



Neutral Citation Number: [2012] EWHC 496 (QB)

Case No: HQ09X04089

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2012

Before:

THE HONOURABLE MRS JUSTICE SLADE DBE

Between:

WXY	<u>Claimant</u>
- and -	
(1) Henry Gewanter	<u>Defendants</u>
(2) Positive Profile Ltd	
(3) Mark Burby	

Mr Aidan Eardley and Miss Clare Kissin (instructed by **Archerfield Partners LLP**) for the
Claimant
No appearance for or by the Third Defendant

Hearing dates: 14-15 and 18-20 July 2011

Approved Judgment

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

.....

THE HONOURABLE MRS JUSTICE SLADE DBE

Mrs Justice Slade:

1. The Claimant, who for the purposes of this action is described as WXY, seeks final injunctive relief restraining the Defendants from publishing or disclosing private or confidential information and from harassing the Claimant. She also claims damages for breach of confidence, misuse of private information and harassment. The Claimant is a wealthy woman with close connections with a foreign Head of State and his family. The First Defendant, Mr Gewanter, is a public relations consultant, the Second Defendant, Positive Profile Limited, his company and the Third Defendant, Mr Burby, their client.
2. In summary the Claimant alleges that the Defendants have published or threatened to publish, including on a website, 'A', operated by the Third Defendant, private and confidential information. It is said that this was done to harass the Claimant in order to put pressure on her to obtain payment of or to pay a Judgment Debt owed to the Third Defendant by members of the Head of State's family ('the Judgment Debt'). The principal categories of information in respect of which permanent orders are sought are: first an allegation that the Claimant had a sexual relationship with M ('the sexual allegation') and second that she lied in denying it in legal proceedings ('the perjury allegation'). Third, it was alleged that during 'pillow talk' with M the Claimant had told him that the Head of State had provided support for terrorism ('the terrorism allegation'). Fourth, information and allegations concerning attempts made by the Claimant to help the Third Defendant obtain payment of the Judgment Debt and of discussions about consideration of financial assistance to the Third Defendant by the Claimant. Fifth, information calculated to identify the Claimant as the Claimant in domestic and foreign proceedings against X.
3. There have been several applications in these proceedings which were heard before six different High Court judges. The first order granting an interim injunction was made by Maddison J on 9 September 2009. He described the factual background as complex, a description with which I wholeheartedly agree. The terms of the order precluded the First, Second and Third Defendants in England and Wales from:
 - (1) Publishing or disclosing to any person or institution any of the information set out in a Confidential Schedule to the order;
 - (2) Communicating to the Claimant (directly or indirectly) any threat to make such publication or disclosure as set out in (1) above, or making any request for payment or other benefit in return for not doing so;
 - (3) Otherwise harassing the Claimant.

The subject matter of the Confidential Schedule will be described as follows:

- (1) Any information or allegation concerning any personal relationship of any kind between the Claimant and M;
- (2) Any information or allegation known or believed by the Defendants or any of them to have been communicated by the Claimant to M including terrorism allegations;

- (3) Any information or allegation relating to steps taken by the Claimant to secure payment of a Judgment Debt obtained by the Third Defendant (including the fact that such steps have been taken);
- (4) The fact of and any details of any or any alleged discussions or dealings between the Claimant and the Third Defendant regarding the Judgment Debt and any information or allegation known or believed by the Defendants to have been communicated by the Claimant to the Third Defendant during the course of such discussions or dealings;
- (5) Any information calculated to identify the Claimant as the Claimant in English proceedings against X or as plaintiff in proceedings in another jurisdiction against X and O (a company);
- (6) Any allegation that the Claimant was involved in or responsible for the death of X.

Permanent injunctions are sought in similar terms.

4. As did all the other judges who heard the applications for interim relief, at the outset of the trial I made an order pursuant to CPR 39.2(3)(a), (c) and (g) that the hearing should be conducted in private because I was satisfied that having regard to the subject matter of the application – restraint sought of publication of information said to be private and confidential – making it public would defeat the object of the hearing. In my judgment it was in the interests of justice that such an order be made. That continued to be my view throughout the hearing of the trial.
5. Further, pursuant to CPR 39.2(4) the Claimant continued to be anonymised and other individuals whose naming may lead to the Claimant's identification are also referred to by letters of the alphabet.
6. Despite recent publicity describing the orders made in these proceedings as super-injunctions none of the orders made since the first injunctions on 9 September 2009 have been super-injunctions.

Preliminary Applications

7. There were several preliminary applications before me at the outset of the hearing. Mr Eardley with Miss Kissin appeared for the Claimant. All Defendants were represented by counsel for the purposes of the applications. All Defendants applied for an adjournment of the trial due to start on 11 July 2011. In light of a doctor's opinion of the health of Mr Gewanter, Mr Eardley for the Claimant acknowledged that he could not resist the application for the adjournment of the trial against the First and Second Defendants. An application for an adjournment made by the Third Defendant, Mr Burby, was refused by Mr Justice Tugendhat on 27 May 2011. An application by Mr Burby for permission to appeal that order and the refusal of a variation of interim injunctions was refused by the Court of Appeal on 6 July 2011.
8. Mr Burby also made an application under CPR 33.2 to place before the court witness statements or witness summaries from four witnesses. One witness summary was for

M with whom Mr Burby alleged that it was possible that the Claimant had sexual relations.

9. On 13 July 2011 I granted on grounds of his ill health an application for an adjournment on behalf of Mr Gewanter and his company, Positive Profile Ltd. I refused the application for an adjournment on behalf of Mr Burby. Save in relation to part of the proposed evidence of one witness I ruled that witness statements or witness summaries be excluded from the trial against Mr Burby. In rejecting the application in relation to the witness summary served in respect of M I referred to the judgment of Rix LJ on 6 July 2011 in which he said:

‘3. Now in his defence Mr Burby does not say that an allegation of a sexual relationship between the Claimant and M is true or that the Claimant has perjured herself in her affidavit at the beginning of these proceedings when she said that it was not true. What the defence says is that ‘The Claimant’s denial of the sexual allegation may be perjury’. When further information as to the nature of that pleading was sought it was given in these terms:

‘The third defendant did not say that the sexual allegation is true or that he considered it true. The third defendant stated that he considered it possible that it is true.’

4. In the course of his submissions today on behalf of the applicant, Mr Burby by his counsel Mr Patrick Green has confirmed to the court that there is no positive case upon the pleadings that the sexual relationship existed or that the Claimant has committed perjury, only a putting to proof, and he has in effect accepted that no responsible counsel could plead a positive case without evidence for it.’
10. No application was made on behalf of Mr Burby to amend the pleadings. Accordingly his position on the sexual and perjury allegations remained as it was stated by the Court of Appeal: that Mr Burby did not assert that the sexual allegation was true or that he believed it to be so or that the Claimant had committed perjury, but that it was possible that the sexual allegation was true and that the Claimant’s denial of the allegation may be perjury.
11. Counsel represented Mr Burby solely for the purpose of making the applications for an adjournment and to admit evidence under CPR 33.2 heard on 11 and 12 July 2011. They did not participate in the hearing of the claim against him after his application for an adjournment was refused on 13 July 2011. Mr Burby no longer attended court. In those circumstances in order to ensure as far as possible that Mr Burby was kept informed of the progress of the hearing, unusually the solicitors for the Claimant, Archerfield Partners LLP, agreed to communicate with Finers Stephens Innocent, solicitors who had previously acted for Mr Burby, who in turn kept him in the picture. Their actions are appreciated by the court.

