



Neutral Citation Number: [2008] EWHC 1777 (QB)

Case No: HQ08X01303

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2008

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

MAX MOSLEY

Claimant

- and -

NEWS GROUP NEWSPAPERS LIMITED

Defendant

James Price QC and David Sherborne (instructed by Steeles) for the Claimant
Mark Warby QC and Anthony Hudson (instructed by Farrer & Co) for the Defendant

Hearing dates: 7-10 & 14 July 2008

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 MR JUSTICE EADY

Mr Justice Eady :

The nature of the claim

1. The claimant in this litigation is Mr Max Mosley, who has been President of the Fédération Internationale de l'Automobile ("FIA") since 1993 and is a trustee of its charitable arm, the FIA Foundation. He sues News Group Newspapers Ltd as publishers of the *News of the World*, complaining of an article by Neville Thurlbeck in the issue for 30 March 2008 under the heading "F1 BOSS HAS SICK NAZI ORGY WITH 5 HOOKERS". It was claimed as an "EXCLUSIVE" and was accompanied by the subheading "Son of Hitler-loving fascist in sex shame". It concerned an event which took place on 28 March, described variously as a "party" (by the Claimant and his witnesses) and "an orgy" (by the Defendant). He also complains of accompanying images published alongside the article.
2. He sues additionally over the same information and images on the newspaper's website, which also contained video footage relating to the same event. Reference is also made to a "follow up article" contained in the issue of 6 April headed "EXCLUSIVE: MOSLEY HOOKER TELLS ALL: MY NAZI ORGY WITH F1 BOSS". This consisted primarily of a purported interview with one of the women who had been present at the event in question and had filmed what took place clandestinely with a camera concealed in her clothing, which had been supplied by the *News of the World*. It is relied upon primarily in the context of aggravation of damages and in support of a claim for exemplary damages.
3. The cause of action is breach of confidence and/or the unauthorised disclosure of personal information, said to infringe the Claimant's rights of privacy as protected by Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). There is no claim in defamation and I am thus not directly concerned with any injury to reputation.
4. It is argued not only that the content of the published material was inherently private in nature, consisting as it did of the portrayal of sado-masochistic ("S and M") and some sexual activities, but that there had also been a pre-existing relationship of confidentiality between the participants. They had all known each other for some time and took part in such activities on the understanding that they would be private and that none of them would reveal what had taken place. I was told that there is a fairly tight-knit community of S and M activists on what is known as "the scene" and that it is an unwritten rule that people are trusted not to reveal what has gone on. That is hardly surprising. (It is apparently more common nowadays to refer to "BDSM", a term which embraces bondage, discipline, domination and submission or sado-masochistic practices, but I shall continue to use the more familiar "S and M" for convenience.)
5. It is alleged against the woman in question (known as "Woman E") that she breached that trust and that the journalist concerned must have appreciated that she was doing so. That could not in reality be disputed, since the whole object of supplying her with a concealed camera, and instructing her how to use it, was to ensure that she could record the events without being suspected by her fellow participants.

6. Against that background, it is clear that the present claim is partly founded, as in *McKennitt v Ash* [2008] QB 73, upon “... old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information”: see e.g. *ibid* at [8], *per* Buxton LJ.

The “new methodology”

7. Although the law of “old-fashioned breach of confidence” has been well established for many years, and derives historically from equitable principles, these have been extended in recent years under the stimulus of the Human Rights Act 1998 and the content of the Convention itself. The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence. That is because the law is concerned to prevent the violation of a citizen’s autonomy, dignity and self-esteem. It is not simply a matter of “unaccountable” judges running amok. Parliament enacted the 1998 statute which *requires* these values to be acknowledged and enforced by the courts. In any event, the courts had been increasingly taking them into account because of the need to interpret domestic law consistently with the United Kingdom’s international obligations. It will be recalled that the United Kingdom government signed up to the Convention more than 50 years ago.
8. The relevant values are expressed in Articles 8 and 10 of the Convention, which are in these terms:

“Article 8

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

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such

formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

9. It was recognised in *Campbell v MGN Ltd* [2004] 2 AC 457 that these values are as much applicable in disputes between individuals, or between an individual and a non-governmental body such as a newspaper, as they are in disputes between individuals and a public authority: see e.g. Lord Nicholls at [17]-[18] and Lord Hoffmann at [50]. Indeed, “ ... in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10”: *per* Buxton LJ in *McKennitt v Ash* [2008] QB 73 at [11].
10. If the first hurdle can be overcome, by demonstrating a reasonable expectation of privacy, it is now clear that the court is required to carry out the next step of weighing the relevant competing Convention rights in the light of an “intense focus” upon the individual facts of the case: see e.g. *Campbell* and *Re S (A Child)* [2005] 1 AC 593. It was expressly recognised that no one Convention right takes automatic precedence over another. In the present context, for example, it has to be accepted that any rights of free expression, as protected by Article 10, whether on the part of Woman E or the journalists working for the *News of the World*, must no longer be regarded as simply “trumping” any privacy rights that may be established on the part of the Claimant. Language of that kind is no longer used. Nor can it be said, without qualification, that there is a “public interest that the truth should out”: cf. *Fraser v Evans* [1969] 1 QB 349, 360F-G, *per* Lord Denning MR.
11. In order to determine which should take precedence, *in the particular circumstances*, it is necessary to examine the facts closely as revealed in the evidence at trial and to decide whether (assuming a reasonable expectation of privacy to have been established) some countervailing consideration of public interest may be said to justify any intrusion which has taken place. This is integral to what has been called “the new methodology”: *Re S (A Child)* at [23].
12. This modern approach of applying an “intense focus” is thus obviously incompatible with making broad generalisations of the kind to which the media often resorted in the past such as, for example, “Public figures must expect to have less privacy” or “People in positions of responsibility must be seen as ‘role models’ and set us all an example of how to live upstanding lives”. Sometimes factors of this kind may have a legitimate role to play when the “ultimate balancing exercise” comes to be carried out, but generalisations can never be determinative. In every case “it all depends” (i.e. upon what is revealed by the intense focus on the individual circumstances).
13. The exercise is sometimes still described, in terminology used by Lord Goff in the *Spycatcher* litigation, as determining whether any “limiting principles” come into play: see *Att.-Gen. v Guardian Newspapers (No 2)* [1990] 1 AC 109, 282B-F:

“ ... The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. ...

The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.

The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply ... to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

Embraced within this limiting principle is, of course, the so called defence of iniquity. In origin, this principle was narrowly stated, on the basis that a man cannot be made 'the confidant of a crime or a fraud': see *Gartside v Outram* (1857) 26 LJ Charity 113, 114, *per* Sir William Page Wood V-C. But it is now clear that the principle extends to matters of which disclosure is required in the public interest: see *Beloff v Pressdram Ltd* [1973] 1 All ER 241, 260, *per* Ungood-Thomas J, and *Lion Laboratories Ltd v Evans* [1985] QB 526, 550, *per* Griffiths LJ. It does not however follow that the public interest will in such cases require disclosure to the media, or to the public by the media. There are cases in which a more limited disclosure is all that is required: see *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892.”

14. This “ultimate balancing test” has been recognised as turning to a large extent upon proportionality: see e.g. Sedley LJ in *Douglas v Hello! Ltd* [2001] QB 167 at [137]. The judge will often have to ask whether the intrusion, or perhaps the degree of the intrusion, into the claimant's privacy was proportionate to the public interest supposedly being served by it.
15. One of the more striking developments over the last few years of judicial analysis, both here and in Strasbourg, is the acknowledgment that the balancing process which has to be carried out by individual judges on the facts before them necessarily involves an evaluation of the use to which the relevant defendant has put, or intends to

put, his or her right to freedom of expression. That is inevitable when one is weighing up the *relative* worth of one person's rights against those of another. It has been accepted, for example, in the House of Lords that generally speaking "political speech" would be accorded greater value than gossip or "tittle tattle": see e.g. *Campbell* at [148] and also *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 at [147].

The significance of visual images

16. This naturally has particular significance in the context of photographs or other visual images. Sometimes there may be a good case for revealing the fact of wrongdoing to the general public; it will not necessarily follow that photographs of "every gory detail" also need to be published to achieve the public interest objective. Nor will it automatically justify clandestine recording, whether visual or audio. So much is acknowledged in the relevant section of the Press Complaints Commission ("PCC") Editors' Code at Clause 10:

- " i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs or by accessing digitally-held private information without consent.
- ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means."

17. Naturally, the very fact of clandestine recording may be regarded as an intrusion and an unacceptable infringement of Article 8 rights. That is one issue. Once such recording has taken place, however, a separate issue may need to be considered as to the appropriateness of onward publication, either on a limited basis or more generally to the world at large. In this case, the pleaded claim is confined to publication of the information; it does not include the intrusive method by which it was acquired. Yet obviously the nature and scale of the distress caused is in large measure due to the clandestine filming and the pictures acquired as a result.

18. The intrusive nature of photography has been fully discussed in the European Court of Human Rights in *Von Hannover v Germany* (2004) 40 EHRR 1 and also in domestic jurisprudence. The point was articulated by Waller LJ in *D v L* [2004] EMLR 1 at [23]:

"A court may restrain the publication of an improperly obtained photograph even if the taker is free to describe the information which the photographer provides or even if the information revealed by the photograph is in the public domain. It is no answer to the claim to restrain the publication of an improperly obtained photograph that the information portrayed by the photograph is already available in the public domain."

19. Later, in *Douglas v Hello! Ltd (No 3)* [2006] QB 125 at [84] the Court of Appeal explored the underlying reasons in terms which resonate in the factual circumstances now before the court:

“This action is about photographs. Special considerations attach 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.”
20. It was acknowledged by Lord Hoffmann in *Campbell*, at [60], that there could be a genuine public interest in the disclosure of the existence of a sexual relationship (in, for example, a situation giving rise to favouritism or advancement through corruption), but he went on to warn that the addition of salacious details or intimate photographs would be disproportionate and unacceptable. “The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning”.
21. At the Court of Appeal stage of *Campbell* [2003] QB 633 at [64], Lord Phillips stated that provided the publication of particular confidential information is justifiable in the public interest, the journalist must be given reasonable latitude as to the manner in which the information is conveyed to the public: see too *Fressoz v France* (1999) 31 EHRR 28. Yet, for the reasons given by Lord Hoffmann, it should not be assumed that, even if the subject-matter of the meeting on 28 March was of public interest, the showing of the film or the pictures was a reasonable method of conveying that information. In effect, it is a question of proportionality.
22. It is always important to remember that a number of the comments made about intrusion by photography or video recording in Strasbourg have been made in the context of images recorded in more or less public spaces. This was so in *Von Hannover v Germany* itself and in *Peck v United Kingdom* (2003) 36 EHRR 41. It was true also of the decision of the Supreme Court of Canada in *Aubry v Éditions Vice-Versa Inc.* [1998] 2 SCR 591, in which it was held that there had been a violation of a young woman’s right of privacy under Article 5 of the Quebec Charter of Human Rights and Freedoms, notwithstanding the fact that she had been sitting on the steps of a public building.
23. The present complaint relates to the recording on private property of sexual activity. The situation may be at the extreme of intimate intrusion, but the matter is by no means outside the scope of existing authority. An injunction was granted, for example, by Ouseley J in *Theakston v MGN Ltd* [2002] EMLR 22 in respect of photographs taken inside a brothel, even though he recognised that it was not appropriate to restrain verbal descriptions of what the claimant did there. The passage

in his judgment giving reasons for restraining publication of the photographs was cited and endorsed by the Court of Appeal in *Douglas v Hello! Ltd (No 3)* at [85].

A brief summary of the Defendant's case on Article 8

24. In the present case, the Defendant advances two alternative propositions in the light of the legal principles developed over recent years. First, it is said that the Claimant had no reasonable expectation of privacy in relation to the information concerning the events of 28 March, or in relation to the visual images contained in the newspaper, or in relation to the video material. Alternatively, the argument is raised that the Claimant's right to privacy under Article 8 of the Convention is outweighed by a greater public interest in disclosure, such that the Defendant's right to freedom of expression under Article 10 should, in these particular circumstances, be allowed to prevail.
25. The public interest argument has somewhat shifted as matters have developed. The primary case would appear to be that the public has an interest in knowing of the newspaper's and/or Woman E's allegation that the events of 28 March involved Nazi or concentration camp role-play. A somewhat later variation on the theme, perhaps primarily attributable to the Defendant's legal team, is that what took place was at least partly illegal. It was said that the Defendant was committing offences such as assault occasioning actual bodily harm and brothel-keeping. When the editor of the newspaper went into the witness-box on 8 July, he went so far as to claim, *irrespective of any Nazi element*, that the nature of the sexual activities was such that the public had a right to know that the Claimant indulged in them. This was because of his role as President of the FIA.

