two women to stop.

7. On 28 December 2022 Mr and Mrs Stoute and their guests travelled by boat to a beachside restaurant up the coast to celebrate their middle child's birthday. The boat was moored approximately 150 metres from the beach. A jet ski was used to ferry the members of the party from the boat to the beach. It therefore made multiple journeys. Once on the beach, the party travelled on foot a distance of about 100 metres to the restaurant. The beach was empty where the party was dropped, but there were around 30 people sitting on the beach in front of the restaurant and around 60 sitting on the restaurant terrace. Mr and Mrs Stoute were photographed as they went to the restaurant via the beach. They say that they were unaware at the time that they were being photographed, that they did not consent to being photographed and that the photographs must have been taken from a considerable distance, using a telephoto lens with a long range. They infer that the same photographers were involved on both occasions and that the photographers had targeted them and followed them.

8. NGN obtained a number of photographs of Mr and Mrs Stoute, their house and boat and members of their party from an agency called Backgrid. At 17.01 on 30 December 2022 Eleanor Sharples, a journalist working for NGN, emailed Mr and Mrs Stoute and said that NGN intended to publish photographs of the claimants in *The Sun on Sunday* on 1 January 2023. Following discussions overnight, at 10.03 on 31 December 2022 Mr and Mrs Stoute indicated that an application would be made for an injunction to restrain publication. At 13.05 on 31 December 2022 NGN's in-house lawyer sent an email to Mr and Mrs Stoute. It enclosed four photographs: one of Mr and Mrs Stoute's house from the seaward side with three people in front of it; one of their boat; one of Mr Stoute; and one of Mrs Stoute. The clear implication was that these were the photographs that NGN was intending to publish.

9. Mr and Mrs Stoute applied for an interim injunction to prevent the publication of the four photographs. The application was heard on an urgent basis by Heather Williams J later the same day. Heather Williams J granted an injunction in respect of the photographs of the house and the boat, but refused an injunction in respect of the photographs of Mr and Mrs Stoute. She set 17 January 2023 as the return date for the application.

10. On 1 January 2023 NGN published articles about Mr and Mrs Stoute in the print and online editions of *The Sun on Sunday* illustrated by photographs of Mr and Mrs Stoute on the beach. These photographs were the same as the photographs that had been sent to Mr and Mrs Stoute the previous day, save that those copies of the photographs were cropped whereas the published version of the photograph of Mrs Stoute was not, nor was the version of the photograph of Mr Stoute published online. The photograph of Mrs Stoute in the version that had been disclosed pre-publication showed her from head to waist. The published version showed her from head to toe.

11. On 2 January 2023 *The Daily Mail* published an article about Mr and Mrs Stoute in its print and online editions. The version of the article published in the print edition included copies of the same two photographs as had been published in *The Sun on Sunday*, as did the first version published online. The online version was later updated to include two additional photographs of Mr and Mrs Stoute and two photographs of

Mr and Mrs Stoute with other adults in their party. The photographs were attributed to Backgrid.

12. On 4 January 2023 Mr and Mrs Stoute wrote to NGN about the publication, pointing out that the version of the photograph of Mrs Stoute that had been considered by the court was different from the published version. Mr and Mrs Stoute asked NGN to supply copies of all photographs held by NGN of the relevant events with the embedded metadata so that the court would be better able to understand the circumstances in which the photographs were taken and the behaviour of the photographers who took them. Mr and Mrs Stoute also asked what steps, if any, NGN had taken to ensure that the photographs obtained had not been obtained by oppressive or unwarranted paparazzi behaviour using long lenses. NGN refused voluntarily to disclose the other photographs or the respective metadata and did not respond to the request about whether any safeguards had been applied with respect to the circumstances in which the photographs had been taken.

13. On 8 January 2023 NGN published a further article in *The Sun on Sunday* which republished the photographs. On 12 January 2023 NGN stated that it did not oppose the continuation until trial of the order that had been made by Heather Williams J.

14. On 13 January 2023 Mr and Mrs Stoute made an application seeking an order to restrain publication of any information that might identify their second home or boat, including any photographs of their home or boat, the photographs that were disclosed to them on 31 December 2022, the photographs that were published by NGN on 1 and 8 January 2023, and any further photographs that were taken of Mr and Mrs Stoute in the general area of their second home since 26 December 2022.

15. Mrs Stoute set out in a confidential schedule to her second witness statement made on 13 January 2023 certain reasons why she objects to the publication of the photographs published by NGN. She did not suggest that she or Mr Stoute were aware of any further targeting of them or their guests by photographers between 28 December 2022 and 13 January 2023, save for one possible incident involving a child of a guest on 8 January 2023.

16. At the hearing before the judge Mr and Mrs Stoute only sought to restrain further publication of the two photographs that NGN had already published. They did not pursue their application in respect of other photographs or information.

The photographs and the articles

17. The photograph of Mrs Stoute shows her wearing a loose-fitting kaftan-type dress which covers her body down to her upper thigh, but her arms and legs are largely uncovered. She is also wearing sunglasses and some jewellery. She appears to be laughing. The photograph of Mr Stoute shows him wearing a polo shirt, shorts and sunglasses.

18. Although Mr and Mrs Stoute's claim only concerns the photographs, it is necessary for the reasons explained below to have regard to the context in which the photographs were published. The version of the article published in the print edition of *The Sun on Sunday* is dominated by the photograph of Mrs Stoute. The article is

headlined "£2BN PPE COUPLE HAVING A LAUGH". The tenor of it can be gauged from the opening paragraphs:

> "A super-rich former nurse whose PPE firm raked in £2billion from Covid contracts laughs as she paddles on a Caribbean island.
>
> Sarah Stoute, 49, and husband Richard, 52, spent Christmas abroad in luxury."