12. Many of the issues relevant to the determination of the various elements of the claims in privacy or confidentiality and harassment were not in dispute. At the outset of the hearing nine other relevant issues likely to be disputed were identified. These were:
1. Whether the Third Defendant approached the press or just responded to their enquiries.
 2. Who was responsible for making and publicising the publications complained of, including on website A.
 3. The motive of each Defendant.
 4. Whether the material published on website A was already in the public domain.
 5. In the privacy complaint, what public interest is there in having the perjury allegation and/or terrorism allegations made known, balanced against the right to privacy.
 6. Whether and to what extent the Third Defendant's entitlement to 'tell his own story' amounts to a defence.
 7. Whether the Claimant had a right to privacy or confidence in respect of-
 - (a) Her dealings with the Third Defendant since April 2006, and
 - (b) Her personal views, including as to her wealth and religious sentiments.
 8. Whether the Third Defendant did in fact have reasonable grounds to fear for his life, as he expressed to the media.
 9. Whether in relation to the claim and/or the relief sought, there is evidence relating to the veracity of the sexual allegations which needs to be investigated.
13. Mr Burby, commented on the nine issues in a letter to the Court of 15 July 2011. He was informed that submissions would be received on the status of the letter. For the Claimant Mr Eardley submitted that there was no evidence before the court in relation to the factual matters asserted in the letter and that at trial the appropriate way of making submissions in the absence of any direction to the contrary is orally. I accepted that those submissions were correct and the letter of 15 July 2011 has not been taken into account. However, as rightly recognised by Mr Eardley, the Claimant must prove matters on which she bears the burden of proof. Further, the Defence has not been struck out and issues of law raised in it will be considered.
14. By application notice issued on 18 July 2011 Mr Burby again applied for an adjournment of the trial. I refused the application.
15. I was satisfied that Mr Burby knew that he could participate in the substantive hearing before me. He did not do so. On 19 July 2011 I held that A, the only witness for Mr Burby whose witness summary (in part only) was not ruled inadmissible, could not give evidence. No-one would be calling her as Mr Burby was not participating in the trial.

16. The Claimant gave evidence as did the following witnesses: the Claimant's foreign attorney, P, her London solicitors Matthew Dowd and Mark Bateman and D, a public relations adviser to the Head of State.
17. Judgments on the interim applications for injunctions in this case have not been made public as, in the view of the judges hearing those applications, to do otherwise would have run the real risk of revealing the material which the Defendants were restrained from disseminating.

Outline Background Facts

18. A company named CBTL (Holdings) Limited obtained a judgment in the autumn of 2005 in a large sum ('the Judgment Debt') in proceedings against a company with which members of the extended family of the Head of State were connected. The Judgment Debt, of which Mr Burby claims to be a beneficiary, remained unsatisfied.
19. In early 2006 Mr Burby was contacted by a journalist who told him that he knew about the unsatisfied Judgment Debt and of someone who may be able to assist him to recover that debt. Mr Burby was introduced to M with whom the Claimant agreed that she had had a brief non-sexual relationship in late 2003 and early 2004. M was claiming that the relationship was sexual ('the sexual allegation').
20. In 2004 the Claimant had issued proceedings against M to restrain him from disseminating his allegations about the nature of their relationship. In the spring of 2005 M signed a letter withdrawing the sexual allegations. Proceedings against him were stayed on the basis of his undertakings not to repeat it.
21. In April 2006 Mr Burby met M. M made the sexual allegation. M also gave information which he claimed was a repetition of matters the Claimant had told him.
22. According to the evidence of Mr Dowd, Mr Burby had contacted someone connected with the Head of State to tell him that in his search for information about the family members connected with the judgment debtors he had been introduced to M who had offered to sell him confidential information. The matter was referred to the Claimant's London solicitors.
23. Mr Dowd met Mr Burby with his Jersey lawyer, Mr Pallot, in London on 26 April 2006. The information provided by Mr Burby as to what M had said to him indicated that M was in breach of his undertakings given in the proceedings brought against him by the Claimant.
24. During the course of the meeting of 26 April 2006 Mr Burby mentioned the outstanding Judgment Debt.
25. Further meetings took place in May 2006 between Mr Burby, accompanied by Mr Pallot, Mr Dowd and Mr Bateman, another of the Claimant's London solicitors. Mr Burby asked whether the Claimant might be prepared to assist in obtaining payment of the Judgment Debt. On the Claimant's instructions Mr Dowd spoke to someone close to the Head of State about the Judgment Debt and told Mr Burby that the Head of State's response was that he did not want to get involved as he considered the debt to be a private matter.

26. In July 2006 M was committed to prison for contempt of court for breach of the undertakings he had given in the proceedings brought against him by the Claimant.
27. In October 2006 Mr Burby contacted X, a businessman who was conducting legal proceedings in a foreign jurisdiction against the Head of State. He met X and M in Jersey. X made a tape recording of their conversations in which M made the sexual allegation and also other allegations of a private nature concerning the Claimant ('the Jersey tapes').
28. Following the Jersey meeting, X contacted Mr Bateman and threatened to disclose private information given to him by M. The Claimant issued proceedings against X in England and abroad seeking injunctions to restrain disclosure of private and confidential information. On 17 November 2006 an interim injunction was obtained by the Claimant against X in the foreign proceedings and on 17 April 2007 the Claimant obtained judgment in default against him in English proceedings. X was restrained from disclosing or threatening to disclose the sexual allegation or information believed by X to have been communicated by the Claimant to M.
29. In April 2007 Mr Burby or Mr Pallot told the Claimant's solicitors that Mr Burby had the Jersey tapes.
30. In May 2007 Mr Burby and his Jersey lawyer, Mr Pallot, met the Claimant's English lawyers and her foreign lawyer, for the preparation of an affidavit by him in the foreign proceedings against X. Mr Burby or Mr Pallot told the Claimant's solicitors that he was facing bankruptcy proceedings in Jersey. Mr Burby asked for the Claimant's assistance in making representations to the Jersey court in relation to his bankruptcy.
31. On 11 May 2007 Mr Burby signed a document entitled 'Release and Indemnity'. In it he agreed to preserve confidentiality in respect of the Jersey Tapes and other matters and not without the consent of the Claimant to disclose any details concerning them. He signed an affidavit on 31 May 2007 for the foreign proceedings against X. The document went through many drafts at the offices of the Claimant's solicitors. Mr Bateman, one of the Claimant's solicitors, stated that Mr Burby was being assisted by Mr Pallot, his Jersey legal adviser. Mr Pallot was not present at the meetings at the Claimant's solicitors' office. Serious allegations made by Mr Burby in his Defence about the drafting of paragraph 23 of the affidavit of 31 May 2007 are not relevant to the issues to be determined in these proceedings. In any event on the evidence before me those allegations would not have been established.
32. At various times the Claimant made contact with the Head of State to seek to obtain payment of the Judgment Debt for Mr Burby. His response was that he was not prepared to intervene in a private matter.
33. In September 2007 Mr Burby met the Claimant in London at the offices of her solicitors.
34. In May 2008 the Claimant had lunch at the Dorchester with Mr Burby. Mr Dowd was present and Mrs Burby joined them. The Claimant travelled back to the Burbys' hotel in a car with Mrs Burby.

35. As a result of the bankruptcy proceedings Mr Burby was at risk of repossession of his home in Jersey. In late summer and early autumn of 2008 various means of the Claimant providing financial assistance were discussed by Mr Burby and his advisers with the Claimant's solicitors. The discussions did not result in an agreement.
36. On 29 April 2009 the first posting of material relating to the Claimant on a website entitled 'A' appeared. Many other postings followed.
37. The message of many of the articles posted on the A website was that a senior member of the Head of State's family had benefitted from Mr Burby's loyalty but had failed to pay or secure payment of the Judgment Debt. By reason of the private and confidential information there referred to the Claimant knew and Mr Burby would have known that she would understand that she was the person referred to. Further, because he knew that the Claimant had drawn the attention of the Head of State to the Judgment Debt it is reasonable to infer that Mr Burby would have known that the Claimant would be concerned that the Head of State and his advisers appreciated that the postings on the A website and other publications referred to her. The Home Page of the website explained:

‘...[A] is the phrase [a newspaper] used to describe an injustice inflicted on an innocent family by trusting [the Head of State’s family]. This story will be released piece-by-piece post-by-post.’