The publication of 30 March 2008

26. I have already recited the headlines to the article of 30 March which took up most of the front page of the *News of the World* from the second edition onwards. There was very little text on the front page, which was there simply to summarise and to direct the reader's attention to the "full story" on pages 4 and 5. The few allegations on the front page were as follows:

"FORMULA One motor racing chief Max Mosley is today exposed as a secret sado-masochist sex pervert.

The son of infamous British wartime fascist leader Oswald Mosley is filmed romping with five hookers at a depraved NAZI-STYLE orgy in a torture dungeon. Mosley – a friend to F1 big names like Bernie Ecclestone and Lewis Hamilton – barks ORDERS in GERMAN as he lashes girls wearing mock DEATH CAMP uniforms and enjoys being whipped until he BLEEDS."

Factually, what is challenged in this introductory passage are the references to "NAZI-STYLE" and "DEATH CAMP uniforms". It will be recalled, however, that the Claimant is not suing for injury to reputation. The relevance of this would appear to be confined to the Defendant's public interest defence.

27. Inside, on pages 4 and 5, there is an inset box headed “Evil father was a Hitler wannabe”, drawing attention to the Claimant’s father and the fact that his parents were married at the home of Goebbels with Hitler as the “guest of honour”. There is also a heading spread across both pages asserting, “In public he rejects father’s evil past, but secretly he plays Nazi sex games in £2,500 dungeon orgy”. There are then various photographs displayed, which are taken from the clandestine video recording of the 28 March party. There are captions to the following effect:
- i) “FASTEST SLAP Racing boss Mosley wallops one of the squealing hookers with leather paddle.”
 - ii) “SO SICK In the midst of one beating, a panting Mosley watches one hooker take off her Nazi uniform.”
 - iii) “IN CHAINS Mosley lies face down on a bed trussed up before his punishment.”
 - iv) “TAKE ZAT! Formula One supremo Mosley is bent naked and chained over the torture bench in the S&M dungeon as one of the hookers lays into his bare buttocks so hard with a cane he needed a dressing to cover the wounds.”
 - v) “SINISTER Hooker in mock death camp clothes is gagged.”
 - vi) “TEA-TIME: Mosley after orgy.”
 - vii) “TWISTED GAME: Hooker ticks off SS-style inspection sheet. Mosley has called himself ‘Tim Barnes’ to earn extra punishment.”

There are two other uncaptioned photographs showing part of the “medical inspection” at the beginning of the first scenario, including one of his head being examined for lice.

28. There is also a red star on the page drawing attention to the display of the video on the website with the invitation, “See the shocking video at notw.co.uk”. I shall return to that when addressing the Defendant’s case on public interest.
29. The text of the article is again introduced as an “EXCLUSIVE by Neville Thurlbeck”, while the main heading is a pun on Formula 1 racing, namely “THE PITS”.
30. It is fair to point out that any parts of the photographs revealing anybody’s private parts are discreetly blocked out – including in one instance by a chequered flag. The Claimant said that he was particularly offended by a small inset photograph of his wife gratuitously inserted at the foot of the page (opposite one of Hitler).
31. The text itself summarises what can be seen on video, in fairly intimate detail, and also gives a brief account of his earlier career. There are included in the text also references to “AUSCHWITZ” and “Nazi uniforms”. The medical inspection is described as “mocking the humiliating way Jews were treated by SS death camp guards in WWII”. It is also said that “His Jew-hating father – who had Hitler as guest of honour at his marriage – would have been proud of his warped son’s command of German as he struts around looking for bottoms to whack”.

32. There are short clips from the video material available on the website, again with discreet blobs to cover private parts, but these only lasted for something like 90 seconds. They were available until the morning of 31 March, when the newspaper agreed to take them down until the outcome was known of an application for an injunction (to be made before me on 4 April). I declined the injunction and handed down my reasons on 9 April. The material was available elsewhere, but that displayed on the Defendant's website was itself viewed hundreds of thousands of times. It was restored to the website very shortly after I refused injunctive relief.

The publication of 6 April 2008

33. The following Sunday the front page was again largely taken up with the headline "MY NAZI ORGY WITH F1 BOSS" accompanied by the claim "EXCLUSIVE: MOSLEY HOOKER TELLS ALL". There is another strap across the bottom of the page claiming, "Secret S&M tapes expose his lies". There is a full-length photograph of Woman E dressed in a peaked cap, white shirt, leather skirt and thigh-length boots. She is carrying a cane. This time it is her face which is blocked out. There is the caption "POSING: Mosley hooker in Nazi outfit".
34. The "full story" is said to be set out on pages 4, 5, 6 and 7 inside. Again, on the front page, the events of 28 March were described as his "infamous Nazi-style orgy".
35. On pages 4 and 5 there is a headline extending across both pages "MAX DEATH CAMP LUST". There is a smaller heading claiming, "HOOKER REVEALS LIES AND PERVERSIONS OF F1 SUPREMO".
36. An attempt is made to rebut the Claimant's denials of "the so-called Nazi element" by setting out ten key points:
- "1. Two hookers wore German military jackets with eagle and tunic collars (below).
 2. Three of the vice girls wore striped prison uniforms.
 3. Mosley played a death camp inmate – guards checked him for lice and took measurements with a clipboard.
 4. He is told to face the floor as girl signs for him on clipboard.
 5. One 'guard' uses the term 'facility' – the sort of clinical language associated with Nazis.
 6. Mosley gives out brutal beatings – like concentration camps.
 7. He is shaved – just like the Jews.
 8. Other camp 'victims' are forced to watch their friends being abused.
 9. Mosley speaks in German.

10. He uses fake German accent to speak English.”
37. There are other headlines on page 4, including “Girls forced to act like Nazi victims”. There are also photographs of Women A, B and E either walking down the street or posing in costume. Each has her face pixillated.
38. There is a photograph of the Claimant with the caption “LIAR: Mosley ordered a Nazi-style orgy from hookers”. It is repeatedly alleged that there had indeed been a Nazi theme to the 28 March gathering. For example, the article is introduced as follows:
- “TODAY we expose Formula 1 chief Max Mosley as a LIAR as well as a pervert who revelled in a chilling Nazi-style sado-masochistic orgy with five hookers.”
39. It is said also that the previous week’s “exposé” had sparked outrage in the motor racing world because of the “DEPRAVED 5-HOUR session of beatings and sexual torture with prostitutes dressed as German military officers and concentration camp inmates”.
40. There is a sub-heading “SHAME” followed by this passage:
- “Then he made light of the shocking scandal as ‘harmless and completely legal’ adding: ‘It goes without saying that the so-called Nazi element is pure fabrication’.
- But that’s a total LIE. And today we prove it by revealing all that’s decent to print on the episode that disgraced even HIS family’s already shame-drenched name.
- One of the five hookers he hired for sex in the London torture chamber nine days ago insisted last night: ‘Max KNEW last week’s orgy was to have a Nazi theme – he ORDERED it!’ ”
41. On pages 6 to 7 there appears another article with the cross-heading “SECRET TAPES REVEAL VILE MOSLEY’S TRUE DEPRAVITY”. There are also headlines to the effect, “MOSLEY’S TWISTED NAZI-STYLE RANT AT HOOKERS” and “Sick games WERE like death camps”.
42. There is a leader on page 6 headed “A vain deviant with no sense of truth or honour”. It refers to the Claimant acting out Nazi death-camp fetishes and “parodying Holocaust horrors with five prostitutes”.
43. In the body of the article, also by Mr Thurlbeck, there are a number of allegations intended to “PROVE the head of world motor racing WAS acting out his vile death-camp fantasies in a torture dungeon orgy with five hookers”. There is then a fairly long description of events purporting to demonstrate the Nazi element.

Was there a Nazi or “death camp” theme?

44. The principal factual dispute between the parties related to the allegation in the *News of the World* that the 28 March session had a Nazi theme. This was vehemently

denied by the Claimant and by the four women called by him at the trial under the names Women A to D. It had been thought until the fourth day of the trial that evidence to the opposite effect would be given by Woman E, who had been fitted out with the camera to make the video recording and who was ultimately paid a total of £20,000 for her co-operation. Reliance was also placed by the Defendant on the content of the recording itself. On the fourth day, however, Mr Warby indicated that no further reliance was to be placed on Woman E or the proposition, advanced vigorously up to that point, that the Claimant had actually “ordered” or requested a “Nazi” or concentration camp theme. It was confirmed also that it was no part of the Defendant’s case, either, that Woman A had passed any such instruction on to Woman E.

45. It would probably have been wise for me to focus in any event on the footage itself, as containing the “proof of the pudding”, rather than upon the evidence of Woman E, whose credibility would naturally be suspect in view of her willingness to betray a trust for money. Moreover, if she had been telling Mr Thurlbeck the truth, one would certainly expect to see the allegation borne out on film. I was now asked to draw the inference that there was in fact a Nazi theme on 28 March from, and only from, the content of the hours of recorded material.
46. The primary significance of this issue is that the newspaper’s original stance was that the intrusion by clandestine filming was justified by the anticipation of a Nazi theme, which was said to be a matter of public interest and relevant to the Claimant’s suitability for the responsibilities of his post as President of the FIA. Moreover, the subsequent publication was justified by the “unmistakably” Nazi content. The Nazi theme is no longer the sole basis for the defence case, since allegations of illegality and/or immorality are also relied upon independently of it, but it is nonetheless necessary for me to come to a conclusion about it. The submission is made that, at stage one, it deprives the Claimant of any reasonable expectation of privacy; in any event, any such right would be outweighed at stage two because of the public interest in the quasi-Nazi behaviour.
47. Mr Price has argued that no reasonable person could think from an examination of the recorded material of 28 March that it had anything to do with Nazism or concentration camps. He submitted that what took place was simply a “standard” S and M prison scenario – which is one of the most common fantasies enacted by those interested in this pastime. After the first article was published on 30 March, the editor of the *News of the World* called on his staff for ten reasons to be identified which would, with the benefit of hindsight, justify the newspaper’s claims of a Nazi theme. This was probably with a view to refuting the Claimant’s denials published in the media, and partly also to set out such reasons in tabular form to demonstrate to readers “at a glance” that the claims had been true. These were identified on page 5 of the April 6 issue and I have set them out above at paragraph [36].
48. A number of factors are relied upon. It is nonetheless vital to have in mind the particular and most unusual context in which these events took place. Beatings, humiliation and the infliction of pain are inherent to S and M activities. So too is the enactment of domination, restraints, punishment and prison scenarios. Behaviour of this kind, in itself, is in this context therefore merely neutral. It does not entail Nazism.

49. Women A and D gave evidence about the attractions and excitement of S and M role-play. Woman A said that, after receiving whatever number of strokes she had set herself as a target, it was “the best feeling in the world”. She referred to children playing games, citing the example of “cowboys and Indians”. At all events, what took place on 28 March was very much a “game” of two halves, with the Claimant in the first scenario playing the submissive and in the second adopting the dominant role. It will be noted that of the editor’s 10 key points listed on 6 April those numbered 3, 4, 5 and 7 relate to the first scenario only, whereas the remainder are specifically directed to the second.
50. There was a suggestion that some of the women were wearing Nazi clothing, but Mr Thurlbeck himself ultimately recognised in a memo, after publication, that what was worn was simply “foreign uniform and ordinary blazer”. He had been addressing in the same email the rather incongruous possibility of a “Nazi blazer”. As the Claimant himself pointed out, if there had been a desire to create a Nazi scenario it would have been easy to obtain Nazi uniforms online or from a costumier. The uniform jacket worn by Woman E had been in her possession before either the 8 or 28 March gatherings were organised and had not been obtained specifically for that purpose. It was there to be seen in a photograph on her website which Mr Thurlbeck inspected.
51. The facts that the jacket corresponded to the modern Luftwaffe uniform and that German was spoken in the second of the two scenarios acted out on 28 March cannot be identified with Nazism. As Woman B observed, and most Germans would agree, it is inappropriate and offensive to equate everything German with the Nazi era. Mr Thurlbeck’s answer, on more than one occasion, was that everything has to be seen “in the round”. I take that to mean that notwithstanding the absence of specifically Nazi or concentration camp indicia a reasonable person would still view the overall exercise as Nazi role-play. He said that this was to be regarded merely as “am drams” and the Claimant had been let down by his wardrobe department, with the result that the clothes (whatever they actually were) should be regarded as “pretend” Nazi uniforms. This is an approach that is not uncommon when witnesses in court are trying to defend a certain position under cross-examination. If it is believed that a particular state of affairs came about, it becomes necessary to explain away any indicators to the contrary. Here, simply because it is *assumed* that there was Nazi role-play, non-Nazi clothes have to be explained as “pretend” Nazi clothes.
52. In the first scenario, when the Claimant was playing a submissive role, he underwent a medical inspection and had his head searched for lice. Again, although the “medical” had certain unusual features, there is nothing specific to the Nazi period or to the concentration camps about these matters. Moreover, no German was spoken at this stage – not least because Woman B appeared later, in time only for the second scenario.
53. Mr Thurlbeck also relied upon the fact that the Claimant was “shaved”. Concentration camp inmates were also shaved. Yet, as Mr Price pointed out, they had their *heads* shaved. The Claimant, for reasons best known to himself, enjoyed having his bottom shaved – apparently for its own sake rather than because of any supposed Nazi connotation. He explained to me that while this service was being performed he was (no doubt unwisely) “shaking with laughter”. I naturally could not check from the DVD, as it was not his face that was on display.