The version published online has a different headline, but otherwise the text is identical.

The law

The legislative framework

19. Article 8 of the European Convention on Human Rights, to which the United Kingdom is party, provides that "[e]veryone has the right to respect for his private and family life" and that "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 … for the protection of the rights and freedoms of others". Article 10 provides that "[e]veryone has the right to freedom of expression" including "freedom … to receive and impart information … without interference by public authority" and that "[t]he exercise of these freedoms … may be subject to such … restrictions … as are prescribed by law and are necessary in a democratic society … for the protection of the … rights of others". Section 6(1) of the Human Rights Act 1998 provides that (subject to subsection (2)) "it is unlawful for a public authority to act in a way which is incompatible with a Convention right", and section 6(3)(a) defines "public authority" as including a court. Section 2(1) provides that "[a] court … determining a question which has arisen in connection with a Convention right must take into account any (a) judgment … of the European Court of Human Rights …". Section 12(3) provides that no relief is to be granted by a court which might affect the exercise of the right to freedom of expression so as to restrain publication before trial "unless the court is satisfied that the application is likely to establish that publication should not be allowed". Section 12(4) requires the court, where the proceedings relate to journalistic material, to have regard to "(a) the extent to which (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code."

20. The right to private life protected by Article 8 and the right to freedom of expression protected by Article 10 may come into conflict with each other, particularly when the media report information concerning identifiable individuals. It is the task of the courts to resolve that conflict. Since the coming into force of the 1998 Act it has become well established in English law that, in principle, people whose right to privacy has been infringed by the publication of information concerning them by the media can bring a claim for misuse of private information. As discussed in more detail below, such a claim will only succeed if, first, the claimant has a reasonable expectation of privacy in respect of the information in question and, secondly, the

claimant's right to privacy outweighs the defendant's right to freedom of expression in the specific circumstances of the case.

Case law of the European Court of Human Rights

21. Although there is now an increasingly substantial body of domestic case law concerning misuse of private information, the courts are still required to take account of the judgments of the European Court of Human Rights. There are relatively few judgments of the European Court concerning privacy claims specifically in respect of photographs. The principal cases are as follows.

22. In *Peck v United Kingdom* (2003) 36 EHRR 41 Mr Peck attempted to take his own life by cutting his wrists late at night in a high street while suffering from severe depression. He was filmed by CCTV. The footage showed him with a knife but not cutting his wrists. Stills were published by the local council and by two local newspapers and extracts from the footage were published by two television programmes. An application by Mr Peck for judicial review of the council's disclosures of CCTV materials was dismissed. The European Court held that the disclosures constituted a breach of Article 8. It repeated at [57] its statement in *PG and JH v United Kingdom* (2001) (subsequently reported at (2008) 46 EHRR 51) at [56] that there is "a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'", a point which the Court has reiterated in many subsequent decisions. It went on at [58] to cite its statement in *PG and JH v United Kingdom* at [57] that, while "[a] person walking down the street will, inevitably, be visible to any member of the public who is also present", "[p]rivate life considerations may arise however once any systematic or permanent record comes into existence of such material from the public domain". The Court reasoned at [62] that Mr Peck was in a public street, but he was not a public figure and he was not there for the purposes of participating in a public event. It was late at night and he was in state of distress. The disclosures of the CCTV materials meant that the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing what the applicant could possibly have foreseen. The disclosures therefore constituted a serious interference with the applicant's right to respect for his private life. The Court went on to hold that this was not justified.

23. In *Von Hannover v Germany* (2005) 40 EHRR 1 the applicant was Princess Caroline of Monaco, who had no official function in Monaco. The case concerned photographs published by German magazines. These photographs showed the Princess on her own or with others in a variety of circumstances: with an actor in a restaurant courtyard, on horseback, with two of her children, canoeing with another child, shopping, with the actor and another child, on a skiing holiday, visiting a horse show with her husband, leaving her house in Paris, playing tennis and bicycling with her husband and at a beach club. All of the photographs had been taken in public places except for the beach club. The beach club was a private establishment, but the photographs had been taken from a neighbouring house. The Princess brought proceedings in the German courts seeking injunctions to restrain further publication of the photographs. The Princess was successful in respect of the photographs of the Princess with the actor in the restaurant courtyard (since that was held to be a secluded place) and of the Princess with her children (since that was held to interfere with her right to protection of her family), but otherwise was unsuccessful since the domestic courts ruled that as

a "figure of contemporary society *par excellence*" she was not entitled to prevent the publication of photographs taken of her in public places. The European Court held that, despite the margin of appreciation afforded to the State, the German courts had not struck a fair balance between the competing interests and that there had been a breach of Article 8. The Court held at [50] that "the concept of private life extends to aspects relating to personal identity, such as … a person's picture". The photographs in question showed the Princess engaged in "activities of a purely private nature" ([61]), and "the sole purpose" of their publication "was to satisfy the curiosity of a particular readership regarding the details of the [Princess'] private life" ([65]). In so holding, the European Court placed some weight upon the Princess' evidence that, as soon as she left her house, she was constantly hounded by paparazzi who followed her every movement. As the Court stated at [59] (and see also [68]):

> "Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution."

24. In *Sciacca v Italy* (2006) 43 EHRR 20 the applicant was a teacher at a private school who was investigated by the revenue police. Two Italian newspapers published articles about the investigation which included an identity photograph of the applicant taken by the revenue police and released by them to the press. The European Court held that the release of the photograph was a violation of Article 8. It held at [29] that "the publication of a photograph falls within the scope of private life". The applicant was an ordinary person, and the fact that she was the subject of criminal proceedings did not curtail the scope of the protection to which she was entitled. Accordingly there had been an interference with her right to respect for her private life. Since it was not disputed that this was not "in accordance with the law", the interference was not justified.