38. A posting on the A website on 11 June 2009 was titled ‘Introducing [M]’. It contained an allegation that a person identifiable by her as the Claimant had a sexual relationship with M.
39. On 4 July 2009 Mr Burby engaged Mr Gewanter, a public relations consultant.
40. Further postings on the A website contained information concerning the Claimant’s alleged offers to assist Mr Burby to obtain payment of the Judgment Debt. Postings also contained alleged information about the Claimant’s personal feelings. The titles of other postings indicate their purpose and content: on 4 July 2009: ‘Perjury...Perjury...Perjury. It’s a Lord Archer situation all over again.’ The perjury allegation was related to the Claimant’s denial of a sexual relationship with M. Another posting was titled: ‘assurances keep Mark [Burby] distracted from the unpaid debt.’ The terrorism allegations were made.
41. The postings indicated that further details would be revealed. A posting on 8 July 2009 stated:

‘No Pardon for Perjury! ...We cannot post the details of this at the moment because affidavits are being prepared. All will become clear very soon...’ and

‘We have only just started to scratch the surface in this site. Its [sic] a treasure chest of:-

- Meticulously prepared files

- Detailed Contemporaneous Notes on Every Meeting
- Audio Recordings
- Supporting Evidence

Some of you are already reading the signs that we are deliberately holding back at the moment. We are doing so at the request of [the Second Defendants]. There are very good reasons for this. We appreciate all your interest in the site and wish to reassure you that this matter is not going to be brushed under the carpet.'

42. A public relations adviser to the Head of State, D, gave evidence. He and Mr Gewanter had been colleagues many years earlier in a public relations company. In 2005 Mr Gewanter had spoken to him about Mr Burby and the Judgment Debt. He had wanted D to engage the Head of State in finding a settlement to the dispute. On 11 August 2009 Mr Gewanter telephoned D and wanted to talk to him again about Mr Burby and the unpaid Judgment Debt. He said that things had not developed well for Mr Burby. Mr Gewanter referred D to the A website. Mr Gewanter telephoned D again on 21 August 2009. His tone was less friendly. Mr Gewanter said that Mr Burby had wanted to pass on the terrorism and perjury allegations. In his statement D said that Mr Gewanter was insistent that he should pass this information to his client. D gave evidence that he would have been in touch with someone in the Head of State's office and may have been advised to pass the information to Mr Bateman. D thought that he reverted to Mr Gewanter saying that he could not help.
43. By letter dated 26 August 2009 the Claimant's solicitors sent Mr Burby a letter before action in these proceedings. Copies of the injunctions in the English and foreign proceedings against X were enclosed.
44. The A website was hibernated in August 2009.
45. Mr Burby gave journalists information about alleged private and confidential matters concerning the Claimant. Before 3 September 2009 Mr Burby gave a telephone interview to a female print journalist.
46. On 3 September 2009 X was murdered abroad. In his Part 18 Response Mr Burby states that he was contacted by and gave interviews to journalists including a telephone call with a male journalist on a foreign publication. The resulting publications were to the effect that he had been badly treated by the Head of State's family and sought to make a link between his treatment and that of X who had a legal dispute with the Head of State's family.
47. D gave evidence that on 9 September 2009 he received an email from a journalist. She repeated the terrorism allegation.
48. On 9 September 2009 Maddison J granted an interim injunction in these proceedings which was formally served on Mr Burby on 14 September 2009.

49. In May 2011 a newspaper referred to the interim injunction in these proceedings and a restraint on the terrorist allegation being publicised.

The relevant legal principles

Protection of private and/or confidential information

50. The relevant legal principles may be summarised as follows in terms adopted at an earlier stage in these proceedings and set out in the skeleton argument on behalf the Claimant.

Confidential information

51. A claimant seeking relief for breach of confidence must establish that the information has the necessary quality of confidence, that it was imparted in circumstances importing an obligation of confidence and that its disclosure was (or would be) an unauthorised use of the information. (See **Coco v A N Clark (Engineers) Ltd** [1969] RPC 41 P13A). The test is satisfied if the information is not something which is public property and public knowledge. As explained by Lindsay J in **Douglas v Hello! (no. 5)** [2003] EMLR 31, 701-702, what matters is whether the information has ‘the basic attribute of inaccessibility’. The duty of confidentiality however is subject to three limiting principles identified by Lord Goff in **Spycatcher (A-G v Guardian Newspapers Ltd (No 2))** [1990] 1 AC 109 at page 282. First, generally, once information is in the public domain, it will no longer be confidential. Second, the duty does not apply to useless information or trivia. Third, the public interest in maintaining confidence may be outweighed, on the particular facts of the case, by a public interest in disclosure.

Private information

52. The Court of Appeal in **Murray v Express Newspapers Plc** [2008] 3 WLR 1360 at paragraphs 24, 27, 35 and 40 summarised the approach to considering whether the publication of information which is said to be private should be permitted. The court must first decide whether the information in question is private, that is whether the claimant has a reasonable expectation of privacy in respect of that information such that the claimant's rights under article 8 of the European Convention on Human Rights are engaged (stage 1). If yes, the court must then engage in a balancing exercise, weighing the article 8 rights of the claimant against the article 10 rights of the defendant (stage 2).
53. In **Murray** the Court of Appeal said at paragraph 35 that the question at stage 1 is ‘a broad one’ which ‘takes account of all the circumstances of the case’. The Court of Appeal quoted with approval Lord Hope’s formulation of the test in **Campbell v MGN** [2004] 2 AC 457, at paragraph 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 the same publicity.”

54. As explained in **Lord Browne of Madingley v Associated Newspapers Ltd** [2008] QB 103 at paragraph 26, the nature of any relationship between the relevant persons or parties is also of considerable potential importance in considering whether information is information in respect of which a Claimant has a reasonable expectation of privacy. Particular importance is attached in this context to pre-existing personal relationships or relationships governed by contractual undertakings as to confidentiality. The fact of a relevant pre-existing relationship does not absolve the court from examining whether information obtained in the course of that relationship is private, but the fact of the relationship has an important bearing on how the information is to be assessed. At paragraphs 31 and 34 it was held that relevant questions include:

“whether the person concerned ... [i.e. the person who has received information in the course of a relationship] received information which he knew or ought reasonably to have known was fairly and reasonably to be regarded as confidential or private.”....Business information passed by a company director to his sexual partner could readily be held to be information which the latter knew or ought reasonably to have known was fairly and reasonably to be regarded as confidential or private and in respect of which the former had a reasonable expectation of privacy.”

55. Lord Steyn in **Re S (a child)** [2005] 1 AC 593 paragraph 17 held that the Court should approach the balancing exercise at stage 2 in this way:

“First, neither article 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.”

56. Eady J in **McKennitt v Ash** [2008] QB 73 held at paragraph 79 that a claim for misuse of private information may be maintained even where the information is false. He held that a person's right to 'tell his own story' which would attract the *prima facie* protection of privacy rights must be exercised, so far as possible, to protect the other person's privacy.

57. As explained in **Mosley v News Group Newspapers Ltd** [2008] EWHC 687 paragraphs 24 to 26 a claimant's Article 8 rights may be engaged even where the information in question has been previously publicised.

58. This is a case in which the relief sought might, if granted, affect Mr Burby's exercise of his Convention right to freedom of expression. Accordingly, the Human Rights Act 1998 ('HRA') Section 12 applies. S.12(4) provides:

‘(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to

(a) the extent to which-

the material has, or is about to, become available to the public;
or

it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.’