54. The first scenario begins with the words “Welcome to Chelsea” and the Claimant uses the *nom de guerre* “Tim Barnes”. One of the “guards” is referred to as “Officer Smith”. These factors lend no support to the Nazi role-play allegation; indeed, they would appear to be inconsistent with it. Moreover, the use of the word “facility” is neutral. It is after all an English and/or American word and has no especially Nazi connotations.
55. There is discussion of a spontaneous kind, which does not make much sense, of his being there to serve a life sentence imposed by a judge. There was similar discussion at the gathering of 8 March on which the later event was modelled. This is because they were both seen in S and M parlance as “judicial” scenarios. Those sent to concentration camps, of course, were not there as a result of a “sentence” being passed or, for the most part, in consequence of any judicial process at all. Judicial and/or prison scenarios are, according to the evidence, very common forms of role-play on the S and M “scene”. This is entirely consistent with one of the few surviving messages relating to Woman A’s organisation of the party. On 25 March she sent a message to the following effect:
- “Hi ladies. Just to confirm the scenario on Friday at Chelsea with Mike, starting at 3. If you’re around before then, *I’m doing a judicial on him at noon* so if you’d like to witness that, be here for 11am but don’t stress if you can’t make that. [Woman D] I’ve got uniform everyone else as before [i.e. on 8 March] ... Can’t wait it’ll be great ... My bottom is so clear for a change. Any problems or address needed just yell. Lots of love [Woman A]
- xxxx” (Emphasis added)
56. In neither the first nor the second scenario was any reference made to the concentration camps, Nazi ideology or anything else which is unmistakably linked to the period.
57. Mr Warby argued that if Woman A was really offended by the “Nazi” references in the newspaper, she could have been expected to record that in her round robin text of 11 April (cited below at paragraph [105]). But, since she called Woman E a “liar”, with three exclamation marks, it is not easy to see how she could have made the point any clearer.
58. In the second scenario, the young women “victims” wore horizontally striped pyjamas. That may loosely suggest a prison uniform but, yet again, there is nothing to identify the clothing as of the Nazi era. Photographs were introduced by Mr Price, for what they were worth, to show that the uniforms worn in concentration camps tended to have vertical stripes. Pictures were also produced to show a group of people running in the recent London Marathon wearing “prison” costumes. These too had horizontal stripes; yet no-one would imagine that they were in any way making reference to concentration camps or “mocking” their victims (as the *News of the World* alleged of the Claimant). I was also referred to the invoice for those particular costumes which were obtained for £11.91 each from a “joke” supplier. I did not find any of this evidence especially helpful, since what matters is the simple fact that

prison uniforms worn for S and M role-play do not in themselves echo concentration camps or involve “mocking” the victims.

59. As to the use of the German language, Woman D gave evidence that she was turned on by the thought of being interrogated, while she was in a submissive role, by people using a foreign language which she did not understand. It added to the sense of helplessness and having no control. She had originally heard the Claimant and Woman B speaking German at a gathering towards the end of January or beginning of February (simply because they had the language in common) and suggested to Woman A that it would be a good idea to incorporate the further use of German in a scenario later on. This in fact happened on 8 March when Woman D had a more pressing engagement and she was disappointed not to have participated. She requested a re-run, which was a contributory factor to the format adopted on 28 March. As was further explained, to many English ears at least, the language is perceived as having a harsh and guttural sound and is thought to be more suitable for use by those playing a dominant role in S and M scenarios than (say) French or Italian. Apparently Russian might have also been suitable, but unfortunately none of the participants spoke Russian.
60. The use of German on 28 March, in the second scenario when the Claimant was playing a dominant role and Woman B was also present, was said to be largely to please Woman D rather than at the Claimant’s request. Odd though it may seem to many people, as does much fetishist behaviour, I see no reason to disbelieve Woman D’s explanation. In any event, she had been interviewed on a weblog at the end of February when she made exactly the same point. So it was plainly not made up for this litigation. In any case, it is clear that the Claimant threw himself into his role with considerable enthusiasm.
61. Mr Warby takes a rather elaborate point to the effect that this account differs from what was said by the Claimant’s solicitor in his witness statement when seeking an injunction on 4 April. There, the emphasis was placed on the mere fact that Woman B happened to be a German speaker – rather than the use of the language being a “turn on”. This is relied upon to undermine the Claimant’s credibility. I do not find it very powerful. The later evidence was more expansive and I see no fundamental contradiction.
62. Although Mr Thurlbeck thought the use of German highly significant as one of the Nazi indicia, it is noteworthy that neither he nor anyone else thought it appropriate to obtain a translation before evaluating the material for publication. It contained a certain amount of explicit sexual language about what the Claimant and Woman B were planning to do to those women in the submissive role, but nothing specifically Nazi, and certainly nothing to do with concentration camps.
63. The newspaper accused the Claimant of playing a concentration camp commandant, but he was dressed (if at all) only in white shirt and the dark trousers of a business suit. He did not wear any kind of uniform. Moreover, apart from his usual S and M name of “Mike”, the only bogus identity he adopted was, as I have said, that of “Tim Barnes”. These factors are difficult to explain away if the Claimant was supposed to be playing a Nazi officer or concentration camp commandant.

64. There was also reference in the article of 30 March to an “SS-style clipboard”. What was in fact shown was an ordinary notebook with a spiral binder and the name “Tim Barnes” at the top. This is simply another example of creativity intended to plug the lack of support for a Nazi theme in the recorded material itself.
65. It was put to the editor and Mr Thurlbeck that the reason why Woman E was only paid £12,000 after she delivered the video material, despite having been offered £25,000 previously, was that they had been disappointed by the lack of Nazi content – a pertinent question. This was denied and the editor gave the reason that they like to renegotiate downwards, when in a strong bargaining position. They were affected by the credit crunch like everyone else.

The events of 8 March 2008

66. Since the publications complained of in these proceedings, the Defendant has obtained (from the Claimant on disclosure) and examined a video recording of the party which took place on 8 March 2008, which was apparently in a sense the forerunner of the scenario played out on 28 March. Clearly, this was not a matter in the knowledge of the Defendant prior to publication and accordingly cannot have played any part in the determination either to obtain clandestine footage of the 28 March gathering or to publish what went into the newspaper or on to the website. Nevertheless, reliance was placed upon it, with the benefit of hindsight, in order to buttress the proposition that what the Claimant and the women were doing on both occasions could legitimately be characterised as Nazi role-play.
67. There was, of course, plenty of spanking, and references to “judicial” penalties, but the only passage which is relevant for this purpose relates to an occasion when one of the women was lying face down on the sofa while being given intermittent and rather lack-lustre strokes with a strap. There seems to be some sort of game involving rivalry between blondes and brunettes. At one point, the dark-haired woman lying on the sofa raises her head and cries out “Brunettes rule!” Within a moment or two, a voice from off-camera can be heard (accepted to be that of Woman A, who is indeed blonde) gasping out words to the effect “We are the Aryan race – blondes”.
68. Not surprisingly, this has been fixed upon by the Defendant as being a reference to Nazi racial policies. It is said that the reference to “Aryans” cannot bear any other interpretation.
69. When asked about this, the Claimant said that he had no recollection of any such remark being made and, indeed, that it was perfectly possible that his hearing aids would not have picked this up in all the excitement. This naturally invites a certain degree of scepticism, although there is no doubt that the Claimant is a little deaf (as emerged during the course of his evidence) and does wear hearing aids.
70. What is clear, however, is that the remark was unscripted and that it occurred amid a good deal of shouts and squeals (of delight or otherwise). One had to listen to the tape several times to pick out exactly what was going on and indeed nobody had spotted “Brunettes rule!” until the middle of the trial. It is also clear that there was nothing spoken by the Claimant on this occasion which reflected Nazi terminology or attitudes. There is no reason to suppose that it was other than a spontaneous squeal by Woman A *in medias res*.

71. It is probably appropriate at this point to address another remark from time to time used by Woman B. She uses the term “Schwarze” when she is acting out a dominant role in relation to one or more submissive females. The suggestion was that she was pretending that they were black and racially abusing them. She explained, however, that in German the word is used to refer to a dark-haired woman (or brunette) – such as herself. She said “I am a Schwarze”. It had no racial connotations, so far as she was concerned. Although Mr Warby invites me to reject this, since the German word could also refer to a black person, I see no reason to disbelieve her. It seems more natural to interpret her remark in context as referring to the woman’s dark hair (which she had) rather than to dark skin (which she did not). Mr Warby also submitted that the references by the two women to blondes and brunettes are not connected. Since they occurred within seconds of each other, I believe that is unrealistic. In any event, it could hardly be suggested that the blondes were accorded any more respectful treatment (as “Aryans”) than the brunettes. One of them is abused as a “dumb ass blonde” (in German) and the spanking is indiscriminate in this respect.
72. These matters seem to me, however, to be marginal and in no way to support the Defendant’s primary case that the events of 28 March involved Nazi role-play – still less (as was originally the Defendant’s case) that the Claimant had specifically ordered a Nazi or concentration camp scenario. It is fair to record also that I found no evidence at all of his “mocking the humiliating way Jews were treated”. Yet, for many people, that must have been one of the most shocking and memorable of the “exclusive” revelations. It was not surprising that the Holocaust Centre should have responded that his conduct (as described in the newspaper) was an “insult to millions of victims, survivors and their families”. No doubt others felt the same.

The missing emails

73. Mr Warby placed considerable reliance, both in submissions and in cross-examination, upon the fact that at various stages both Woman A and the Claimant had taken steps to delete their email traffic. The position is by no means clear and the evidence was, to an extent, inhibited on the part of the witnesses who gave evidence by lack of technical knowledge about the process of email deletion. At one stage, it appears that the Claimant’s lawyers obtained an expert report from Quest (Lord Stevens’ organisation) which may or may not have thrown some light on the history of the deletions. Mr Warby asked for it to be produced, and the Claimant indicated that he had no personal objection, but the fact remains that it was not released. Whether it would have clarified the issues I cannot tell.
74. It seems that Woman A’s deletions occurred after the publication of the *News of the World* story and, so far as one can tell, those of the Claimant occurred somewhere between 22 and 28 March of this year (probably no later than 24 March). They seem to have been prompted, albeit with no great urgency, by the warnings he had received that he might be under surveillance by unidentified persons with the motive of trying to undermine his character or reputation in the motoring world. These came from Bernie Ecclestone in January and from Lord Stevens at the end of February.
75. The Claimant commented, more than once, while in the witness box that it was unfortunate that the emails had disappeared, because they would confirm that there had been no Nazi or concentration camp element in the planning of the 28 March gathering. Mr Warby, on the other hand, suggested that they would have been

beneficial to his client's case in helping him to make good the allegation that the Claimant *requested* a Nazi theme.

76. It is important to remember that the Claimant had no reason to suppose, so far as one can tell, that the *News of the World* was interested in his activities at the time when he took steps to delete the emails; nor would he have any reason to know that their ultimate message in the newspaper coverage was going to be that of Nazi role-play. It seems curious, if he was indeed deleting the emails to hide any Nazi element, as Mr Warby seemed to be suggesting, that he nevertheless went ahead with the gathering to take place on 28 March. According to the Defendant's case it was obvious from the recording that the content of the meeting was Nazi and/or concentration camp role-play. I shall come to the validity of this contention in due course, but it hardly seems consistent on the Defendant's part to advance, on the one hand, the proposition that the Claimant deleted his emails prior to the party in order to obscure the plans for Nazi role-play and yet, on the other hand, that he nevertheless went ahead with the party on that basis.
77. It is not surprising, perhaps, that Woman A chose to delete her emails after the massive exposure in the newspaper which caused her so much alarm and offence.
78. It has to be accepted that, in the light of the evidence, it is not possible to come to a definitive conclusion as to precisely when, or why, the Claimant's email traffic was deleted; nor is it possible to conclude how much of it was irretrievably lost, how much of it could be recovered with expert assistance, or what it contained. In the end, therefore, the whole issue seems to me to contribute very little to the resolution of the issues I have to consider. I accept, of course, that there might be something in Mr Warby's point if it could be shown that the Claimant deleted his emails *after* the allegations were made in the *News of the World*. It might in those circumstances be possible to draw an inference that he had something to hide, bearing upon the very allegations made against him. Since the only evidence points, however, to the deletions having taken place prior to the party, it does not seem to me to have any potentially sinister significance of that kind.