25. In *Reklos v Greece* [2009] EMLR 16 the applicants were the parents of a baby born in a private clinic in Greece. After birth, the baby was placed in a sterile unit under the constant supervision of the clinic's medical staff. On the day after the birth, a professional photographer working at the clinic took two photographs of the baby inside the sterile unit. On seeing the photographs, the applicants complained to the clinic's management about the photographer's intrusion into a unit to which only the medical staff should have had access and the taking of photographs of their baby without their prior consent. The applicants asked the clinic to surrender the negatives of the photographs, but the clinic refused. The applicants' claim for damages was dismissed by the Greek courts. The European Court held that there had been a violation of Article 8. As the Court stated at [37]:

> "… the Court would emphasise that in the present case the applicants' son did not knowingly or accidentally lay himself open to the possibility of having his photograph taken in the

> context of an activity that was likely to be recorded or reported in a public manner. On the contrary, the photographs were taken in a place that was accessible only to the doctors and nurses of the clinic … and the baby's image, recorded by a deliberate act of the photographer, was the sole subject of the offending photographs."

26. By contrast with the cases discussed above, two subsequent applications by Princess Caroline concerning the publication of photographs of herself and her husband on holiday were dismissed by the European Court in *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15 and *Von Hannover v Germany (No 3)* (unreported, 19 September 2013). In *Von Hannover (No 2)* the Grand Chamber stated:

> "95. The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's … photo …; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life even where that person is a public figure….
>
> 96. Regarding photos, the Court has stated that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof ..."

27. The Grand Chamber identified a number of criteria at [109]-[113] as relevant to the balance between Article 8 and Article 10 in a case such as the one it was concerned with: (i) the extent to which the publication makes a contribution to a debate of general interest; (ii) how well known the person concerned is and what the subject of the report is; (iii) the prior conduct of the person concerned; (iv) the content, form and consequences of the publication; and (v) the circumstances in which the photographs were taken. The Grand Chamber noted that the German courts had changed their approach following the first case, had taken account of the Court's case law and had carefully balanced the Princess' right to respect for her private life against the publishers' right to freedom of expression. It concluded that the domestic courts had not failed to comply with their obligations under Article 8

28. Similarly, in *Lillo-Stenberg v Norway* (unreported, 16 January 2014) the European Court dismissed an application concerning the publication of photographs of the applicants' wedding. The first applicant was a musician and the second applicant an actress, both of whom were known to the public in Norway. The wedding took place outdoors on an islet in an area of the Oslo fjord which was a popular location for holiday cottages and recreation. A Norwegian magazine published an article about the wedding illustrated by photographs showing, in particular, the bride, her father and her bridesmaids arriving at the islet in a rowing boat (but not the actual ceremony). The article explained that the arrival of the bride had taken place to the sound of a

male voice choir singing a hymn. It was not in dispute that the photographs had been taken covertly using a telephoto lens without the applicants' consent. The European Court held, after considering the five criteria identified in *Von Hannover (No 2)*, that the Norwegian Supreme Court had carefully balanced the right to respect for private life with the right to freedom of expression, and therefore there was no violation of Article 8. Of particular relevance to the present case is what the Court said about the circumstances in which the photographs were taken at [43]:

> "… the Supreme Court examined the way the wedding was conducted and reiterated the principle set out in *Von Hannover v. Germany, (no.1)* … that the concept of private life is comprehensible, and includes 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"'. It thus noted that the wedding was organised in a very unusual way, for example with the arrival of the bride in an open boat and the presence of a men's choir singing a hymn on the islet. Moreover, since the ceremony took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract attention by third parties. The Court accepts the Supreme Court's view in this respect that these elements should also be given a certain amount of weight."

29. Finally, a recent decision which was not cited in argument and which I only discovered when writing this judgment is *Dupate v Latvia* (2021) 72 EHRR 34. The applicant was the partner of a man who was the chairman of a political party and the former director-general of a state-owned company. A Latvian magazine published an article about the birth of the applicant's and her partner's second child. The article included several covertly-taken photographs depicting the moment the applicant and her partner left hospital with their newborn baby. The Latvian courts dismissed the applicant's claim. The European Court held, after considering the five criteria identified in *Von Hannover (No 2)*, that there had been a violation of Article 8 since the domestic courts had not balanced the applicant's Article 8 rights with the publisher's Article 10 rights in conformity with the criteria laid down by the European Court. Again, what is particularly relevant for present purposes is what the Court said about the circumstances in which the photographs were taken (footnotes omitted):

> "70. It is not contested that the photographs of the applicant leaving hospital were taken covertly without her knowledge or consent. Nonetheless, the domestic courts attributed great importance to the fact that they had been taken in a public place—on the street. The courts also considered that these photographs had been taken to illustrate a specific event and 'had not been connected with following the applicant's everyday life and covertly photographing intimate moments of her private life'.
>
> 71. The Court reiterates that the fairness of the means used to obtain the information and reproduce it for the public is an essential criterion to be taken into account. With respect to the present case the Court considers that the applicant did not lay herself open to the possibility of having her photograph taken

> in the context of an activity that was likely to be recorded or reported in a public manner. The domestic courts did not take into account that the applicant needed to traverse the public space between the hospital's entrance and her car in order to bring her newborn child home. This inherently private event was not an activity with respect to which the applicant should have anticipated publicity. In such circumstances an effective protection of a person's image presupposes obtaining the consent of the person concerned at the time the picture is taken and not only if and when it is published. Otherwise an essential attribute of personality is retained in the hands of a third party and the person concerned has no control over any subsequent use of the image.
>
> 72. With respect to the domestic courts' conclusion that the photographs were taken to illustrate a specific event and were not connected with following the applicant's everyday life, the Court notes that there is nothing in its case-law to suggest that a violation of the right to private life could only occur if the person had been followed systematically.
>
> 73. Furthermore, the conclusion that the impugned photographs were not connected with covert photographing of intimate moments of the applicant's private life was manifestly incompatible with the facts of the case. … "

30. In each of the cases discussed above, the European Court held that Article 8 was engaged. In most of them the crucial question was whether the domestic courts had exceeded the margin of their appreciation when balancing the applicants' Article 8 rights with the publishers' Article 10 rights.