59. In deciding whether to restrain publication of information in a privacy case a balance must be struck between Article 8 and Article 10 rights.

Breach of Confidence

60. The authors of Tugendhat and Christie on *The Law of Privacy and the Media* Second Edition, write at paragraph 12.127:

“The values enshrined in Article 10 are now part of very content of the cause of action for misuse of private information. The same appears to be true in cases where the law of traditional breach of confidence is applied to private and personal information.”

Paragraph 11 of the judgment of Buxton LJ in **McKennitt v Ash** shows that the balancing exercise of Articles 8 and 10 is to be undertaken in claims in breach of confidence as it is in claims in privacy.

Public interest defence

61. The approach in confidentiality cases as in privacy cases is to assess proportionality in deciding whether to restrain publication. Public interest is regarded as an aspect of proportionality. Lord Phillips, MR held in **HRH Prince of Wales v Associated Newspapers Ltd** [2008] Ch. 57 at paragraph 68:

“...the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the Public interest that the information should be made public.”

62. In this case perjury is the basis of the principal assertion that disclosure of private or confidential information is in the public interest. Mr Burby asserts that the allegation of perjury is not certain to be true but ‘possibly true’. It is uncontroversial that there can be no public interest in the publication of false information. In Reynolds v Times Newspapers [2001] 2AC 127 Lord Hobhouse observed at page 238:

“there is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation.”

63. Mr Burby also asserts a public interest defence in respect of the terrorism allegations. Those derived from M, allegedly conveyed to him by the Claimant in ‘pillow talk’.
64. Where, as in this case, the public interest asserted is based on an allegation of wrongdoing, the credibility of the allegation and the reliability of the source of information are material to the balancing exercise. In Spycatcher, Lord Goff said at page 283:

“I find it very difficult to envisage a case of this kind in which it will be in the public interest for allegations of such iniquity to be published in the media. In any event, a mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source.”

65. It is a facet of the proportionality approach that the court must consider whether any public interest identified by a defendant requires publication to the world at large, or whether only disclosure to a smaller, more defined group is justified. In Jockey Club v Buffham [2003] QB 462, paragraph 47 Gray J identified a general public interest in (among other things) the effectiveness of the Jockey Club as the regulator of horse-racing. A similar approach was adopted in Francome v Mirror Group Newspapers Ltd [1984] 1 WLR 892, 899 where the court enjoined publication by the defendant newspaper of material said to show breaches of the criminal law or Jockey Club regulations by an individual jockey, but indicated a willingness to permit disclosure to the police or the Jockey Club. Where a defendant contends that the private/confidential information raises only a possibility of wrongdoing, the likelihood is that the only justifiable disclosure, at least in the first instance, would be to the appropriate investigative authority.
66. As for the relevance of the motives of the Defendant in seeking to disclose confidential information, Stevenson LJ said in Lion Laboratories v Evans [1985] QB 526 at paragraphs 536-537:

“The courts will restrain breaches of confidence, and breaches of copyright, unless there is just cause or excuse for breaking confidence or infringing copyright. The just cause or excuse with which this case is concerned is the public interest in

admittedly confidential information. There is confidential information which the public may have a right to receive and others, in particular the press, now extended to the media, may have a right and even a duty to publish, even if the information has been unlawfully obtained in flagrant breach of confidence and *irrespective of the motive of the informer.*” [Emphasis added]

67. Recent cases in privacy have taken into account the defendant's motives in threatening to publish private information. Tugendhat J in AMM v HXW [2010] EWHC 2457 held paragraph 38 that:

“...If a person is making unwarranted demands with threats to publish, that is a factor in deciding whether that person has any Article 10 rights, and, if so then the weight to be accorded to them in balancing them with the applicant's Article 8 rights.”

In another privacy case, Sharp J took into account the defendant's motives balancing the Claimant's Article 8 and the defendant's Article 10 rights when she observed in DFT v TFD [2010] EWHC 2335 at paragraph 23:

“As to the article 10 rights of the respondent, the evidence before me currently suggests the applicant is likely to establish at trial that disclosure of the information (whether to the media or generally), would be the fulfilment of a blackmailing threat. I accept Mr Tomlinson's submission that the expression rights of blackmailers are extremely weak, (if they are engaged at all).”

Harassment

68. The Protection from Harassment Act 1997 ('PHA') provides, so far as material:

1. Prohibition of harassment

- (1) A person must not pursue a course of conduct
(a) which amounts to harassment of another, and
(b) which he knows or ought to know amounts to harassment of the other.

[...]

- (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.

- (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows

- (a) that it was pursued for the purpose of preventing or detecting crime,

- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

[....]

3. Civil remedy

- (1) An actual or apprehended breach of section 1(1) may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question.

[....]

7. Interpretation of this group of sections

- (1) This section applies for the interpretation of sections 1 to 5.
- (2) References to harassing a person include alarming the person or causing the person distress.

- (3) A "course of conduct" must involve--

- (a) in the case of conduct in relation to a single person (see section (1)), conduct on at least two occasions in relation to that person, or

[....]

- (4) "Conduct" includes speech.

69. In **Thomas v News Group Newspapers Ltd** [2002] EMLR 4 it was held at paragraph 15 that the publication of journalistic material may amount to harassment. Moreover, threats to publish damaging or embarrassing material in order to secure or accelerate payment of a debt have been recognised as capable of amounting to harassment which should be restrained by injunction: see e.g. **Potter v Price** [2004] EWHC 781; **Georgallides v Etzin** [2005] EWHC 1790. In **Thomas** it was held that the burden of proof under Section 1(3)(c) ('reasonableness') is on the Defendant, but the Claimant must set out a viable plea of harassment, which will usually involve alleging behaviour which is at least arguably unreasonable. The Claimant must prove conduct which is 'oppressive and unacceptable' rather than merely unattractive, unreasonable or regrettable as explained in **Weakins v Kier** [2009] EWCA Civ 1288 at paragraph 11. The presence of malice on the defendant's part makes it easier to satisfy that test, though it is not an essential ingredient of the tort (See **Weakins** paragraph 16).
70. Harassment within the meaning of PHA may be constituted by the way in which legal proceedings are conducted. In this regard Mr Eardley referred to **Iqbal v Dean Mason Solicitors** [2011] EWCA 123. However, no such basis of the claim for harassment was pleaded in the Particulars of Claim.

The Issues

71. The issues to be determined in considering the claims before me are:

- (1) Whether the information sought to be protected from publication or further publication is private or confidential and was or should have been known to be such by Mr Burby;
- (2) Whether Mr Burby has already published parts of the private and confidential information in this jurisdiction;

- (3) Whether Mr Burby's publications and threatened publications can be justified in the public interest;
- (4) Whether the private and confidential information has entered the public domain such that it is no longer protectable;
- (5) Whether Mr Burby's publications, threats to publish and the contacts he made with the media constitute a course of conduct amounting to harassment.

Findings of fact on disputed issues, discussion and conclusions

72. Mr Burby has not attended or been represented at trial. He has adduced no evidence. However his Defence remains in place. Mr Eardley rightly recognised that insofar as the Defence does not admit or deny the matters in the Particulars of Claim on which the Claimant bears the burden of proof, the Claimant had to prove those matters. Insofar as the Defence advances any defences which are purely arguments of law (or otherwise do not depend on Mr Burby establishing certain facts) the court will consider them. Mr Eardley also contended that by contrast, any part of the Defence which would require the Defendant to prove a matter of fact in order to succeed is to be disregarded because Mr Burby has not adduced any evidence to prove such facts.
73. Mr Eardley contended that the defence of public interest raised by Mr Burby in his pleadings fell into the category of issues to be disregarded because no evidence had been adduced in support of it.
74. The court can only act on evidence but if evidence is before the court it can be taken into account irrespective of which party adduced it. Tugendhat J in **Sir Frederick Goodwin v News Group Newspapers Ltd** [2011] EWHC 1309 held at paragraph 28:

“It is the duty of the court to have regard to the rights of persons who are or might be affected by any order that it makes, whether or not those persons appear before the court. It is for this reason that, before granting an injunction to restrain a publication, the court must have regard to the article 10 (freedom of expression) rights of the media and others...”