Mr Thurlbeck's behaviour following publication on 30 March 2008

79. After the publication of the material on 30 March, it was decided that a "follow up" article was required for 6 April, as there was still likely to be interest in the story and also partly because it was thought appropriate to refute the Claimant's criticisms. These had attracted considerable publicity in the first few days after publication, and in particular his denial of the element of Nazi role-play.
80. In order to firm up the story, therefore, Mr Thurlbeck decided that he would like to publish an interview with at least one of the participants and, if possible, contributions from all of them.
81. In pursuit of this objective, therefore, he sent a number of emails. On 2 April he sent identical emails to Women A and B in these terms:

"I hope you are well. I am Neville Thurlbeck, the chief reporter at the News of the World, the journalist who wrote the

story about Max Mosley's party with you and your girls on Friday.

Please take a breath before you get angry with me!

I did ensure that all your faces were blocked out to spare you any grief.

And soon, the story will become history as life and the news agenda move on very quickly.

There is a substantial sum of money available to you or any of the girls in return for an exclusive interview with us. The interview can be done anonymously and you[r] face can be blacked out too. So it's pretty straight forward.

Shall we meet/talk?"

He became more insistent the following day:

"I'm just about to send you a series of pictures which will form the basis of our article this week. We want to reveal the identities of the girls involved in the orgy with Max as this is the only follow up we have to our story.

Our preferred story however, would be you speaking to us directly about your dealings with Max. And for that we would be extremely grateful. In return for this, we would grant you full anonymity [*sic*], pixilate your faces on all photographs and secure a substantial sum of money for you.

This puts you firmly in the driving seat and allows you much greater control as well as preserving your anonimities [*sic*] (your names won't be used or your pictures).

Please don't hesitate to call me ... or email me with any thoughts.

Regards and hope to do business.

Neville Thurlbeck, chief reporter, News of the World"

82. This would appear to contain a clear threat to the women involved that unless they cooperated with Mr Thurlbeck (albeit in exchange for some money) their identities would be revealed on the following Sunday. He was as good as his word and attached photographs and also some extracts from their websites. This was obviously to bring home to them the scale of the threatened exposé.
83. The threat was then reinforced the same day with a further email to Women A and B:

“Ok girls, here’s the offer. It’s 8,000 pounds for an interview with one of you, with no name, no id and pixilated face. And we pixilate all the pics I send through to you this morning.

BUT time is running out for us and if you want to come on board, you need to start the ball rolling now. Call me ... if you want to.

Best, Neville”

84. Perhaps to their credit, the two women concerned resisted these blandishments and thus risked the further exposure he had threatened.
85. When the editor, Mr Colin Myler, gave evidence on 9 July, he was asked about these communications by Mr Price in cross-examination:

“Q This was a naked threat, wasn’t it, Mr Myler?

A I think it could be interpreted as a threat. I’m not so sure ...

Q Come on, Mr Myler, please.

A Well, clearly it could be interpreted as a threat, but I think by this time the girls who took part would have known that the News of the World had the photographs anyway.

Q What’s it called when you threaten to reveal publicly the identity of somebody who has done something embarrassing which they do not wish to become public unless they cooperate with you? What’s it called?

A I think you know what it’s called. You’re talking about the potential use of blackmail.

Q I am.

A Right.

Q Isn’t that what we have here?

A I’m not so sure it is.

Q Do you think there was a justification for that threat?

A I have already accepted that clearly looking at this it could be interpreted as a threat, and I accept that.”

This seemed to fall short of a wholesale endorsement of his chief reporter’s behaviour.

86. Before moving on, I wished to establish more clearly what Mr Myler's attitude really was to these threats made by his chief reporter. I therefore asked two questions:

“Q Just before you leave that, can I ask you whether you ever raised this with Mr Thurlbeck?

A No, my Lord, because I was away that week so I wasn't aware of these emails at that particular time.

Q When you did become aware of them did you raise it with him then?

A I did not because I didn't become aware of them until considerably after the event, literally only at the disclosure stage.”

That is effectively a non-answer, from which it would appear that Mr Myler did not consider there was anything at all objectionable about Mr Thurlbeck's approach to the two women, as he did not query it at any stage. This discloses a remarkable state of affairs.

87. Mr Price also raised the matter with Mr Thurlbeck, who seemed rather puzzled that his conduct was thought worthy of criticism in this respect. He justified it in these terms, also on 9 July:

“A ... I had two potential stories. I was telling them quite openly what those stories were and giving them an option, I can use one or the other. They were in the driving seat, as I say. The choice is theirs. And I made it very clear the story that I wanted was their story rather than the sort of superficial investigation I was able to do on the internet myself.

Q You are giving them a choice?

A Yes.

Q Between cooperating, giving you an interview and getting paid.

A Yes.

Q And if they don't they get their pictures in the newspaper in the most embarrassing and humiliating circumstances?

A Sometimes unfortunately – I'm not pretending this was an easy choice for them, but it was the only choice. I was a journalist with two stories, one of which I got from my own investigating, and here it was, and the alternative was another story, an interview with them anonymously for which they'd be paid. Those were

the choices. I'm not saying it was an easy choice and I'm not saying it was a choice they particularly relished. It was a tough choice but nevertheless they were the only options I could give them. But I thought the second option of talking to me anonymously and for money was a very fair option.

...

Q Let's be direct about this. There is a clear threat here that if they don't cooperate they will expose them in the News of the World?

A No, I don't accept that. I think there was a clear choice here but there was no attempt to threaten them.

...

Q Let's get this straight. If the blackmailer says to the victim, 'Either you pay up or I'll put your picture in the newspaper' he's offering him a very fair choice?

A No.

Q There's no threat?

A No, because I'm asking for something here. Your example states that I'm asking for something in return for issuing a threat.

Q Yes, indeed you are.

A No, I'm offering to give them something. I'm offering to pay them money for an anonymous interview. I'm offering to pay them, not to take anything from them, so in that sense I'm not blackmailing them at all. That thought never crossed my mind. I'm offering them a choice."

It seems that Mr Thurlbeck genuinely did not see the point. Yet it is elementary that blackmail can be committed by the threat to do something which would not, in itself, be unlawful.

88. I was also asked to have in mind Mr Thurlbeck's approach to Woman E after the original publication and how he obtained the "interview" with her which was published in the following edition. He met her in a hotel in Milton Keynes on the day before publication of the follow-up article and presented her with what purported to be a transcript of an interview which he asked her to sign. It would appear to have been a *fait accompli*. She made no amendments or corrections to the signed copy at all. He then subsequently added further material to it (some of which was attributed to Woman E in the article). When challenged by Mr Price about this, he responded that it was all based on telephone exchanges with her over several days and that the

“interview” represented a genuine reflection of what she had told him. There are unhappily no written notes to confirm this claim, which may be thought surprising for a journalist of Mr Thurlbeck’s experience. It is thus not possible to say how true a reflection the published article was of what Woman E had told him.

89. The interview contained one sentence, however, which was demonstrably false. He attributed to her the following remarks:

“It wasn’t a one off. Max has been hiring us to do this for years. He is addicted to sado-masochistic sex involving Nazis and beatings.”

This contrasts with the contents of paragraph 38 of Mr Thurlbeck’s witness statement, in which he said:

“It was clear to me from speaking to [Woman E] on 27 March that the party the next day was the first time [she] herself was involved with the Claimant in a party with any Nazi or military theme.”

90. Mr Thurlbeck explained this by saying that Woman E had changed her story between 27 March and the signing of his draft article on Saturday 5 April. Such a fundamental shift would surely have rung loud warning bells as to her reliability as a source. Yet, whether this was so or not, he undoubtedly knew that she had known the Claimant only for a very short time (a matter of months). It could not, therefore, possibly be true that “Max has been hiring *us* to do this for *years*”. Mr Thurlbeck thought it would be wrong to construe the word “us” as including Woman E. He thought it should be taken only to convey the impression that the Claimant had been employing the group as a whole (or perhaps dominatrices in general) for years. That seems to me to be a disingenuous interpretation of the words. The allegation was plainly false and he must have known it to be false when it was put into the article.

91. Mr Price pointed to a number of other inconsistencies which demonstrate, he says, that Mr Thurlbeck was in effect “making it up as he went along”.

92. He pointed out, in particular, that Mr Thurlbeck’s account of adding material to his 6 April “follow up” story, after speaking to Woman E at the hotel in Milton Keynes, does not square with paragraph 83 of his witness statement, where he said:

“I filed my copy at about lunchtime on Saturday 5 April. There were no subsequent queries for [Woman E].”

93. Yet in his oral evidence (Day 3, pp.98-100 and Day 4, p.6) he said that he went back and checked with her later on the Saturday (through multiple phone calls). If this were true, it would be very surprising that the information should have been omitted from his detailed witness statement. But the plain fact is that it cannot be reconciled with what he *did* say in paragraph 83.

94. Mr Price also pointed to passages in Mr Thurlbeck’s evidence (on Day 3, pp.52-56) which suggested that, right from the outset, he had it in mind, as a public interest justification for intruding on the Claimant’s activities, that his conduct breached the

criminal law. Yet that did not accord with his witness statement, which stated that the newspaper's interest in the story was simply based on the Claimant's interest in fetishism. I am not convinced that this has any great significance. It relates to a legal submission of Mr Price on the public interest argument, to which I shall briefly return.

95. There was yet another passage in Mr Thurlbeck's evidence which is hard to swallow. It is necessary to have in mind as background the very limited claim he made in paragraph 21 of his witness statement, relating to his first meeting with Woman E's husband, when he said, "Woman E was *under the impression* that the sex party would consist of sado-masochistic acts but played out as a part of Nazi role-play" (emphasis added). In cross-examination (Day 3, pp.61-63), he tried to firm this up, but in a way that was especially unconvincing. Mr Price referred to the passage in question and the exchange went as follows:

"Q So that is not what Woman A said to Woman E, but an impression that Woman E obtained?

A Woman A had told her there was going to be a Nazi theme.

Q That is not what you say in that paragraph. You are quite specific about what Woman A had told her, and you then say that Woman E was 'under the impression' ...

A ... I think there are two ways of reading that word 'impression', and one is that she was under the illusion, and the other way of defining it is that it had been impressed upon her that this was going to be the case, that there was going to be a Nazi theme. It was very clear from her instruction from Woman A. That was what she told me.

Q There is another interpretation, which I suggest is the natural one; that this is what she was told, to wear a German uniform and there would also be a German dominatrix present and, from that, she obtained the impression that there was to be a Nazi theme.

A No, because the word 'Nazi' was used. I remember her specifically telling me that the word 'Nazi' was used. It was a Nazi theme.

...

Q What I am suggesting to you is that, when you in your witness statement that she was under the impression that there was a Nazi theme, you are speaking nothing more and nothing less than the truth. Do you understand?

A No. I very strongly disagree with what you are saying there. It had been impressed upon her and, therefore, she was under the impression that there was going to be a Nazi theme at the orgy. She was very clear about it to me. They were both very clear about it to me.

Q You see, there is a curiosity about this. The fact that there was to be a Nazi theme would be a key element to the whole story, would it not?

A It would be a very important element.

Q But you did not tell anyone back at the News of the World about that?

A Correct.”

It is simply a question of construing the English language in an idiomatic way. Being “under the impression” is not to be equated with having it impressed on one. This again is disingenuous.

96. Mr Price invited me to conclude that the witness was inventing much of his evidence spontaneously in the witness box, since it would be highly unlikely that material of this kind would not have been passed to the solicitor taking his statement or incorporated within it. He submitted that he could not be relied upon as a witness of truth. The problem is naturally compounded by the absence of any contemporaneous notes of the conversations he purports to record. There are undoubtedly inconsistencies, which make it very difficult to decide how much can be relied upon.
97. These points might perhaps bear upon the claim for exemplary damages, or support a general observation that this was not consistent with “responsible journalism”, but I think their primary relevance is as to the credibility of Mr Thurlbeck and, to a degree, of Mr Myler. It is necessary to have regard to these responses when considering to what extent the answers given to the court and to Mr Price can be regarded as frank. The real problem, so far as Mr Thurlbeck is concerned, is that these inconsistencies demonstrate that his “best recollection” is so erratic and changeable that it would not be safe to place unqualified reliance on his evidence as to what took place as between him, Woman E and her husband.