Domestic case law

31. *The two stage test*. Turning to the domestic case law, this was recently reviewed by Lord Hamblen and Lord Stephens, with whom Lord Reed, Lord Sales and Lord Lloyd-Jones agreed, in *ZXC v Bloomberg LP* [2022] UKSC 5, [2022] AC 1158. At [47] Lord Hamblen and Lord Stephens described the two stage test laid down by the Court of Appeal in *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73 and *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481, which I have summarised in paragraph 20 above, as "well established".

32. So far as the first stage is concerned, Lord Hamblen and Lord Stephens said:

> "49. Whether there is a reasonable expectation of privacy is an objective question. The expectation is that of a reasonable person of ordinary sensibilities placed in the same position as the claimant and faced with the same publicity ….
>
> 50. As stated in *Murray* at para 36, 'the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case'. Such

> circumstances are likely to include, but are not limited to, the circumstances identified at para 36 in *Murray* - the so-called '*Murray* factors'. These are: (1) the attributes of the claimant; (2) the nature of the activity in which the claimant was engaged; (3) the place at which it was happening; (4) the nature and purpose of the intrusion; (5) the absence of consent and whether it was known or could be inferred; (6) the effect on the claimant; and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher.

…

52. Whilst all the circumstances of each case must be considered, *Gatley on Libel and Slander*, (12th ed) at para 22.5 suggests that there are certain types of information which will normally, but not invariably, be regarded as giving rise to a reasonable expectation of privacy so as to be characterised as being private in character. These are the state of a person's physical or mental health or condition; a person's physical characteristics (nudity); a person's racial or ethnic characteristics; a person's emotional state (in particular in the context of distress, injury or bereavement); the generality of personal and family relationships; a person's sexual orientation; the intimate details of personal relationships; information conveyed in the course of personal relationships; a person's political opinions and affiliations; a person's religious commitment; personal financial and tax related information; personal communications and correspondence; matters pertaining to the home; past involvement in criminal behaviour; involvement in civil litigation concerning private affairs; and involvement in crime as a victim or a witness. …

53. *Gatley* also suggests that there are some types of information which will normally not be regarded as giving rise to a reasonable expectation of privacy so as not to be characterised as being private in character, namely: corporate information, a person's physical location, involvement in current criminal activity, a person's misperformance of a public role, information deriving from a hearing of a criminal case conducted in public, and the identity of an author …

…

55. The effect on the claimant must attain a sufficient level of seriousness for article 8 to be engaged …. In general, there will be no reasonable expectation of privacy in trivial or anodyne information."

33. As for the second stage, Lord Hamblen and Lord Stephens cited (among other authorities) the classic statement by Lord Steyn in *Re S (A Child)* [2004] UKHL 47, [2005] 1 AC 539 at [17]:

> "First, neither article (8 or 10) has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

34. Since, as I will explain, the issue in this case concerns the first stage of the test rather than the second stage, it is unnecessary to say any more about the principles applicable to the second stage and I can concentrate on those which are relevant at the first stage.

35. *Photographs*. The case law recognises that photographs require special consideration. As Lord Phillips of Worth Matravers MR said when delivering the judgment of the Court of Appeal in *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2006] QB 125 (a point which is unaffected by the decision of the House of Lords in that case [2007] UKHL, [2008] AC 1):

> "84. This action is about photographs. Special considerations attached to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances, voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive. This is quite apart from the fact that the camera, and the telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public.
>
> 85. The intrusive nature of photography is reflected by the various media codes of practice. It is also recognised by the authorities. …
>
> 106. Nor is it right to treat a photograph simply as a means of conveying factual information. A photograph can certainly capture every detail of a momentary event in a way which words cannot, but a photograph can do more than that. A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph. …"

36. *Public places*. The case law establishes that a person is less likely to have a reasonable expectation of privacy with respect to a photograph if the photograph was taken in a public place than if it was taken in a private place, but this is not a bright-line rule and depends on the circumstances.

37. In *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 the model Naomi Campbell succeeded in her claim for misuse of private information in respect of the publication in *The Mirror* of photographs of herself, and in particular a photograph of her in the street on the doorstep of a building, being embraced by two other people whose faces had been pixelated. The photographs were published as part of an article which not merely identified Ms Campbell as the subject of the photograph, but also identified the occasion as her arrival at a Narcotics Anonymous meeting (in fact, she was leaving rather than arriving, but nothing turned on that). Although Ms Campbell also complained about the publication of information concerning the fact that she was receiving treatment by Narcotics Anonymous and the details of the treatment, it was the inclusion of the photographs which tipped the balance.

38. Lord Hope of Craighead said:

> "122. The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must ... be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive … A person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph … But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph. The question then arises, balancing the rights at issue, where the public's right to information can justify dissemination of a photograph taken without authorisation …. The European court has recognised that a person who walks down a public street will inevitably be visible to any member of the public who is also present …: *PG and JH v United Kingdom* …, para 57. But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain. …
>
> 123. The same process of reasoning that led to the finding[] in *Peck* that the article 8 right had been violated … can be applied here. Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the

doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixelated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was not self-explanatory. Neither the place nor the person were instantly recognisable. The reader only had the editor's word as to the truth of these details.