Mr Burby's right to freedom of expression must be considered although he has not participated in the proceedings. There was evidence before the court adduced by the Claimant which is relevant to the public interest defence. It will be considered on those facts.

75. Mr Gewanter was not fit to attend the hearing of the case against Mr Burby. The case against him and his company has been adjourned. Nevertheless, Mr Eardley submitted that the court could take into account in the case against Mr Burby facts submitted by Mr Gewanter in his pleadings. Before an admission by Mr Gewanter in his Defence can be taken into account in the case against Mr Burby the admission would have to be adduced as evidence. Mr Gewanter did not give evidence and was not given the opportunity to confirm or resile from the admissions relied upon. Accordingly, I do not take into account admissions in the pleadings of the First and Second Defendant as evidence in the case against the Third Defendant.

Privacy and Confidentiality

Was the information the subject of the application for injunctive relief private or confidential and was or should have been known to be such by Mr Burby?

76. Although Mr Burby has not given evidence in these proceedings, his Defence has not been struck out. One of the issues there raised is that the Claimant is put to proof that the information or allegations in respect of which an injunction is sought are properly to be regarded as private and confidential. An important factor in deciding this issue is the context in which such information was given to Mr Burby, what was said to him, if anything, about whether the information was private and whether the circumstances in which he disseminated such information indicate that he appreciated it to be so.

The sexual allegation

77. By its nature the sexual allegation is private. I find that at the meeting on 26 April 2006 Mr Dowd told Mr Burby that the Claimant had taken proceedings against M to restrain breach of confidence and harassment and that M had breached the undertaking of confidentiality agreed in the settlement of the proceedings against him. Mr Dowd told Mr Burby that his evidence was relevant to contempt proceedings against M. That evidence was about his meeting with M in October 2006 when M had told Mr Burby about the sexual and other allegations. Further, since in May 2007 Mr Burby swore an affidavit in the foreign proceedings in which the Claimant was seeking an injunction to restrain X from publishing the sexual allegation and other alleged information derived from her relationship with M, I find that at the latest by May 2007 Mr Burby knew that the sexual allegation was private as a result of which X was to be restrained from publishing it.

'Pillow Talk'

78. The Claimant seeks to restrain the Third Defendant from publishing allegations that she told M that the Head of State sympathised with Islamic fundamentalists and had given assistance to terrorists. In Schedule I to his defence, Mr Burby contended that he should not be restrained from publishing those matters as it was in the public interest to disclose them. He does not assert that they were communicated in circumstances which would not give rise to an inference of privacy. In the affidavit made by Mr Burby in the foreign proceedings against X he stated in paragraph 45 of the meetings he had with M in Jersey:

‘In the course of our two days of meetings, [M] conveyed to us a great deal of what [M] made clear that he regarded as confidential information, about [the family of the Head of State]. He said words to the effect:

‘This is very sensitive, Mr Mark [he called me Mr Mark].’

He said:

‘Oh my God, Mr Mark, if this gets out it will be devastating.’

I find that information given to Mr Burby by M obtained by him in the context of his relationship with the Claimant was obtained and given in circumstances in which both M and Mr Burby must have appreciated that they were under an obligation of privacy.

The Claimant's offers to help Mr Burby recover the Judgment Debt and to provide financial assistance

79. The Claimant asserted that dealings between her and the Third Defendant regarding recovering the Judgment Debt and providing him with financial assistance were expressly stated to be confidential. In paragraph 18 of his Defence Mr Burby responded:

‘the Third Defendant will say that no confidentiality was expressed in any of the Third Defendant’s dealings with the Claimant or her advisors save to the extent of the Instrument of Release and Indemnity referred to in paragraph 13 of the Particulars of Claim.’

However in his Part 18 response of 19 February 2010 Mr Burby stated that he had many confidential dealings over the past four years with Mr Bateman, the Claimant’s solicitor.

80. It was contended on behalf of the Claimant that Mr Bateman and Mr Dowd gave evidence of express statements regarding their dealings with Mr Burby on the question of assistance which may be given to him to recover the Judgment Debt and other financial assistance were to be treated as confidential. The Claimant gave evidence as to the reasons for the need for confidentiality. There was also evidence relating to the Third Defendant’s appreciation of the need for confidentiality with regard to these matters.
81. Mr Dowd gave evidence that he learned that Mr Burby had met M and could assist in providing information which may be useful to the Claimant who was pursuing contempt proceedings against M for his alleged breach of an undertaking restraining him from publishing allegations about and gained during his relationship with the Claimant.
82. On 26 April 2006 Mr Dowd met Mr Burby who was accompanied by Mr Pallot, his then Jersey lawyer. A trainee solicitor took a note. When asked by Mr Eardley how the meeting of 26 April 2006 began Mr Dowd said that fairly early on in the meeting

‘...we agreed the contents of the meeting and what we discussed would be confidential.’

He said that it was Mr Pallot who first raised confidentiality and that Mr Burby and he were keen that the meeting be kept confidential. Mr Dowd said that the issue of the Judgment Debt was touched on briefly. However it was clear from his evidence that the purpose of the meeting was to obtain information from Mr Burby which could be put in an affidavit to be used in the contempt proceedings against M. The trainee solicitor’s contemporaneous note of the discussion regarding confidentiality records that Mr Pallot said:

‘...Concerned to ensure nothing Mark says today came back on him.
Want your assurances and undertaking that nothing he says will make your [client] come back to him.’

The note of Mr Dowd’s response is:

‘formally agree meet = confidential I’m happy to agree to that. The content of your Aff.’

At a later stage the Judgment Debt was mentioned and a comment probably to be attributed to Mr Dowd reads:

‘Your assistance in relation to this no doubt will be viewed favourably.’

Mr Pallot is noted as saying:

‘My role in this = to say thanks + we would appreciate if that occurred. We’re not here for that but if it’s offered I’d take it.’

Mr Dowd:

‘I will be having conv with [Head of State’s] right hand man + will pass on...’

Mr Pallot:

‘We’re not limiting today that you may pass on to anyone or your client. We undertake not to discuss things. Given opening undertakings b/w ourselves.’

83. Whilst the opening agreement as to confidentiality was related to the information to be given by Mr Burby regarding the possible breach by M of the terms of settlement of the injunction proceedings against him I find that later in the meeting the agreement as to confidentiality was extended to cover steps that may be taken to bring Mr Burby’s Judgment Debt to the attention of the Head of State.
84. At a later stage there were discussions between the Claimant’s legal representatives and Mr Burby regarding her providing financial assistance to him. Mr Bateman emailed Mr Pallot on 17 October 2008 with the Claimant’s proposal to help Mr Burby. The conditions of the proposal included:

‘1. The agreement and its subject matter especially the fact of who is meeting Mark’s liabilities remains confidential. ...

2. It is agreed that all and any dealings between the parties and their legal representatives past and future remain confidential (including the fact of those dealings)...’

It is to be noted that the language used in the email is that the dealings between the parties *remain* confidential. There was no evidence of any objection from Mr Burby or his representative that the dealings had not been or were not to be treated as confidential. Mr Pallot emailed Mr Bateman on 21 November 2008:

‘Confidentiality

Mark agrees that a reciprocal confidentiality clause is a good idea.’