Was there a reasonable expectation of privacy or a duty of confidence?

98. In deciding whether there was at stage one a reasonable expectation of privacy generalisations are perhaps best avoided, just as at stage two, and the question must be addressed in the light of all the circumstances of the particular case: see e.g. *Murray v Big Pictures* [2008] EWCA Civ 446 at [35]-[39]. Nevertheless, one is usually on safe ground in concluding that anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults (paid or unpaid).
99. There is now a considerable body of jurisprudence in Strasbourg and elsewhere which recognises that sexual activity engages the rights protected by Article 8. As was

noted long ago in *Dudgeon v UK* (1981) 4 EHRR 149, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate for the purposes of Article 8(2) because sexual behaviour “concerns a most intimate aspect of private life”. That case concerned the criminal law in the context of buggery and gross indecency (in Northern Ireland). It was said at [60] that Article 8 rights protect in this respect “an essentially private materialisation of the human personality”.

100. There are many statements to similar effect, the more lofty of which do not necessarily withstand rigorous analysis. The precise meaning is not always apparent. Nevertheless, the underlying sentiments are readily understood in everyday language; namely, that people’s sex lives are to be regarded as essentially their own business – provided at least that the participants are genuinely consenting adults and there is no question of exploiting the young or vulnerable.
101. More recently, in *Tammer v Estonia* (2001) 37 EHRR 857 it was held that criminal penalties imposed in respect of the reporting of a sexual relationship could not be said to violate Article 10 – notwithstanding that the persons concerned were the Prime Minister and a political aide. However broadly one defines the term, it has been recognised in this jurisdiction also that “public figures” are entitled to a private personal life. The notion of privacy covers not only sexual activities but personal relationships more generally.
102. Even in *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 it was common ground among the advocates that the prosecution constituted an interference with the applicants’ right to respect for their private life and the court proceeded on that assumption: see [35]-[36]. The issue was whether the interference was necessary in a democratic society.
103. There is another line of authority addressing the matter of surveillance and clandestine recording. The government argued in *PG and JH v UK*, App. No. 44787/98, that it had been legitimate to place recording devices in police cells and also to record voices clandestinely when the applicants were being charged at a police station. The object of the exercise had been to compare the voices earlier recorded in a private flat in the course of enquiry into a conspiracy to commit armed robbery. The government conceded that the secret recording at the flat interfered with rights under Article 8 but unsuccessfully contested the issue in relation to the recordings at the police station. Similarly, in *Craxi (No 2) v Italy* (2004) EHRR 47 the court held that it was a violation of his Article 8 rights to play, even in court in the course of a prosecution for corruption, covertly recorded private telephone conversations. The case concerned the former Prime Minister of Italy.
104. In the light of these two strands of authority, it becomes fairly obvious that the clandestine recording of sexual activity on private property must be taken to engage Article 8. What requires closer examination is the extent to which such intrusive behaviour could be justified by reference to a countervailing public interest; that is to say, at the stage of carrying out the ultimate balancing test. I will focus on those arguments shortly.
105. Before I do so, however, I need to address the separate question of whether Woman E owed a duty of confidence to the Claimant and the other participants in respect of the

events at the flat on 28 March. In the ordinary way, those who participate in sexual or personal relationships may be expected not to reveal private conversations or activities. Evidence was given by the Claimant and the other women both generally about the recognised code of discretion on “the scene” and also, specifically, about their relationships with one another. Woman A was a close friend of Woman E and had introduced her to the Claimant. Her outrage is displayed in a text she sent on 11 April:

“ ... our scene is based on complete trust and complete discretion. However one of my so called close friends dominatrix [Woman E] has betrayed that confidence by doing what she has done. I am devastated by this act of pure total selfish greed, she has no morals, no integrity, no loyalty, complete disregard to others, cruel, and she is a liar!!! No one ... deserves this invasion of privacy.”

106. It was often said that “there is no confidence in iniquity”, but it is highly questionable whether in modern society that is a concept that can be applied to sexual activity, fetishist or otherwise, conducted between consenting adults in private. All the other women, as well as the Claimant, felt utterly betrayed by Woman E’s behaviour in filming them without consent and selling the information to the *News of the World*. I was told that she was soon ostracised from “the scene”, where the need for discretion is widely accepted.
107. It is true that the Claimant on this occasion paid the women participants, although he has not always done so in the past, but this does not mean that it was a purely commercial transaction. Even if it was, that would naturally not preclude an obligation of confidence, but it is quite clear from the evidence that there was a large element of friendship involved, not only as between the women but also between them and the Claimant. For example, had it not been for the intervention of the *News of the World* there was a plan to offer him a (free) session for his birthday (which falls in April).
108. In any event, irrespective of payment, I would be prepared to hold that Woman E had committed an “old fashioned breach of confidence” as well as a violation of the Article 8 rights of all those involved. This may have been at the instigation of her husband, who saw the opportunity of making £25,000 out of the *News of the World* and who made the first approach.
109. An argument has been pleaded also to the effect that the Claimant forfeited any expectation of privacy partly because of the numbers involved; that is to say, with so many participants it should not be regarded as private. This was coupled with reliance upon the fact that he liked to record these gatherings on video, with the consent of all those present, so as to have a “memento”. That can be safely rejected in the light of the Strasbourg decision in *ADT v UK* (2000) 31 EHRR 33.

Was there a public interest to justify the intrusion? My own conclusions

(i) The allegation of criminality

110. There are various strands to the argument that need to be considered. First, it is said that it is legitimate sometimes to infringe an individual's privacy for the greater good of exposing or detecting crime. So much is expressly recognised in the PCC Code in a form of words originally deriving from the draft attached as a schedule to the report of the Committee on Privacy and Related Matters (the Calcutt Report): (1990) Cm 1102.
111. The question has to be asked whether it will always be an automatic defence to intrusive journalism that a crime was being committed on private property, however technical or trivial. Would it justify installing a camera in someone's home, for example, in order to catch him or her smoking a spliff? Surely not. There must be some limits and, even in more serious cases, any such intrusion should be no more than is proportionate.
112. One of Mr Price's submissions, strongly challenged by Mr Warby, is that a defendant may only rely in support of a public interest defence on matters of which he was aware at the time of publication *and* which were actually communicated to the public. He argues that significant parts of the Defendant's case here did not occur to the journalists at the time and were thought up by the lawyers after the event. Mr Thurlbeck was cross-examined to that effect; in particular, because it was being suggested that he did not choose to publish all these salacious allegations for the reason that he thought that certain specific offences had been committed. Nor did he inform the public that this was the reason he felt compelled to draw them to their attention. That may well be so. But I do not believe that it would, as a matter of law, be fatal to the public interest defence. If the facts are published, I see no reason why the relevant defendant should be precluded from later teasing out their implications more fully, when brought before the court, or from refining the way the case is presented in jurisprudential terms. Nor is there, as yet, any authority for the proposition that a defendant's state of mind, in a privacy case, is relevant to the issue of public interest at all – still less capable of depriving him of such a defence which would otherwise be upheld.
113. Perhaps the most artificial argument, verging on desperation, was to the effect that the Claimant was inciting or aiding an offence of assault occasioning actual bodily harm contrary to the Offences against the Person Act 1861 – on himself. There was actual harm and perhaps the application of the large piece of elastoplast on his right buttock would demonstrate, as Mr Myler and Mr Thurlbeck pointed out, that there had been actual wounding as well. (That might be the case also, technically, with decorative piercings.) One must try not to lose all touch with reality, and no-one could pretend that this was either the original reason or a justification for the clandestine filming or the coverage.
114. There is no question of a sexual offence being committed, since everything was consensual. On the other hand, when the Claimant was acting out his "dominant" role after dressing his own wound, it is right to acknowledge that some of the young women playing the submissive role also developed a visible coloration of the buttocks. As Woman D accepted, it was painful – "but in a nice way". Although no doubt interesting to the public, was this genuinely a matter of public interest? I rather doubt it.

115. Mr Warby placed considerable reliance on the case of *Brown* [1994] 1 AC 212, in which the majority held that neither consent nor the sexual context could afford a defence in a case concerning extreme sado-masochistic activity. Thus, it was argued that the consent of these women to the spanking, despite their evident enjoyment, does not excuse the fact that a technical assault contrary to the 1861 Act was committed by the Claimant with every thwack. Yet again, however, I must try to maintain some sense of reality. In any event, consent is a valid defence so far as common assault is concerned.
116. The facts of *Brown* involved cruelty of an altogether different order and activities that were extremely dangerous. One of the considerations which justified the criminalisation of such activities, according to the Strasbourg court, was the potential impact on health: see *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 at [63]. There was also the issue, which does not arise here by any stretch of the imagination, that some very young people were victimised or corrupted.
117. It is well known that the Attorney-General and the Crown Prosecution Service exercise discretion in deciding whether to institute criminal proceedings and frequently acknowledge that it would not be in the public interest to prosecute every crime – however trivial. I have little doubt that such a discretion would be exercised in cases of this kind. This was rather confirmed by the CPS prosecution guidelines and “Charging Standard” introduced by Mr Price. It would hardly be appropriate to clutter up the courts with cases of spanking between consenting adults taking place in private property and without disturbing the neighbours. That would plainly not be in the public interest. It would not be logical, therefore, to pray in aid the public interest when seeking to justify hidden cameras and worldwide coverage.
118. It is worth remembering that even those who have committed serious crimes do not thereby become “outlaws” so far as their own rights, including rights of personal privacy, are concerned: see e.g. *Silver v UK* (1983) 5 EHRR 347 and *Polanski v Condé Nast Publications Ltd* [2005] 1WLR 637.
119. So too, it was recognised in *Campbell* at [56] that drug dependency was a matter which ordinarily a person might expect to keep private (as in the case of other problems affecting health). That is notwithstanding that it is implicit in that information that the person concerned has regularly been in possession of prohibited drugs. Again, it can be seen that illegal behaviour does not automatically undermine a person’s rights under Article 8.
120. Another argument thought up by the Defendant, or rather its legal team, was that the Claimant had been keeping a brothel. This would not bear close scrutiny and is certainly not consistent with the evidence. By the time of closing speeches, this line of argument had been abandoned. It seems clear from the authorities that for premises to fall within the definition of a brothel it is necessary to show that more than one man resorts to them for whatever sexual services are on offer. The only man enjoying the activities in this case was the Claimant himself. He paid for the flat and Woman A arranged parties there with various dominatrices for his (and apparently also their) enjoyment. This was not a service offered to men in general. He was the only one paying, although I was told that it was a standing joke among some of the regulars that they had so much fun that they ought to be paying “Mike”. There was

never any question of a business being carried on there or the Claimant taking a cut of the proceeds.

121. As it happens, some of the women were rather reluctant to accept the description “prostitute”. (For the purposes of the Sexual Offences Act 2003, the term is defined by reference to providing “sexual services” in return for payment: s.51(2) of the Act.) Several of them offer a variety of services on their website (usually spanking or being spanked in various guises) but expressly warn that they do not offer specifically sexual services. They apparently made an exception in “Mike’s” case and threw in a bit of sex, as it were, as an “extra” between friends. Indeed, sometimes they were not paid at all. As they liked the premises and found the atmosphere relaxing and congenial, things developed from there. Indeed, although the Claimant’s sexual activity as revealed in the DVD material did not seem to amount to very much, some of the women stayed on after the party was over and indulged in same sex action purely for their own entertainment.

(ii) The Nazi and concentration camp theme

122. The principal argument on public interest related to the Nazi theme. I have come to the conclusion (although others might disagree) that if it really were the case, as the newspaper alleged, that the Claimant had for entertainment and sexual gratification been “mocking the humiliating way the Jews were treated”, or “parodying Holocaust horrors”, there could be a public interest in that being revealed at least to those in the FIA to whom he is accountable. He has to deal with many people of all races and religions, and has spoken out against racism in the sport. If he really were behaving in the way I have just described, that would, for many people, call seriously into question his suitability for his FIA role. It would be information which people arguably should have the opportunity to know and evaluate. It is probably right to acknowledge that private fantasies should not in themselves be subjected to legal scrutiny by the courts, but when they are acted out that is not necessarily so.
123. On the other hand, since I have concluded that there was no such mocking behaviour and not even, on the material I have viewed, any evidence of imitating, adopting or approving Nazi behaviour, I am unable to identify any legitimate public interest to justify either the intrusion of secret filming or the subsequent publication.