124. Any person in Miss Campbell's position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with her right to respect for her private life. …"

39. Similarly, Baroness Hale of Richmond said:

"154. Publishing the photographs contributed both to the revelation and to the harm that it might do. … We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it. …

155. But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly part of the group. They showed the place where the meeting was taking place, which will have been entirely recognisable to anyone who knew the locality. A picture is 'worth a thousand words' because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she

> was being followed or betrayed, and deterring her from going back to the same place again."

40. Lord Carswell agreed with Lord Hope and Lady Hale. Lord Nicholls of Birkenhead and Lord Hoffmann did not disagree as to the applicable principles, but rather on the application of those principles to the facts of the case.

41. In *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 at [19] Lord Hope, with whom Lady Hale, Lord Mance, Lord Kerr of Tonaghmore and Lord Reed agreed, essentially repeated what he had said in *Campbell* at [122].

42. In *Murray* the claim concerned the publication in *The Sunday Express* of a photograph of David, the 19-month old son of the author J.K. Rowling and her husband, being pushed by his father in a pushchair in a public street, with his mother walking alongside, on their way to a café. The Court of Appeal reversed an order striking out the claim, holding that David had a real prospect of establishing that he had a reasonable expectation of privacy. Sir Anthony Clarke MR giving the judgment of the Court emphasised at [32] and [54] the distinction drawn by Lord Hoffmann in *Campbell* at [74], based on *Peck*, between the mere taking of a photograph and its publication. Of particular relevance for the present case are the following passages in his judgment:

> "17. It may well be that the mere taking of a photograph of a child in a public place when out with his or her parents, whether they are famous or not, would not engage article 8 of the Convention. However, as we see it, it all depends upon the circumstances. … This was not the taking of a single photograph of David in the street. On the claimant's case, which must be taken as true for present purposes, it was the clandestine taking and subsequent publication of the photograph in the context of a series of photographs which were taken for the purpose of their sale for publication, in circumstances in which BPL did not ask David's parents for their consent to the taking and publication of his photograph. It is a reasonable inference on the alleged facts that BPL knew that, if they had asked Dr and Mrs Murray for their consent to the taking and publication of such a photograph of their child, that consent would have been refused.
>
> 18. Moreover, on the assumed facts, this was not an isolated case of a newspaper taking one photograph out of the blue and its subsequent publication. This was at least arguably a very different case from that to which Baroness Hale of Richmond referred in her now well known example … of Ms Campbell being photographed while popping out to buy the milk. The correspondence to which we have referred shows that a news agency, a freelance photographer and two newspapers had photographers outside the Murrays's house in the period before publication of the photograph and a schedule exhibited to the particulars of claim shows that this was not an isolated event. … The claimant further relies upon the fact that BPL describes

itself as 'The world's biggest and best celebrity picture agency' …

55. We recognise that there may well be circumstances in which there will be no reasonable expectation of privacy, even after *Von Hannover v Germany* …. However, as we see it all will, as ever, depend upon the facts of the particular case. The judge suggests that a distinction can be drawn between a child, or an adult, engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. This is on the basis that the first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends and that, on the test deployed in *Von Hannover v Germany*, publicity of such activities is intrusive and can adversely affect the exercise of such social activities. We agree with the judge that that is indeed the basis of the European court's approach but we do not agree that it is possible to draw a clear distinction in principle between the two kinds of activity. Thus, an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as adversely to affect such activities in the future.

56. We do not share the predisposition identified by the judge …. that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends upon the circumstances. The position of an adult may be very different from that of a child. …"

43. In *Weller v Associated Newspapers Ltd* [2015] EWCA Civ 1176, [2016] 1 WLR 1541 the claimants, who were the 16 year-old daughter and 10 month-old twin sons of the musician Paul Weller, succeeded in their claim for misuse of private information in respect of the publication in *Mail Online* of seven photographs of Mr Weller and the claimants out shopping in the street and relaxing in a café visible from the street. Of particular relevance for present purposes is what Lord Dyson MR, with whom Tomlinson and Bean LJJ agreed, said in the following passages:

"18. The taking of photographs in a public street must be taken to be one of the ordinary incidents of living in a free community …. It is not, however, in dispute that a person's privacy rights may be infringed even in relation to things done in a public place. …

60. It is true that the photographs were taken of the claimants and their father in a public place. But it is well established in both the domestic and Strasbourg case law that there are some matters about which a person can have a reasonable expectation of privacy notwithstanding that they occur in public.

> 61. The starting point is the place where the activity happened and the nature of the activity. As the judge said, this was a private family outing. It could have been a family visit to a local park or to a public swimming pool. It happened to be an outing to the shops and to a café which was visible from the street. The essential point is that it was a family activity which belongs to that part of life which is protected by the broader right of personal autonomy recognised in the case law of the Strasbourg court …. The family element of the activity distinguishes it from Naomi Campbell's popping out to the shops for a bottle of milk and Sir Elton John standing with his driver in a London street, outside the gate to his home wearing a baseball cap and tracksuit: see *John v Associated Newspapers Ltd* [2006] EMLR 27."

44. Both *Murray* and *Weller* concerned photographs of children, and in both cases the Court of Appeal held that that was an important factor: see Sir Anthony Clarke in *Murray* at [16], [37], [45]-[52] and [56]-[58] and Lord Dyson in *Weller* at [20]-[31] and [63]. That this is a significant, but not determinative, factor was confirmed by the Supreme Court in *Re JR38* [2015] UKSC 42, [2016] AC 1131 at [95]-[98] (Lord Toulson, with whom Lord Hodge agreed) and [113]-[114] (Lord Clarke of Stone-cum-Ebony, with whom Lord Hodge also agreed).