85. The evidence of how Mr Burby treated the fact that the Claimant had discussed the Judgment Debt with him and expressed her willingness to try to help him is of assistance in determining whether such matters were confidential and whether Mr

Burby appreciated that they should be treated as such. On 5 March 2009 Mr Burby's wife wrote to the Claimant about the financial assistance proposed by the Claimant for Mr Burby in the context of his facing bankruptcy proceedings:

‘Mark & I have always retained the utmost confidentiality regarding yourself.’

86. A document disclosed by Mr Burby entitled ‘[...Scandal]’ sets out in different coloured text information which has been posted on the A website, that which has been headlined but no details given and that, in red, which has not been posted. The document has the following legend at the foot of each page:

‘Sensitive & Confidential Information

Not to be discussed or passed to any party, in part or in full, without the written consent of the author.’

The text in red included the following:

‘[The Claimant’s] lawyers tell Mark that she is corraling support for his debt to be paid.

...

...assurances keep Mark [distracted from the unpaid debt]

- To keep him on the hook they promise that they will use their influence to get his debt paid.’

87. The Claimant gave evidence as to why it was essential that her offers to assist Mr Burby remain confidential. These are accurately reflected in a website posting of 8 July 2009 which read:

“Apparently, she is afraid that, if she does what she wants, against the wishes of her advisors, then they make her life difficult by reporting back to the [Head of State]. In extreme situations, if she did what she wanted and it was not the wish of the [Head of State], her advisors would inform him and then she could be banned from returning to [her home country]”

88. It is unsurprising that the fact that the Claimant was assisting Mr Burby to recover his Judgment Debt from members of the Head of State’s family and was considering giving him financial assistance would be likely to be regarded by the Head of State and his family as disloyal conduct. It is clear from the evidence that Mr Burby appreciated this. Further it is clear from the website entries that he was aware of the Claimant’s particular concern that such assistance may lead to serious repercussions within her family. In addition to what was said in the meeting of 26 April 2006 and the terms of the proposed agreement in 2008 for the Claimant to provide financial assistance to the Burbys, in my judgment it is clear from the evidence of the Burbys’ conduct and statements that they knew that their dealings with the Claimant regarding assistance in recovering the Judgment Debt and in proposing offers of financial assistance were confidential.

Personal information of the Claimant passed to Mr Burby in the course of their dealings

89. It is not in dispute that the Claimant discussed personal matters with the Burbys such as karma and her attitude to her religion and wealth. A post on the website refers to these matters but does ‘not name her in the post to protect her dignity’. In another post Mrs Burby said that she and the Claimant talked ‘non-stop’ in the back of a car in which they were travelling from the Dorchester in May 2008. ‘We could talk about anything and it surprised me all the intimate and personal things we discussed considering we had only just met a few hours earlier’. These included a reference to the sexual allegation.
90. From the comments made by Mr and Mrs Burby on the website it is apparent that they appreciated that her views and beliefs were communicated to them by the Claimant with the mutual expectation that they would remain private.

The identity of the claimant in the English and foreign proceedings against X

91. The Claimant was anonymised by order of the court in her proceedings against X, both in England and abroad.
92. Mr Burby appears to dispute that this information is confidential. I agree with the submission made by Mr Eardley that where a court makes an order protecting the identity of the claimant from being disclosed to the public, that information has the ‘basic attribute of inaccessibility’ which is the hallmark of confidential information. Further, I accept the submission that Mr Burby cannot sensibly deny that he knew at all material times that the Claimant’s identity as claimant in the proceedings against X was protected. The affidavit he swore in the foreign proceedings against X referred to the parties by initials. Further, Mr Burby admits in his Defence that he saw a copy of the foreign anonymity order ‘during or about August 2009’. On the evidence I find that Mr Burby knew by May 2007 when he made an affidavit in the proceedings against X and would have seen by their title that the Claimant was anonymised that the identity of the Claimant as claimant in the foreign proceedings against X was confidential.

Public Interest

93. By his Defence Mr Burby agreed that specified allegations allegedly derived from M which are set out in Schedule I of the Particulars of Claim were private matters. However Mr Burby asserted that privacy could not be claimed in the allegation of possible perjury and allegations concerning the Head of State’s sympathy for and support of Islamic fundamentalism and terrorists, as they were matters of public interest.

Perjury allegation

94. As noted by the Court of Appeal, Mr Burby is not alleging that the Claimant has committed perjury in denying that she had sexual relations with M. In his pleading he asserted that it is possible that she may have committed perjury.

Terrorism allegation

95. Mr Burby contends that information derived from M about what he said he was told by the Claimant about support by the Head of State for terrorists was a matter of public interest and therefore he should not be prevented from publishing such information.

Reliability of the source of the allegations

96. The Claimant gave evidence. She denied that her relationship with M had been sexual. The Claimant gave evidence that she never talked to M about terrorism or fundamentalists. No grounds to have real doubts about her denials were placed before the Court. In accordance with the approach formulated by Lord Goff in **Spycatcher** I have considered whether the perjury and the terrorism allegations are to be regarded as being credible and from an apparently reliable source. I pay regard to the fact that in settling in 2005 the proceedings brought against him by the Claimant, M retracted his previous allegation that his relationship with the Claimant had been sexual. M confirmed that he did not have sexual relations with the Claimant. This was contrary to his assertion to the Third Defendant in 2006. M changed his account of his relationship with the Claimant. Further, according to the evidence of Mr Dowd, Mr Burby told him that M had offered to sell him confidential information about the Claimant. Such a financial motive for disclosing information should have given Mr Burby doubts about its reliability. M cannot be regarded as a reliable source of information regarding his relationship with the Claimant including ‘pillow talk’ regarding the terrorism allegations.

The motive of Mr Burby in threatening to publicise the sexual allegation and other private information

97. The Claimant alleges that the purpose or one of the purposes of the A website was to pressurise her into paying or securing the payment of the Judgment Debt. It is said that to that end until about 24 July 2009 the Third Defendant added articles to the A website which contained private or confidential information and/or threats to publish such information. By his Defence Mr Burby stated that the purpose of the website is ‘to publicise the ill treatment of the Third Defendant by members of the [Head of State’s] family’. In context this is a reference to non-payment of the Judgment Debt and the failure of Mr Burby’s efforts including through the Claimant to obtain such payment or financial assistance.
98. From the time of the first meeting between Mr Burby and the Claimant’s legal advisors on 26 April 2006, the evidence establishes that Mr Burby hoped that for assisting in the litigation the Claimant was conducting he would receive help in return to recover the Judgment Debt or, as time passed, direct financial assistance.
99. Mr Burby alleged that the Claimant agreed that she would pay or procure payment of the Judgment Debt. Mr Dowd and Mr Bateman gave evidence that, to their knowledge, the Claimant gave no such assurance. Mr Burby was told this and Mr Pallot acknowledged that such assurances had not been given. The Claimant when giving evidence stated categorically that she did not give such assurances.
100. The website entries frequently linked the non-payment of the Judgment Debt with the ‘piece-by-piece’ release of private or confidential information. The Home Page of the website read:

‘...[A] is the phrase used by [a newspaper] to describe an injustice inflicted on an innocent family, by trusting [the Head of State’s family]. This story will be released piece-by-piece.’

Another website entry reads:

‘...Third parties seem keen to serialise and publicise the spectacle of the story regardless of the outcome but, as soon as the case is settled, Mark hopes to be able to forget about it and get on with his life.’

That Mr Burby wished to maintain the interest of his readers by drip feeding material is shown by paragraph 22(b) of his Defence in which he stated that:

‘...the Third Defendant’s story was told by instalments because it was too long to tell in one fell swoop and it was easier, and more interesting, for the reader to digest it slowly; and it made the reader look forward to the next instalment (as in a TV series or a newspaper serialisation).’

101. Other postings threatened to publicise the assistance provided by the Claimant to recover the Judgment Debt. Postings of 4 July 2009 on the ‘Coming Soon’ page are titled:

‘...assurances keep Mark distracted from the unpaid debt’

and

‘...does lots of lobbying, but the debt still not paid. Who’s in charge?’