(iii) “Depravity and adultery”

124. I need to consider, therefore, whether the residual S and M behaviour and other admitted aspects of what took place on 28 March could be said in themselves to be matters of legitimate journalistic investigation or public interest. Mr Warby described it as immoral, depraved and to an extent adulterous. Everyone now, thanks to the *News of the World*, probably holds an opinion on that, but even if there was adultery and even if one happens to agree that it was “depraved”, it by no means follows that they are matters of genuine public interest, as that is understood in the case law.
125. The modern approach to personal privacy and to sexual preferences and practices is very different from that of past generations. First, there is a greater willingness, and especially in the Strasbourg jurisprudence, to accord respect to an individual’s right to conduct his or her personal life without state interference or condemnation. It has now to be recognised that sexual conduct is a significant aspect of human life in

respect of which people should be free to choose. That freedom is one of the matters which Article 8 protects: governments and courts are required to afford remedies when that right is breached.

126. Secondly, as Lord Nicholls at [17]-[18] and Lord Hoffmann at [50] observed in *Campbell* in 2004, remedies should be available against private individuals and corporations (including the media) because, absent any serious element of public interest, they are obliged to respect personal privacy as much as public bodies. It is not merely state intrusion that should be actionable. Moreover, the Council of Europe Resolution 1165 of 1998 had already made this clear:

“11. The Assembly reaffirms the importance of every person’s right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.”

127. Thirdly, it is not for the state or for the media to expose sexual conduct which does not involve any significant breach of the criminal law. That is so whether the motive for such intrusion is merely prurience or a moral crusade. It is not for journalists to undermine human rights, or for judges to refuse to enforce them, merely on grounds of taste or moral disapproval. Everyone is naturally entitled to espouse moral or religious beliefs to the effect that certain types of sexual behaviour are wrong or demeaning to those participating. That does not mean that they are entitled to hound those who practise them or to detract from their right to live life as they choose.

128. It is important, in this new rights-based jurisprudence, to ensure that where breaches occur remedies are not refused because an individual journalist or judge finds the conduct distasteful or contrary to moral or religious teaching. Where the law is not breached, as I said earlier, the private conduct of adults is essentially no-one else’s business. The fact that a particular relationship happens to be adulterous, or that someone’s tastes are unconventional or “perverted”, does not give the media *carte blanche*.

129. I was referred by Mr Price to the judgment in *CC v AB* [2007] EMLR 11 at [25]-[27] where it was said:

“25. Judges need to be wary about giving the impression that they are ventilating, while affording or refusing legal redress, some personal moral or social views, and especially at a time when society is far less homogeneous than in the past. At one time, when there was, or was perceived to be, a commonly accepted standard in such matters as sexual morality, it

may have been acceptable for the courts to give effect to that standard in exercising discretion or in interpreting legal rights and obligations. Now, however, there is a strong argument for not holding forth about adultery, or attaching greater inherent worth to a relationship which has been formalised by marriage than to any other relationship.

26. A judge, like anyone else, is obviously entitled to hold personal moral views about the issues of the day, but it is important not to let them intrude when interpreting and applying the law. Such issues are best avoided – at least without some statutory sanction. No doubt many people, especially those with a strong religious faith, will disapprove of adultery. Many others, on the other hand, will not give it a second thought, while moving easily through a series of medium or short-term relationships as they feel it appropriate.
27. With such a wide range of differing views in society, perhaps more than for many generations, one must guard against allowing legal judgments to be coloured by personal attitudes. Even among judges, there is no doubt a wide range of opinion. ... ”

It was only, of course, a decision at first instance which did not go to appeal, but that is because permission was refused (in January 2007).

130. I am conscious that the decision in *CC v AB* was subjected to a number of criticisms, the more restrained of these being directed to its “moral relativism”. This is, I believe, largely because of a failure to appreciate the task which judges are now required to carry out in the context of the rights-based environment introduced by the Human Rights Act, hitherto largely unfamiliar in our common law tradition. In deciding whether a right has been infringed, and in assessing the relative worth of competing rights, it is not for judges to make individual moral judgments or to be swayed by personal distaste. It is not simply a matter of personal privacy versus the public interest. The modern perception is that there is a public interest in respecting personal privacy. It is thus a question of taking account of conflicting public interest considerations and evaluating them according to increasingly well recognised criteria.
131. When the courts identify an infringement of a person’s Article 8 rights, and in particular in the context of his freedom to conduct his sex life and personal relationships as he wishes, it is right to afford a remedy and to vindicate that right. The only permitted exception is where there is a countervailing public interest which in the particular circumstances is strong enough to outweigh it; that is to say, because one at least of the established “limiting principles” comes into play. Was it necessary and proportionate for the intrusion to take place, for example, in order to expose illegal activity or to prevent the public from being significantly misled by public claims hitherto made by the individual concerned (as with Naomi Campbell’s public denials of drug-taking)? Or was it necessary because the information, in the words of the Strasbourg court in *Von Hannover* at [60] and [76], would make a contribution to

“a debate of general interest”? That is, of course, a very high test. It is yet to be determined how far that doctrine will be taken in the courts of this jurisdiction in relation to photography in public places. If taken literally, it would mean a very significant change in what is permitted. It would have a profound effect on the tabloid and celebrity culture to which we have become accustomed in recent years.

132. The facts of this case are far removed from those in *Van Hannover*. There can be little doubt that intimate photographs or recording of private sexual activity, however unconventional, would be extremely difficult to justify at all by Strasbourg standards: see e.g. *Dudgeon v UK* (cited above) at [49]-[53]. It is those to which we are now required by the Human Rights Act to have regard. Obviously, titillation for its own sake could never be justified. Yet it is reasonable to suppose that it was this which led so many thousands of people to accept the *News of the World*'s invitation on 30 March to “See the shocking video at notw.co.uk”. It would be quite unrealistic to think that these visits were prompted by a desire to participate in a “debate of general interest” of the kind contemplated in *Von Hannover*.
133. More recently the principles have been affirmed in Strasbourg in the case of *Leempoel v Belgium*, App. No. 64772/01, 9 November 2006:

“In matters relating to striking a balance between protecting private life and the freedom of expression that the Court had had to rule upon, it has always emphasised ... the requirement that the publication of information, documents or photographs in the press should serve the public interest and make a contribution to the debate of general interest ... Whilst the right for the public to be informed, a fundamental right in a democratic society that under particular circumstances may even relate to aspects of the private life of public persons, particularly where political personalities are involved ... publications whose sole aim is to satisfy the curiosity of a certain public as to the details of the private life of a person, whatever their fame, should not be regarded as contributing to any debate of general interest to society.”

134. In the light of the strict criteria I am required to apply, in the modern climate, I could not hold that any of the visual images, whether published in the newspaper or on the website, can be justified in the public interest. Nor can it be said in this case that even the information conveyed in the verbal descriptions would qualify.

Public interest: the journalists' perception

135. As the law stands, it seems clear that it is for the court to decide whether a particular publication was in the public interest. This may require further explanation. It is important to have in mind that some authorities (here and in Strasbourg) have in recent years placed emphasis on the need to make due allowance for editorial judgment and also for a wide discretion so far as taste and modes of expression are concerned: see e.g. *Jameel (Mohammed) v Wall Street Journal Spri* [2007] 1 AC 359 at [31]-[33] in the context of privilege in the law of defamation, where Lord Bingham made these observations:

- “31 The necessary precondition of reliance on qualified privilege in this context is that the matter published should be one of public interest. In the present case the subject matter of the article complained of was of undoubted public interest. But that is not always, perhaps not usually, so. It has been repeatedly and rightly said that what engages the interest of the public may not be material which engages the public interest.
- 32 Qualified privilege as a live issue only arises where a statement is defamatory and untrue. It was in this context, and assuming the matter to be one of public interest, that Lord Nicholls proposed [in *Reynolds v Times Newspapers Ltd*], at p 202, a test of responsible journalism, a test repeated in *Bonnick v Morris* [2003] 1 AC 300, 309. The rationale of this test is, as I understand, that there is no duty to publish and the public have no interest to read material which the publisher has not taken reasonable steps to verify. As Lord Hobhouse observed with characteristic pungency, at p 238, ‘No public interest is served by publishing or communicating misinformation.’ But the publisher is protected if he has taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication.
- 33 Lord Nicholls, at p 205, listed certain matters which might be taken into account in deciding whether the test of responsible journalism was satisfied. He intended these as pointers which might be more or less indicative, depending on the circumstances of a particular case, and not, I feel sure, as a series of hurdles to be negotiated by a publisher before he could successfully rely on qualified privilege. Lord Nicholls recognised, at pp 202-203, inevitably as I think, that it had to be a body other than the publisher, namely the court, which decided whether a publication was protected by qualified privilege. But this does not mean that the editorial decisions and judgments made at the time, without the knowledge of falsity which is a benefit of hindsight, are irrelevant. Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner.”

136. I have decided that the only possible element of public interest here, in the different context of privacy, would be if the Nazi role-play and mockery of Holocaust victims were true. I have held that they were not. Does any weight need to “be given to the professional judgment of [the] editor or journalist” to the contrary? Do I need to

consider whether such judgments were “made in a casual, cavalier, slipshod or careless manner”?

137. In the defamation context, it seems clear that it is for the court alone to decide “whether the story as a whole was a matter of public interest”, but there is scope for editorial judgment as to what details should be included within the story and as to how it is expressed (see e.g. also Lord Hoffmann at [51]). That distinction seems to be clear, although in individual cases the line may be difficult to draw. Here the situation is that the journalists’ perception was, or may have been, that the story was about Nazi role-play. Even though I concluded that this was not the case, should some allowance be made for a different view on the matter? The answer is probably in the negative, because it is only the court’s decision which counts on the central issue of public interest.
138. It might seem reasonable to allow in this context for some difference of opinion. I cannot believe that a journalist’s sincere view on public interest, however irrationally arrived at, should be a complete answer. A decision on public interest must be capable of being tested by objectively recognised criteria. But it could be argued as a matter of policy that allowance should be made for a decision reached which falls within a range of reasonably possible conclusions. Little was said in submissions on this aspect of the case.
139. It would seem odd if the only determining factor was the decision reached by a judge after leisurely debate and careful legal submission – luxuries not available to a hard-pressed journalist as a story is breaking with deadlines to meet. Obviously, on the other hand, the courts could not possibly abdicate the responsibility for deciding issues of public interest and simply leave them to whatever decision the journalist happens to take. As Sir John Donaldson MR observed in *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 898, “The media ... are peculiarly vulnerable to the error of confusing the public interest with their own interest”.
140. Against this background, it would seem that there may yet be scope for paying regard to the concept of “responsible journalism”, which has been referred to over recent years in the context of public interest privilege in libel. There is an obvious analogy. This rather vague term has been illuminated and defined in such a way that it could now be regarded as approaching a legal term of art. It has to be assessed in the round, but there are certain guidelines which have been listed to assist in making a judgment: see e.g. Lord Nicholls’ 10 non-exhaustive “factors” in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205.
141. There may be a case for saying, when “public interest” has to be considered in the field of privacy, that a judge should enquire whether the relevant journalist’s decision prior to publication was reached as a result of carrying out enquiries and checks consistent with “responsible journalism”. In making a judgment about that, with the benefit of hindsight, a judge could no doubt have regard to considerations of that kind, as well as to the broad principles set out in the PCC Code as reflecting acceptable practice. Yet I must not disregard the remarks of Lord Phillips MR in *Campbell* [2003] QB at [61] to the effect that the same test of public interest should *not* be applied in the “two very different torts”.