45. In addition to *Campbell*, there have been a number of (mainly first instance) decisions concerning the publication of photographs of adults, in some of which the claimant succeeded and in some of which the claimant failed. In general, the claims in which the claimant succeeded have involved photographs which were either (i) taken in a private place and/or (ii) involved the depiction of something sensitive (even if, as in *Campbell*, the sensitivity of the subject matter was not apparent from the photograph itself). The closest case to the present one to which we were referred is *John v Associated Newspapers Ltd* [2006] EWHC 1611(QB), [2006] EMLR 10, which was distinguished by Lord Dyson in *Weller*. In that case Sir Elton John applied for an interim injunction to restrain the publication in *The Daily Mail* of a photograph of Sir Elton standing with his driver in the street outside the gate to his home. Eady J refused to grant an injunction on the ground that he was not satisfied that Sir Elton was more likely than not to establish that he had a reasonable expectation of privacy in respect of the publication of the photograph. As Eady J put it at [15]:

> "In the present case there is no question of the photograph revealing information which touches upon or is relevant to Sir Elton John's health. Nor is there any information about social or personal relationships or, as sometimes happens in these cases, sexual relationships. Those are all matters in respect of which, to a greater or lesser extent, as with allegations about health, an individual has a reasonable expectation of privacy. Here it seems to me that the circumstances are much more akin to 'popping out for a pint of milk'. In other words, it is simply an individual leaving his car and going to his front gate."

46. *Targeting by paparazzi*. Paparazzi take their name from the character Paparazzo in Federico Fellini's film *La Dolce Vita*. They may be defined as freelance

photographers who take pictures of high-profile individuals, typically while the subjects go about their daily life, with a view to selling (often via agencies) rights to publish the pictures in popular media outlets. The case law, and in particular the passages from *Campbell* and *Murray* cited above, shows that a person is more likely to have a reasonable expectation of privacy with respect to photographs taken by paparazzi, particularly photographs taken covertly from a distance using telephoto lenses, than in respect of photographs which do not involve such targeting, but again this is not a bright-line rule and depends on the circumstances.

47. *Comparison with the case law of the European Court*. If the domestic case law is compared with the case law of the European Court on this issue, it can be seen that the European Court is readier than the domestic courts to accept that Article 8 is engaged by the taking and publication of photographs of individuals, but nevertheless it places a strong emphasis on the need to balance publishers' Article 10 rights against applicants' Article 8 rights. In my view there is no reason to think that this slight difference in the two approaches leads to the overall balance being struck in a materially different way.

The judge's judgment

48. The judge dealt with the application in an impressive extempore judgment. Having set out the facts, he summarised the law as to misuse of private information at [17], citing *Campbell*, *Douglas*, *Kinloch*, *McKennitt*, *Murray*, *Peck*, *Re S*, *Weller* and *ZXC*. He said at subparagraph (6) that "whether a person has a reasonable expectation of privacy in respect of any particular information is highly fact-sensitive" and cited *Murray* at [36]. At [18] he noted that, by virtue of section 12(3) of the 1998 Act, Mr and Mrs Stoute had to show that it was more likely than not that they would succeed at trial, citing *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2005] 1 AC 253. At [19] he set out the material paragraphs from the relevant privacy code, but since these were not relied upon by either side in this Court I do not need to repeat that exercise. At [20] he noted that Mr and Mrs Stoute had to show that the balance of the risk of injustice favoured the grant of an injunction at this stage. He added:

> "In this context, the fact that the material that the claimant seeks to protect is already in the public domain is a relevant, but not decisive, factor. In other words, an injunction may be granted to prevent the further publication of material that is already in the public domain if such an injunction would serve a useful purpose: *PJS v News Group Newspapers Ltd* [2016] UKSC 26; [2016] AC 1081 *per* Lord Mance at [25]-[32]."

49. The judge proceeded at [21] to identify the issues as being: (1) whether the application should be entertained in the light of the application before and decision of Heather Williams J on 31 December 2022; (2) whether Mr and Mrs Stoute were likely to succeed in showing that the photographs amounted to information in respect of which they had a reasonable expectation of privacy. If Mr and Mrs Stoute succeeded on this issue, then NGN did not seek at that stage to argue that the resulting interference with their privacy was justified; and (3) whether the balance of the risk of injustice fell in favour of granting injunctive relief pending trial.

50. The judge summarised the parties' submissions at [22]-[25]. Having regard to the arguments on the appeal, it is necessary to set out his summary of Mr and Mrs Stoute's argument as to reasonable expectation of privacy at [23]:

> "… Mr Bennett stresses that the claimants were engaged on what was essentially a private activity, namely attending a celebratory meal for their daughter's birthday, with invited family and friends. The material comprises photographs and the law is clear that special considerations apply to privacy cases involving photographs. He accepts that they were taken in a place where the public had access, but submits that it does not follow that the claimants did not have a reasonable expectation of privacy. There is, he says, a difference between, on the one hand, other beach users merely seeing the claimants and their party on the beach, and, on the other hand, the claimants and their party being targeted and followed and pursued by a photographer, and secretly photographed, with the ensuing photographs being published to the world at large in a national newspaper. A reasonable person would, he says, take offence and be concerned if he knew at the time, or found out later, that somebody who merely happened to be on the beach with them was behaving or had behaved in a 'creepy' manner, particularly if those being pursued and photographed included children. He says that knowing that one and one's children have been covertly stalked in order to obtain photographs for mass publication is unnerving and destabilising and amounts to a particularly intrusive infringement into private life. He says it has a seriously detrimental effect on the claimants' well-being and their family life, including the knowledge that, absent the court's intervention, it may well happen in future when they are at their second home on holiday or elsewhere for as long as there is a market in paparazzi photographs."