A document entitled ‘[Scandal]’ disclosed by Mr Burby shows texts of allegations under different colour codes for ‘Web Site Entries’. ‘Black – been posted, Blue – headline been posted but no detail, Red – not posted’.

Some of the entries read:

‘56. Copy of the £50m court order and confirmation statement from Mark’s lawyer (blue)

- Should be posted just to show people it’s real.

...

63. ...She is afraid that his advisers will force [the Head of State] to ban her from [the country] They report everything back to [the Head of State].

- This is apparently one of the reasons why [the Claimant] was not able to pay Mark his £50m. She wanted to and [the Head of State] expressly said No, so

if she had gone ahead and done it he would have known about it (red)

...

65. Selina's correspondence to a covert address to [the Head of State's residence] (blue)

- Posting Selina's letters that were sent directly to the [residence] to the Claimant's private fax will cause internal chaos
- They highlight that her advisors are manipulating her instructions and that she is not fulfilling her commitment to sort things out
- The letters hint to [the Claimant] about the [sexual allegation] conversation in the back of the car. This is when [the Claimant] let slip about the sex/perjury
- Selina did not make a statement about it in the letter because the standard procedure is for them to cry 'blackmail' and try to get in camera gagging order.'

The letter from Mrs Selina Burby which is referred to is likely to have been that of 10 March 2009. In the letter she refers to her family's dire financial situation and that the Claimant had wanted to help them but nothing was happening. She wrote:

'I realise that our problems are not your problems, but Mark took on your problems and decided to do the right thing by you, could you not do the same in return? I do however believe I am a good judge of character and stand firmly with my belief that you are a good person and someone who will honour her word. Just like Mark has honoured his word of maintaining his loyalty to you and helping you. I too have kept the utmost of discretion and confidentiality regarding the sensitive personal matters we discussed in the back of your car.'

102. In my judgment, the postings and proposed postings on the website created by Mr Burby demonstrate a clear linkage between the Judgment Debt and actual or threatened revelations of private information relating to the Claimant. That Mr Burby's motivation for disclosing private information relating to the Claimant was not as he claims 'To publicise [his] ill-treatment by [members of the Head of State's family]' is demonstrated by his publishing the fact that the Claimant was taking steps to assist him to recover the Judgment Debt. Such steps could not be characterised as 'ill-treatment'. Further, the document, entitled '...Scandal' shows that Mr Burby appreciated that if the Claimant were seen to be assisting him to recover the Judgment Debt she would suffer serious repercussions within her family. The disclosure of the assistance the Claimant was rendering would not demonstrate ill-treatment by her. I find that by making the postings on the A website about the Claimant, Mr Burby intended to put pressure on her to secure financial advantage for himself.

Who was responsible for making and publicising the publications complained of, including the website?

103. On the evidence before me the inescapable inference is that Mr Burby was responsible for the postings and proposed postings on the website whether or not they were made with the assistance of the other Defendants. Further, in his part 18 response he stated that he ‘...does not deny that he directed people to the [A] website.’

In his response to a request for particulars of paragraph 31 of his Defence, Mr Burby stated that:

‘following the murder of [X] media interest exploded’

and he was

‘overwhelmed with phone calls from journalists every few minutes.’

He listed those journalists to whom he can recall speaking.

104. In his Defence Mr Burby stated that he:

‘...engaged the First and Second Defendants to publicise his ill-treatment by members of the [Head of State’s] family.’

‘Ill-treatment’ is the term used by Mr Burby to describe the failure to pay or obtain payment of the Judgment Debt.

105. In my judgment on the evidence, Mr Burby was responsible for making and publicising the postings complained of on the A website. From the graph of the geographical distribution of ‘hits’ on the website, it is apparent that the website was accessed in this country.

Whether the material published on the website was already in the public domain

106. By paragraph 23.11 of his Defence Mr Burby contended that if visitors to the website would have identified the Claimant as the subject of the articles complained of, the matters were in the public domain and protection could not be sought in respect of them.

107. The Claimant gave evidence that although there may have been references to the sexual allegation on obscure websites it had not been generally available.

108. In my judgment the fact that Mr Burby was intending to release the information in respect of which privacy is claimed ‘piece by piece’ shows that such information was not in the public domain or readily accessible. There is no reason which the Claimant cannot claim protection in respect of further publication of private information even though it may have been on some websites. The Claimant can also claim protection in respect of information which has not been published at all.

Conclusions on the privacy/confidentiality claim

109. In my judgment the Claimant has clearly established that the matters set out in the Schedule to the Particulars of Claim are private or confidential and that at material times Mr Burby knew or should have known them to be so. The only categories of such information in relation to which public interest is asserted are the perjury and terrorism allegations. So far as the other matters are concerned: steps taken by the Claimant to secure payment of the Judgment Debt, discussion or dealings between the Claimant and the Third Defendant regarding the provision by her of financial assistance to him and information calculated to identify the Claimant as the claimant in English proceedings against X or as plaintiff in proceedings in another jurisdiction against X and O, no public interest is claimed, nor could it be. Mr Burby may be said to have Article 10 rights to ‘tell his story’. However, even if his motives for publicising information regarding the Claimant had not been to exert pressure on her for his financial benefit, in all the circumstances his rights to publicise such information are of less weight than the Claimant’s Article 8 rights.
110. An additional factor to be weighed in the balance in deciding whether the Third Defendant should be restrained from publicising the perjury allegation and the terrorist allegation is the claimed public interest. Neither allegation is from an apparently reliable source. The perjury allegation is, in the words of Lord Goff in Spycatcher, ‘A mere allegation of iniquity’. Further, I take into account that any public interest in publishing the perjury or the terrorism allegations did not require publication to the world at large. It was appropriate that an allegation of criminal conduct be made to the relevant police or security authority.
111. The evidence establishes that Mr Burby was responsible for publicising private and confidential information of the Claimant on the website and giving such information to journalists. The information has had some exposure by reason of his actions. The flow of such information ceased or diminished after the service on Mr Burby of Maddison J’s injunctions of August 2009. I accept the submissions made by Mr Eardley that the information has not entered the public domain so as to render it is no longer private and confidential. It still retains ‘the basic attribute of inaccessibility’. It is not public property or public knowledge.

Harassment

Did Mr Burby's publications, threats to publish and the contacts he made with the media constitute a course of conduct amounting to harassment?

112. The Claimant gave evidence that she was a private person and that she was very distressed to hear that allegations about her private life had been posted on the A website. She felt that Mr Burby tarnished her name and at the same time wanted her to give him money. She was also upset by the publication of the allegations about her because she did not want the Head of State to think she had a conversation with M about terrorism and other matters.
113. The Claimant has established that Mr Burby published private and confidential information relating to the Claimant on the A website.
114. Mr Burby admitted in his Defence that he engaged public relations consultants, Mr Gewanter and his company, ‘to publicise his ill-treatment by members of the [Head of State’s] family’. The inference to be drawn from their engagement is that Mr Burby

was actively seeking to publicise his dealings with members of the Head of State's family, including the Claimant.