142. Mr Price argued that if the journalists simply got it wrong about the Nazi and concentration camp theme, that is the end of the matter. Yet it is at least clear that this cannot be the test to apply when addressing a decision made prospectively whether or not to instal a hidden recording device. That is to say, the decision cannot be made on the footing that the Nazi theme is true or false, since the event has not yet taken place. A journalist's conduct in those circumstances *could* only be judged by reference to a reasonable apprehension that the public interest would be served.
143. Having earlier arrived at my own decision, I propose now to consider whether the decision to publish any or all of this material, from 30 March onwards, could be classified as one that could have been taken by a responsible journalist on the information available to him at that time. I stress that I am not in a position to rule that this is the correct test to apply, but I propose to consider it in case it should be later so held.
144. As to the clandestine recording, I have already referred to Clause 10 of the PCC Code which requires a public interest justification and for it to be demonstrable that "the material cannot be obtained by other means". In Convention terms, this may be expressed as an aspect of proportionality. Mr Price pointed out that the newspaper would have available to it information as to the identities of the various Women A to D (from Woman E) and could check their dominatrix activities from the relevant websites. Photographs could be taken of them arriving and departing as well as of the Claimant. This was in fact done. They could also obtain a statement from Woman E as to what had transpired. Crucially, she would be able to produce the money to confirm her story that she had received payment from the Claimant on that occasion. The decision to instal a secret recording device had been made in principle at an early stage and before any Nazi element had been mentioned. The purpose was to record the Claimant's involvement with dominatrices. All that information would normally be considered enough to plead justification if there was a claim for libel. The journalist's response to the effect that the Claimant might just have been going to the flat (for several hours) for the purpose of changing a fuse and having a cup of tea is hardly convincing.
145. I find it difficult, therefore, to see how the Clause 10 requirement that "the material cannot be obtained by other means" could have been fulfilled. The point does not seem to have been addressed adequately, if at all, at the material time. The editor was not consulted, although he seems to have been aware of the possibility. (Once again it must be emphasised that Mr Price does not rely on the clandestine filming as a distinct infringement giving rise to a cause of action.)
146. Once the material was obtained, it was not properly checked for Nazi content and the German was not even translated. Those concerned were simply content to rely on general impression (looking at it "in the round"). That is hardly satisfactory having regard to the devastating impact the publication would have on all those involved and to the gravity of the allegations – especially that of mocking the treatment given to concentration camp inmates.
147. According to Mr Thurlbeck, it seems that Woman E and her husband were telling him that there was to be a Nazi theme.

148. It is necessary, however, to trace through how the Nazi and concentration camp themes emerged. According to Mr Thurlbeck, the first contact was on 13 March, when a man who was later identified as the husband of Woman E made a call to the newspaper's offices which was taken by the Associate News Editor Mr Neil McCleod. He referred it on to Mr Thurlbeck, telling him that the man had a story about Max Mosley.
149. Mr Thurlbeck called the husband back on the same day but made no recording or note of the conversation. This was true also of later conversations held between Mr Thurlbeck and Woman E and/or her husband. His evidence in respect of these matters was therefore based on "best recollection" supplemented by contemporaneous emails (to fix times or dates).
150. The man told Mr Thurlbeck that his wife was a dominatrix and that she had participated in S and M role-play with the Claimant. All the girls involved knew that the man at the centre of the role-play parties was the Claimant. He was told that the women generally referred to him as "El Presidente" (presumably because of his role in the FIA).
151. He said that the husband was vague about the length of time for which his wife had been involved with the Claimant, but he thought that it was about a year. It was explained that the Claimant generally enjoyed both dominant and submissive roles. Reference was also made to parties which had taken place near Euston Station at which a number of men were entertained by women performing various roles. On such occasions the Claimant would refer to himself as "Mike" and would wear a mask. Woman E had attended such a party with a judicial theme which had taken place at a gay nightclub. (As I have said, judicial and/or punishment role-play is quite common on "the scene".)
152. Mr Thurlbeck asked Woman E's husband when she would be likely to be attending another of the S and M parties and whether she would be prepared to wear a hidden camera. The original intention was to expose in the *News of the World* the Claimant's interest in sado-masochism and his use of prostitutes and dominatrices. There had up to that point been no mention of a Nazi or concentration camp theme. The husband enquired whether there would be "something in it for us" and Mr Thurlbeck indicated that the *News of the World* would make sure he was paid. No discussion of actual amounts took place at that stage.
153. Mr Thurlbeck made a second telephone call to the husband, which he thinks might have taken place on 14 March. This is based on an email he sent to Mr McCleod on that day to inform him that he had set up a meeting in Milton Keynes with the husband for Tuesday 18 March.
154. During the second telephone conversation, Mr Thurlbeck believes, he was told that there was to be a party on 28 March. He added, "To the best of my recollection it was in this conversation that [the husband] told me that [Woman E] had told him that she had been told that this party would have a Nazi theme". He does not recall the actual terms of the conversation; nor did he make a note of it. His response, however, was to tell the husband that this was interesting because the Claimant was the son of Sir Oswald Mosley. The husband had apparently never heard of him and Mr Thurlbeck explained. His statement continued in these terms:

“[The husband] said that this was fascinating because [his wife] had told him that the Claimant had ordered a German theme, that there would be a German-speaking dominatrix at the sex party (in addition to [his wife]) and that the dominatrices had been asked to wear military uniform. [His wife] had been told all of this by a woman whose name was [Woman A] who [the husband] told me was the senior prostitute/dominatrix. From speaking to [the husband], it was apparent that it was [Woman A] (rather than [Woman E]) who liaised directly with the Claimant regarding his instructions for the sex parties. [Woman A] then arranged the parties and their themes according to the Claimant’s instructions.”

It will be noted that Mr Thurlbeck appears to have no specific recollection of a Nazi theme being mentioned at this stage either.

155. The husband told Mr Thurlbeck that the party would take the same S and M format as the previous parties and would involve several women. He was positive that his wife would not “be having sex with the Claimant” but would only be acting as a dominatrix. To the best of Mr Thurlbeck’s recollection, he thought that the meeting with the husband had been rearranged and actually took place on 19 March at Waterloo Station. This recollection is apparently based upon an email he had sent to Mr McLeod and others within the *News of the World* to the effect that he would be meeting him the next day (i.e. 19 March).
156. When the meeting took place, Woman E was not present, but only Mr Thurlbeck and the husband. Again, there was no note or recording made. The husband confirmed that Woman E was willing to meet Mr Thurlbeck and to wear a hidden camera at the party. The husband recounted to Mr Thurlbeck that his wife had been asked to wear a German military uniform and that there would also be a German dominatrix present. The statement continues:

“[Woman E] was under the impression that the sex party would consist of sado-masochistic acts but played out as part of a Nazi role-play. [The husband] was speaking in these general terms about the ‘theme’ of the party being ‘Nazi’ that the Claimant had apparently ordered through [Woman A].”

Thus, at this stage, Mr Thurlbeck had the information from the husband that Woman E was “under the impression” that there would be Nazi role-play. He was speaking about this only “in these general terms”. He added:

“ ... I recognised that what [the husband] was saying about the party having a German military and, in particular, a ‘Nazi’ theme to it was of significance given the Claimant’s public role as head of the FIA.”

157. There was discussion as to payment. The husband asked for £25,000 and Mr Thurlbeck agreed on condition that the story was selected to be the “splash” (which indeed in due course it was). Mr Thurlbeck explained that if the story was not the “splash”, there would be less money available. He confirmed that it was within his

authority to offer payment of that amount although, of course, later it was reduced. This was explained by Mr Thurlbeck simply on the basis that, after he had obtained the clandestine film from Woman E, “I suggested to [her] that a more appropriate fee for the story was £12,000 and she agreed to this”. Why this was so, despite the fact that the story did in fact become the “splash”, is nowhere explained.

158. Mr Thurlbeck asked the husband what clothing his wife would be wearing at the party because he needed to hire a recording device with the right specification. He was at that stage told that she would be wearing her German military tunic or a jacket and tie, but that at some stage she may be required to take it off.
159. Mr Thurlbeck finally met Woman E, together with her husband, at about 11am on Thursday 27 March (i.e. the day before the party). She had brought the military tunic with her. He took the opportunity to explain the equipment to her and was confident that she would be able to use it effectively. He arranged for equipment to be hired which involved one lens but two recording devices. One of them would be in the tunic while Woman E was wearing it and a separate device would be installed in a body belt strapped to her waist. After her costume change the lens itself would be transferred from the tunic to her tie.
160. Mr Thurlbeck asked Woman E about earlier parties in which she had participated and she explained that she had been involved in judicial role-play; that is to say, a scenario where a female dominatrix wears judge’s robes and where there would be prison warders and beatings. Nothing was said on this occasion about a concentration camp or the lice inspection or any of the other details. Nonetheless, according to Mr Thurlbeck’s recollection, she did tell him that there would be a “Nazi” theme the following day. Whether he raised the subject or she did is unknown.
161. Nor did it emerge whether any distinction was drawn between Nazi and “German military”. It is quite possible that the distinction was at some stage glossed over by Mr Thurlbeck, by Woman E or by her husband. Since no notes were taken, the matter remains obscure.
162. In any event, at least by the end of the trial, it was not part of the Defendant’s case that Woman A in fact told Woman E there was to be a Nazi theme. The case was only to the effect that Mr Thurlbeck *believed*, as a result of what he was told by Woman E, that she had been told there was to be a Nazi theme.
163. There is no doubt that Mr Thurlbeck knew exactly which jacket was to be worn because he borrowed it and took it away to be fitted with the hidden cameras. He could therefore see that it had no Nazi connotations. He could also see from Woman E’s website, containing a photograph of it, that it was not advertised by her as having any such connotations. He agreed that he would travel up to Milton Keynes that night and arrange to give Woman E the uniform fitted with the camera and give her some instruction in how to use it.
164. Later Mr Thurlbeck met Woman E and her husband at her place of work. The conversation took place in “a pleasant sitting room” where there were “a couple of pieces of sado-masochistic paraphernalia in the room such as a cane and a whip”. It was there that he showed Woman E how to use the camera and rehearsed the procedure a couple of times. In the course of his instruction, Mr Thurlbeck agrees

that he said, “ ... when you want to get him doing the Sieg Heil it’s about 2.5 to 3 metres away from him and then you’ll get him in – no problem”. He added:

“When I said this to [her] I was not in any sense trying to persuade her to make that gesture when she was with the Claimant, or persuade her to try to get the Claimant to make that gesture. I had been told by [Woman E] that the sex party the next day was to have a Nazi theme. I obviously considered it important that should the Claimant make such a gesture it was recorded on film.”

165. It seems that Mr Thurlbeck discussed again the previous parties at which Woman E had been present with the Claimant. He added:

“At this time *my understanding* from talking to [Woman E and her husband] was that the previous parties *may have had* a Nazi theme.” (Emphasis added)

This is remarkably vague in the circumstances, and particularly against the background of the clandestine recording proposed. He confirmed, however, that it was clear to him from speaking to Woman E that the party next day was to be the first time that she had been “involved with the Claimant in a party with any Nazi or military theme”. I have already commented on the apparent inconsistency between this passage in the witness statement and the contents of the “interview” which she signed on 5 April.

166. After the video recording had been made and passed to Mr Thurlbeck, he took it to the newspaper’s offices where he played back the footage. He says that when he saw some of what he considered to be the Nazi connotations he called in Mr James Mellor, who is the news editor:

“I showed Mr Mellor what I believed to be strong Nazi connotations in the footage. I showed him the scenes which contained the lice inspection; the girls in the pseudo-Nazi uniforms; the inmates in the striped uniforms which I believed were reminiscent of concentration camp victims; the beatings of the Claimant and the beatings of the girls; the Claimant counting the beatings in German; [Woman B] taking charge of the sex acts with the girls; and [Woman B] speaking in German with the Claimant. Mr Mellor shared my view that the footage contained strong Nazi connotations.”

167. The next day Mr Mellor is supposed to have said something to Mr Thurlbeck along the lines:

“There is obviously a very strong Nazi theme here – there is no doubt about it, but I suggest we write the story without resorting to hyperbole because the mere description of the events themselves will be sufficient to convey the powerful Nazi theme at the party.”

This advice does not seem to have been heeded.

168. It was on the following Thursday that Mr Thurlbeck commented in an email to Mr Edmondson, the news editor, observing that it was “not Nazi uniforms or Nazi blazers the girls wear. Merely foreign uniform and ordinary blazer, as discussed”. In his witness statement Mr Thurlbeck commented on this:

“I had confirmed that whilst the prostitutes were wearing foreign military uniforms they were not genuine Nazi uniforms. Despite this I, Ian Edmondson, James Mellor and the editor all considered that the orgy clearly had Nazi and concentration-camp connotations. This conclusion was supported by what I had been told before the orgy by [Woman E]. [She] had told me that [Woman A] had told her to dress in a German army uniform and that there would be prostitutes performing the role of prisoners. There would also be a German dominatrix and part of the role-play would be conducted in German and that Mr Mosley would be speaking in German.”

It is perhaps curious that, at this stage, when giving his account of what he had been told previously, Mr Thurlbeck should omit any reference to a “Nazi theme”. Again, it rather suggests that “German” may have simply been glossed into “Nazi”.