51. The judge considered the first issue and resolved it in favour of Mr and Mrs Stoute at [26]-[31]. There is no challenge by NGN to that aspect of his decision.

52. The judge considered the second issue at [32]-[37]. He began at [32] by listing the relevant facts. He concluded that it was not more likely than not that Mr and Mrs Stoute would establish that they had a reasonable expectation of privacy in respect of the photographs for the following reasons:

> "33. The fact that the claimants were in a public location at the time that the information about them was obtained does not, of itself, mean that they had no reasonable expectation of privacy in respect of that information. A person may retain a reasonable expectation of privacy in respect of information that is obtained about them when they are in a public place. So, for example, if a person touches a postbox when posting a letter and thereby leaves their DNA on the letterbox, they retain a right of privacy in respect of that material. If two people walking down the street have a whispered conversation with

each other when there is nobody in the vicinity, they are likely to enjoy a right of privacy in respect of that conversation: cf *PG v United Kingdom* …. If a person suffers a mental health crisis or physical ill-health whilst in public, then they may well retain a right to privacy in respect of that: *Peck v United Kingdom.* If a person is the subject of a lengthy and intrusive campaign by paparazzi photographers, that they may give rise to a reasonable expectation of privacy, even in respect of events that take place in a public place: *Von Hannover v Germany* …. If a person gets changed on a beach under cover of a towel and the towel momentarily slips, then they might reasonably expect not to be photographed. In each of these cases there is an additional element which renders information private even though it is obtained in a public place. It is that additional information that engages the 'inner zone' that is recognised in *Peck* and *PG*. In the absence of that additional element, information that someone chooses to reveal in public is less likely to be recognised by the law as private. Public and private CCTV and the use of mobile phones to take photographs and record video is ubiquitous. Anyone venturing out in public may be captured by such cameras. The reasonable person knows that is the case. It follows that there is no general reasonable expectation of privacy in respect of information that is patent to anyone who happens to be in the same place at the same time.

34. In this case, the claimants were in a public place, namely a public beach, that they crossed in order to reach a restaurant. They arrived by jet ski. There was a demonstrative and performative element to their arrival. Members of the public were present at the restaurant and the beach and the method of the claimants' arrival is likely to have drawn attention to them. The information that is captured in the photographs corresponds to how the claimants chose to appear in public. There is no additional element of inherently private information. The information that is contained in the photographs is simply what any person present at that place and at that time would have seen. … The fact that the claimants did not consent to the photographs and that they were taken from a distance using highly magnified telescopic lenses and the context of the pursuit of the claimants over a period of two or three days is relevant to the question of whether they had a reasonable expectation of privacy. I do not, however, consider that these factors are present to a degree or extent which make it likely that the court at trial would conclude that they had a relevant reasonable expectation of privacy. The degree of intrusion is far less than was present, for example, in the Princess Caroline of Monaco case: *Von Hannover v Germany* … , *John v Associated Newspapers Ltd* … ."

53. The judge considered the third issue at [38]-[41]. He found at [38] that there was a real prospect that, if it was not restrained, NGN would republish the photographs. As he noted at [40], however, the photographs had already been published. He concluded that the balance of the risk of injustice favoured refusal of the injunction sought for the reasons he gave at [41]:

> "I accept the claimants' submission that an injunction can be granted to restrain further misuse of private information even if the information is already in the public domain. In the particular circumstances of this case, however, I consider that, even if the claimants could show that they had a reasonable expectation of privacy, the balance now falls against the grant of injunctive relief and in favour of maintaining the status quo until trial."

The underlying claim

54. It is important to emphasise before proceeding further that all we are concerned with is an appeal against the refusal of an interim injunction made at an early stage of the proceedings. No application was made by either side for an expedited trial. The underlying claim has not even progressed as far as a case and costs management conference. There has been no disclosure or exchange of trial witness statements, and a trial appears unlikely before the first quarter of 2024.

The appeal

55. The judge's decision that Mr and Mrs Stoute were unlikely to succeed in establishing that they had a reasonable expectation of privacy in respect of the publication of the photographs involved a multi-factorial evaluation. It follows that this Court is not entitled to interfere with the judge's assessment unless he made some error of law or principle or exceeded the ambit of conclusions which a judge could reasonably reach: see *Weller* at [56]-[58]. This accords with the general approach of this Court to appeals against evaluative decisions: see *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [72]-[78] (McCombe, Leggatt and Rose LJJ). Similar principles are applicable to the judge's exercise of his discretion when considering the balance of the risk of injustice.

56. Counsel for Mr and Mrs Stoute submitted that the judge had erred in law or principle in two respects. First, the judge had wrongly held that, because Mr and Mrs Stoute had no reasonable expectation of privacy vis-à-vis other people present on the beach, they did not have any reasonable expectation of privacy in respect of the publication of photographs of them on the beach in a national newspaper. Secondly, the judge had wrongly applied a presumption that events which took place in public were not private unless some additional element was present. It is convenient to take these submissions in reverse order.

57. The second submission is based on what the judge said in [33], and in particular the three sentences towards the end of that paragraph referring to an "additional element" or "additional information", and on the judge's reference to the absence of an "additional element" in the sixth sentence of [34]. In my judgment the judge did not make the error attributed to him. Paragraph [33] must be read as a whole, and the

judge began by expressly accepting that the fact that Mr and Mrs Stoute were in a public location when the photographs were taken did not, of itself, mean that they had no reasonable expectation of privacy. Although he did refer to an additional element being present in each of the examples he had given, in the key sentence he said that "[i]n the absence of that additional element, information that someone chooses to reveal in public is *less likely* to be recognised by the law as private [emphasis added]". Particularly when read together with the judge's self-direction at [17(10)] that the question is "highly fact-sensitive", and bearing in mind that the judge went on in [34] to take into account other factors such as the targeting of Mr and Mrs Stoute by the paparazzi, I consider that the judge accurately applied the law.