115. The Third Defendant admitted in his Defence and Part 18 in response that he spoke to a journalist and believes that he informed him of the terrorist allegation. He also admitted in his Defence and Part 18 response that following the death of X he was in contact with and gave interviews to print and broadcast journalists. In his Part 18 response Mr Burby stated that he did express the opinion that it was possible that X's murder was at the hands of the Head of State's family.
116. On the evidence there would be no reason for journalists to associate Mr Burby with X's death. Mr Burby engaged PR consultants to further his aim of 'publishing his ill-treatment' at the hands of the Head of State's family. Mr Eardley contended that given his relative obscurity in this country, the extent of Mr Burby's contact with the UK press suggests an active, not passive approach to the press by him. Mr Burby accepted that he gave interviews to journalists regarding the Judgment Debt and that he spoke to a journalist about the Jersey Tapes.
117. Mr Burby posted and threatened to post the Claimant's private and confidential information on the A website. He also gave interviews to the press referring to such matters. Although she was not named, Mr Burby must have known that the Claimant would realise that she was to the subject of the postings and publications because she would have recognised her connection, albeit inaccurately described in many respects, with matters referred to. Further, Mr Burby knew that the Claimant had brought his concern about the non-payment of the Judgment Debt to the attention of the Head of State. It is reasonable to infer that the Head of State and his advisers would therefore be likely to conclude that references in publications, including on the A website, which linked the senior family member to Mr Burby were references to the Claimant. That the Third Defendant would have been aware that this would be so is shown by an entry on the A website in which comment was made that members of the Head of State's family had not been named because they had become friends of the Burbys and because of the thought that to do so would harm them or their children.
118. The Claimant gave evidence, which I accepted, that she was distressed by the material publicised by Mr Burby which came to her notice. I have found that Mr Burby made such postings on the A website to apply pressure to the Claimant for his financial advantage. On the evidence before me, Mr Burby must have known that his actions amounted to harassment of the Claimant.
119. In my judgment in posting and threatening to post the Claimant's private and confidential information on the A website Mr Burby was pursuing a course of conduct which was unreasonable, oppressive to her and unacceptable. The interviews given by Mr Burby and reported in the press were likely to add to her distress. Mr Burby's conduct amounted to harassment and it was unreasonable. Accordingly his conduct does not fall within the statutory defence provided by PHA Section 1(3)(c).

Whether Mr Burby did in fact have reasonable grounds to fear for his life as he explained to the media

120. In response to the allegation of harassment, Mr Burby stated in his Defence that he had received credible threats and/or had reasonable grounds to fear for his life or safety. He averred in paragraph 32 that he considers that:

‘...he has, or had, reasonable grounds to fear for his life or safety and maintains that he is entitled to exercise freedom of speech to express that view’

and that he has real and reasonable grounds to fear for his life and safety

‘....through being privy to information about a member of the [Head of State's family] which it was in the interests of [the family] to suppress’

121. When requested for further information of these allegations, Mr Burby by his Part 18 response stated that he

‘...did express his opinion that it was possible that X’s murder was at the hands of the [Head of State's family] . He did so because he considered it possible that they had the motive and opportunity.’

He also stated that Mr Bateman told him that arrangements had been made by the Head of State for M ‘to be taken care of’. Further, he sought to infer a link between X’s murder with steps in the litigation against him. He also relied to support his allegations on an e-mail from the Claimant’s solicitors, which he described as ‘cold’ which stated that X was dead and, ‘warning the third defendant that the injunction against him remained in place.’ Mr Burby also relied in his defence on the fact that Mr Bateman did not give the assurance requested by his advocate Mr Begg that no member of the Head of State’s family was responsible for X’s murder.

122. In order to establish a statutory defence based on these allegations, pursuant to PHA Section 1(3)(a) Mr Burby would have to show that his course of conduct was pursued for the purpose of preventing crime, his murder. Mr Burby did not give evidence. There is no direct evidence that he did or does fear for his life at the behest of the Head of State’s family. However, I will consider the circumstantial evidence which was before the court as to whether Mr Burby had reasonable grounds for this alleged fear. Articles in the media relating to this issue were before the court.
123. A newspaper article reported Mr Burby as saying that he had been placed under police protection after fears he could be targeted by those who murdered another businessman. The article referred to the Judgment Debt and that Mr Burby had access to delicate information which had also been known to X. The newspaper expressly distanced itself from any suggestion of a link between the businessman’s death, the Head of State’s family and any threats to Mr Burby.
124. A transcript of a radio interview with Mr Burby records him as referring to an ongoing private matter involving one of the Head of State’s relatives and a proposal by X, described by the host of the program as an associate of his, to blackmail the Head of State.

125. Mr Eardley drew attention to a newspaper article which referred to a violent side to X's character and the fear he inspired in those who crossed him. A reasonable inference to be drawn from this observation is that X had enemies.
126. Mr Bateman gave evidence that Mr Burby had a conversation with him about a foreign government in the context of M being a national of that country. He had libelled a book about the regime in that country. Mr Bateman denied that he had said that there was special relationship between the head of state of that country and the Head of State and that something was going to happen to M.
127. The e-mail exchanges between his lawyers and Mr Bateman referred to in Mr Burby's Defence were before the Court. The e-mail from Mr Bateman described as 'cold' did refer to the murder of X. However it did not contain the embellishments purportedly contained in the e-mail as recounted by Mr Burby in a radio interview. Further, the death of X was referred to in the context of a statement that since legal proceedings were being pursued by the Claimant against both X and O, a corporate entity, they would proceed against the company.
128. Mr Bateman gave evidence that he spoke to police Special Branch about Mr Burby's allegation that he was in fear for his life. He gained the impression that the officer to whom he spoke was a bit confused about the claim Mr Burby was making that he was in fear because of some link between him, X and M. Mr Bateman was told that the police had taken basic steps prescribed for such circumstances. He gained the impression that the police were not taking the complaint very seriously. Further, Mr Bateman did respond to Mr Begg's request for an assurance that the Head of State's family was not involved in the murder of X. He replied to Mr Begg.

'I am not dignifying this nonsense with a response...'

He then listed reasons for describing such a suggestion as nonsense.

129. There is some material in the press interviews given by Mr Burby and in his complaint to the police showing that he stated that he feared for his life at the hands of the Head of State's family. Even if he held such a belief, in my judgment on the evidence before the Court he did not have any reasonable grounds for such a belief. Mr Burby attributed his fear to the fact that he was in litigation with members of the Head of State's family as was X. As did X he said that he had private information which the Head of State's family would not wish to have publicised.
130. Litigation in which Mr Burby had an interest was pursued against members of the Head of State's family in 2005. He took steps to contact representatives of the Head of State's family to obtain payment of the Judgment Debt. When this was not satisfied he took steps to publicise what he characterised as 'ill-treatment' by members of the Head of State's family. I have found as a fact that such publicity was carried out to put pressure on the Claimant to obtain payment of the Judgment Debt. The website which Mr Burby set up for this purpose was only 'hibernated' in late August 2009 when injunctions were sought to restrain further publications by him. In my judgment, these are not the actions of someone who was in fear for his life at the hands of the Head of State's family. Nor did the murder of X on 3 September 2009 give Mr Burby reasonable grounds to fear for his life. The matters upon which he relies do not support such a conclusion. In any event any fear engendered in Mr Burby by X's

murder on 3 September 2009 could not be a justification for his actions before that date.

131. Whilst the matters relied upon by Mr Burby do not support the conclusion that he had a reasonable fear for his life, they do indicate that he knew that he had information, in particular that relating to the sexual allegations made by M and the terrorist connection allegation, which was private and which was not in the public domain. He alleged that X was planning to blackmail the Head of State by threatening to release such information. He alleged that his situation was comparable to that of X because he had such information which the Head of State's family did not wish to have made public.
132. The burden is on a defendant to show that the course of conduct which would otherwise amount to harassment within the meaning of PHA is not to be regarded as such because, applying Section 1(3)(a), it was pursued for the purpose of preventing crime. Mr Burby has not given evidence that he pursued his course of conduct for that purpose nor can such a purpose be inferred from the evidence before the court. I find that Mr Burby harassed the Claimant within the meaning of PHA.

Conclusion

133. In my judgment unless restrained, the Third Defendant is likely to resume publication of or threatening to publish private and confidential information of the Claimant and thereby to continue to harass her. The interim injunctions will continue in place pending a hearing to consider the terms of orders consequential upon this judgment.