58. The first submission is based on what the judge said in the last sentence of [33] and on his reasoning in the first few sentences of [34]. Again, however, in my judgment the judge did not make the error attributed to him. It is true that the judge considered what would have been visible to members of the public present on the beach and at the restaurant, but the European and domestic authorities discussed above demonstrate that he was correct to do so. Counsel for Mr and Mrs Stoute argued that the judge had failed to differentiate between visibility to people who happened to be present on that occasion and publication of the photographs in a national newspaper, and failed properly to consider whether Mr and Mrs Stoute had a reasonable expectation of privacy in respect of the latter as opposed to the former. I do not accept this. As the judge fully appreciated, he was concerned with an application to restrain further publication of the photographs by NGN. Publication of the photographs in a national newspaper was therefore the context for his analysis. As I have noted, the judge cited at [17] a number of authorities on the publication of photographs. These included Lord Phillips' statements in *Douglas* quoted above, which are all about the effect of the publication of photographs. When the judge said in [34] that "[t]he information that is contained in the photographs is simply what any person present at that place and at that time would have seen", he was plainly considering the impact of publication of the photographs. Furthermore, it is implicit in counsel for Mr and Mrs Stoute's argument that, despite having accurately recited his submission about the difference between other people on the beach seeing Mr and Mrs Stoute and publication of photographs taken by paparazzi in a national newspaper, the judge rejected that distinction as legally irrelevant without saying so. As I read his judgment, however, the judge correctly reasoned that, in considering whether Mr and Mrs Stoute had a reasonable expectation of privacy in respect of the publication of the photographs, it was relevant to consider what would have been visible to members of the public present at the time, although that was not determinative.

59. Counsel for Mr and Mrs Stoute also submitted that the judge had given undue weight to some factors and insufficient weight to other factors. This is not a viable ground of appeal unless it compels the conclusion that the judge's evaluation was outside the ambit of reasonable decisions open to him. In my judgment the judge's decision was clearly one that was open to him on the facts of this case. Nevertheless, I shall consider the five principal points counsel made.

60. First, counsel for Mr and Mrs Stoute submitted that the judge had given undue weight to what the judge called the "demonstrative and performative element" of the party's arrival on the beach by jet ski. As the European Court's decision in *Lillo-Stenberg*

demonstrates, however, this was a legitimate factor for the judge to take into account. He did not treat it as decisive, and the weight to be attached to it was a matter for him.

61. Secondly, counsel for Mr and Mrs Stoute submitted that the judge had failed to give sufficient weight to the fact that the occasion on which the photographs were taken was part of their family life, in that it was a trip to a restaurant with their children and friends to celebrate their middle child's birthday. This was one of the facts which the judge listed in [32], however, where he said in terms that "the claimants were engaging in a private activity, that is attending their [child]'s birthday celebration".

62. Thirdly, counsel for Mr and Mrs Stoute submitted that the judge had failed to give sufficient weight to the targeting of Mr and Mrs Stoute and their party by the paparazzi. But this is something that the judge took into account. Again, the weight to be attached to this factor was a matter for him. As I have noted, there was little or no evidence that Mr and Mrs Stoute had been targeted by paparazzi after 27 and 28 December 2022.

63. Fourthly, counsel for Mr and Mrs Stoute complained that the judge had noted at [32(10)] that, despite being aware that they had become the target of photographers, Mr and Mrs Stoute had chosen to make the trip to the restaurant and what to wear. Counsel characterised this as victim-blaming. I disagree. The fact is that, knowing what had happened the previous day, Mr and Mrs Stoute chose to arrive at the restaurant in a manner which was calculated to attract attention to them and their party. As the case law of the European Court demonstrates, this is a legitimate factor to take into account.

64. Fifthly, counsel for Mr and Mrs Stoute argued that the judge had failed to take proper account of the ongoing effects on Mr and Mrs Stoute of the intrusion they had suffered through being targeted by paparazzi and having the resulting photographs published in a national newspaper. It is true that the judge did not expressly refer to this point at [33]-[34], but he did refer to it at two earlier stages in his judgment. First, he said at [13] that he was taking into account the evidence in the confidential schedule to Mrs Stoute's witness statement, which went to this question. Secondly, he referred to the point towards the end of his summary of Mr and Mrs Stoute's argument at [23] which I have quoted above. There is no reason to think that he did not take it into account when reaching his conclusion.

65. It follows that the judge made no error in concluding that it was unlikely that Mr and Mrs Stoute would be able to establish that they had a reasonable expectation of privacy in respect of the publication of the photographs. Even if he was wrong about that, however, he made no error in concluding that the balance of the risk of injustice favoured the refusal of an injunction. Counsel for Mr and Mrs Stoute submitted that the judge had failed correctly to apply *PJS* as to the effect of further publication of material that has already entered the public domain, but the judge directed himself in accordance with *PJS*. Given that the photographs had been published three times in two national newspapers, both in print and online, he was entitled to conclude that Mr and Mrs Stoute would suffer little additional irreparable damage in the event of further publication of them before trial and that the balance favoured refusal of an injunction.

Conclusion

66. For the reasons given above I would dismiss this appeal. I would nevertheless endorse what the judge said at [37]:

> "This does not mean that the defendant or others may publish any pictures of the claimants with impunity. It just means that the claimants have not established their case in respect of the application for an injunction that they have made. It is entirely possible that there are pictures in the possession of the defendant or others which would, if published, amount to an actionable tort."

Lord Justice Males:

67. I agree.

Lord Justice Peter Jackson:

68. I also agree.