169. I am prepared to accept that Mr Thurlbeck and Mr Myler, on what they had seen, thought there was a Nazi element – not least because that is what they wanted to believe. Indeed, they needed to believe this in order to forge the somewhat tenuous link between the Claimant and his father’s notorious activities more than half a century ago and, secondly, to construct an arguable public interest defence. This presumably explains why it was still being put in the forefront of the 6 April editorial headed “SHOCK WAVES: our story”:

“OUR sensational exposé of Max Mosley’s Nazi orgy made global headlines and sent shockwaves through the world of motor racing ... ”

170. The belief was not arrived at, however, by rational analysis of the material before them. Rather, it was a precipitate conclusion that was reached “in the round”, as Mr Thurlbeck put it. The countervailing factors, in particular the absence of any specifically Nazi indicia, were not considered. When Mr Myler was taken at length through dozens of photographs, some of which he had seen prior to publication, he had to admit in the witness box that there were no Nazi indicia and he could, of course, point to nothing which would justify the suggestion of “mocking” concentration camp victims. That conclusion could, and should, have been reached before publication. I consider that this willingness to believe in the Nazi element and the mocking of Holocaust victims was not based on enquiries or analysis consistent with “responsible journalism”. Returning to the terminology used by Lord Bingham in *Jameel* (cited above), the judgment was made in a manner that could be characterised, at least, as “casual” and “cavalier”.
171. The public interest is to be determined solely by the court *ex post facto*, as the authorities so far indicate. But even if it depended upon the reasonable judgment of

the journalists concerned, the basis for a public interest defence would simply fall away.

Exemplary damages

172. I considered the plea of exemplary damages on a strike-out application during the week before the trial began and decided to leave the matter over until findings had been made on the relevant factual issues. I nevertheless indicated that in the light of the authorities my provisional view was that the plea should be disallowed in the context of a claim founded on privacy and/or breach of confidence.
173. My primary reason for not extending the scope of this anomalous form of relief into a new area of law was that such a step could not be justified by reference to the matters identified in Article 10(2) of the Convention. It could not be said to be either “prescribed by law” or necessary in a democratic society. That is to say, I was not satisfied that English law requires, *in addition* to the availability of compensatory damages and injunctive relief, that the media should also be exposed to the somewhat unpredictable risk of being “fined” on a quasi-criminal basis. There is no “pressing social need” for this. The “chilling effect” would be obvious.
174. I need now to consider whether, in the light of the further submissions made to me and the evidence adduced on behalf of the Defendant, largely in the form of uncontested written statements, my provisional view is in need of revision.
175. I record the fact that after my ruling was given, and shortly before the trial began, the Claimant finally elected to pursue the remedy in damages rather than an account of profits.
176. It is well established that an award of exemplary damages may only be made in circumstances where an element of punishment is thought appropriate by the court *and* the amount to be awarded by way of compensation (including aggravated damages) is not sufficient to serve a punitive as well as a compensatory function.
177. It has hitherto been recognised at common law that exemplary damages would only be appropriate in two categories of case. The first, recognised by Lord Devlin in *Rookes v Barnard* [1964] AC 1129, is of no direct relevance here. It is concerned with examples of arbitrary or unconstitutional conduct by public officials. It is to be noted that Lord Devlin, at p.1226, was not in favour of extending this category to comparable conduct on the part of private individuals or corporations.
178. The second category, which has traditionally been defined by reference to the law of tort, applies in the relatively rare circumstances in which there has been a deliberate and knowing commission of a tort *and* a calculation on the part of some identifiable individual or individuals to the effect that more is to be gained by the wrongful act than is likely to be suffered by paying compensatory damages. It is accepted that recklessness (as opposed to mere carelessness or negligence) is to be equated with deliberate conduct in this context.
179. The underlying public policy which has been used to justify the continuance of what is widely acknowledged to be an anomalous remedy is that it may be appropriate in

some circumstances to demonstrate, in the words of Lord Hailsham in *Cassell v Broome* [1972] AC 1027, that “tort does not pay”: see p.1073F.

180. Mr Price has argued that Lord Devlin’s categories have served whatever purpose they may have had in the past and are on the verge of being abandoned. He suggests that now all that is required is conduct characterised as “outrageous”. That is based on some general observations of Lord Nicholls in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122. As I commented on the strike-out application, however, I am not convinced that the time has yet come when the law can be so broadly defined.
181. The cause of action now commonly described as infringement or breach of privacy, involving the balancing of competing Convention rights, usually those embodied in Articles 8 and 10, has recently evolved from the equitable doctrines that traditionally governed the protection of confidential information. Now (and especially since the formulation by Lord Nicholls in *Campbell v MGN Ltd* [2004] 2 AC 457) it is common to speak of the protection of personal information in this context, without importing the customary indicia of a duty of confidence. The question arises whether it may now be correct to apply the label of “tort” to this expanded cause of action. I was referred to some authorities which would certainly suggest not: see e.g. *Kitetechnology v Unicor* [1995] FSR 765, 777-778 and *Douglas v Hello! Ltd* [2006] QB 125 at [96]. It is, nonetheless, true that textbooks dealing with the law of tort such as *Gatley on Libel and Slander* (10th edn) and *Clerk & Lindsell on Torts* (19th edn) do address the subject as being within their remit.
182. The learned editors observe in *Clerk & Lindsell* at 28-03, “ ... Though there is some judicial support for its recognition as a tort, the most favoured basis for the action to date is that of an equitable principle of good faith. However, because of its close relationship with other torts this chapter on breach of confidence is included in this work”. It is fair to say that part of the “judicial support” referred to is to be found in Lord Nicholls’ speech in *Campbell*, where he referred at [14] to “the essence of the tort”. He used this terminology despite having himself been a party to the decision in *Kitetechnology* many years before. It is reasonable to suppose that he used the word advisedly and that he *may* have intended to convey that infringements of privacy should now be regarded as an independent tort uncluttered by any limitations deriving from its equitable origins. Yet it is also right to note that the *Campbell* decision had been cited before the Court of Appeal in *Douglas v Hello! Ltd* and that no such message appears to have been conveyed on that occasion. (On the other hand, Lord Phillips MR, who was presiding in the *Douglas* case, had himself referred to a “tort” in the Court of Appeal in *Campbell*: [2003] QB 633 at [61].)
183. More significantly perhaps, in *Wainwright v Home Office* [2004] 2 AC 406, at [31]-[35], their Lordships expressly rejected an invitation to declare the existence of “a previously unknown tort of invasion of privacy”: *per* Lord Hoffmann, with whom Lords Hope and Hutton agreed. Lord Hoffmann reiterated the point in *Campbell* at [43].
184. It can only be a matter for speculation whether a hypothetical future House of Lords would now follow Lord Nicholls’ classification of invasion of privacy as a “tort” *and*, having done so, would regard it as a wrong to which exemplary damages should now be extended. There is a case in the New Zealand Court of Appeal in which Sir Robin

Cooke P (as he then was) said that he saw no difficulty in such an extension: see *Aquaculture Corp v New Zealand Green Mussel Co.* [1990] 3 NZLR 299, 301. It has to be recognised that there are arguments both ways.

185. It was largely because of this somewhat uncertain legal position that I decided that I was not able to strike out the claim for exemplary damages prior to making findings of fact at trial. The matter may need to be considered at some stage by an appellate court.
186. Meanwhile, in order to come to a decision myself, I have to address the authorities as they stand. There is certainly no English authority which establishes that exemplary damages are recoverable in the context of this newly developed form of action. Nevertheless, I note that in *Douglas v Hello! Ltd* [2003] 3 All ER 996 Lindsay J was prepared to make the assumption that such an award was possible – even before their Lordships’ exposition in *Campbell*. Yet, in the result, he made no such award. In the absence of any positive decision, it would involve something of a departure for a judge now to hold that such damages are indeed available on the list of remedies for infringement of privacy. Such an extension would require to be based presumably upon an analogy to be drawn with existing categories of case where such damages have been awarded.
187. Much attention was focused by Counsel upon the decision by the House of Lords in *Kuddus* to the effect that it is not appropriate to limit the application of exemplary damages purely by reference to what was called the “cause of action test”; that is to say, merely by reference to those torts in respect of which it could be established that there had been an award of exemplary damages prior to 1964 (i.e. when *Rookes v Barnard* was decided). Accordingly, in *Kuddus* itself, it was held that it had been inappropriate to strike out the claim for exemplary damages simply on the basis that it related to the newly developed (or newly discovered) tort of misfeasance in public office.
188. Their Lordships recognised that the abandonment of the “cause of action test” (said to have been associated with the earlier decision in *Cassell v Broome*) carried with it the risk that there might be an expansion of the categories in which exemplary damages could be awarded: see e.g. Lord Scott at [120]. Importantly, however, they were by no means accepting or recommending that this was how the law should develop. At all events, the potential expansion under consideration was itself finite and discussed by reference to certain claims in tort, such as negligence and deceit, and took account also of breach of statutory duty.
189. Lord Scott regretted the possibility of an increase in the class of cases where exemplary damages could be awarded, since he did not consider that they served a useful function at all in our jurisprudence. That is by no means an uncommon view. He favoured a pragmatic approach (on the assumption that exemplary damages had to be retained at all), such that they should *not* be available in cases of negligence, nuisance or strict liability, or for breaches of statutory duty (save where Parliament had made express provision): see [121]-[122].
190. I believe it to be significant that their Lordships’ remarks were confined to categories of tort. It is not suggested either by Lord Scott or by any of his brethren that the

potential extension he recognised (while regretting it) would go so far as to embrace breach of confidence or any other equitable or restitutionary claim.

191. This restrictive approach has a long pedigree. By way of example, I cited in my earlier judgment the observations of Lord Reid in *Cassell v Broome* at pp.1086 and 1088 to the following effect, “ ... I still think it is well within the province of this House to say that that undesirable anomaly should not be permitted in any class of case where its use was not covered by authority” and “ ... I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority”.
192. There can be no doubt that what Mr Price seeks to do is to extend the scope of exemplary damages beyond any point hitherto recognised. It is clearly not a course which would have commended itself either to Lord Scott or to Lord Reid. What is more, as I have already noted, the context is one which engages freedom of expression and the balancing of rights enshrined respectively in Articles 8 and 10 of the Convention. That is why it was necessary to address such matters as necessity and proportionality and also whether such an extension could be characterised as “prescribed by law”.
193. Is this additional dimension of punishment necessary or proportionate? I need to have well in mind the established principle that aggravated damages (being part of the compensatory function) can sometimes go to the “top of the bracket” to reflect the court’s disapproval of a defendant’s conduct: see e.g. the remarks of Lord Reid in *Cassell v Broome* at p.1085 and those of Lord Scott in *Kuddus* at [108]. The desirability of maintaining exemplary damages has been considered academically and also in a number of official reports. For example, the Neill Committee in 1991 recommended the abolition of exemplary damages in the field of defamation, while the Law Commission in 1997 was apparently in favour of their retention and indeed on a broader basis. Parliament so far has not legislated to take account of either of those recommendations.
194. It is trite knowledge that punitive damages are anomalous in civil litigation in a number of respects. First, they bring the notion of punishment into civil litigation when damages are usually supposed to be about compensation. Secondly, the defendant’s means can be taken into account because these damages are in some ways analogous to a fine: see e.g. the remarks of Lord Reid in *Cassell v Broome* at p.1086. Thirdly, despite that, every such sum awarded goes not to the state itself, as is the case with a fine, but to the claimant in the litigation. It represents to that extent a windfall. Fourthly, in the context of those civil claims where a jury is still available, it is the jury rather than the judge which determines the amount of the appropriate penalty.
195. Mr Price argues that it would be inconsistent to acknowledge the possibility of exemplary damages for libel but not for invasion of privacy, since both causes of action are directed to protecting rights under Article 8. So it may be, but claims for exemplary damages in libel (albeit awards are very rare) have long been recognised. As Lord Reid pointed out, it is a different matter to make an extension by judicial intervention.
196. It was argued by Mr Warby, since a claim for invasion of privacy nowadays involves direct application of Convention values and of Strasbourg jurisprudence as part of

English law, that it would be somewhat eccentric to graft on to this Convention jurisprudence an alien anomaly from the common law in the shape of exemplary damages – not apparently familiar in Strasbourg. I agree with that submission.

197. I therefore rule that exemplary damages are not admissible in a claim for infringement of privacy, since there is no existing authority (whether statutory or at common law) to justify such an extension and, indeed, it would fail the tests of necessity and proportionality.
198. I turn now, therefore, to the second point of principle concerning vicarious liability. In view of my first ruling, this may be superfluous but I should express my conclusion nevertheless.
199. Lord Scott in *Kuddus* at [2002] 2 AC 122, 160-164, observed that it is contrary to principle to punish a person whose behaviour is not in any way blameworthy. There is much to be said for the view, as a matter of public policy, that it is undesirable to visit liability for exemplary damages on an employer purely on a vicarious basis. It has traditionally been regarded as inappropriate to the function of punishment. It was long ago noted by Glanville Williams, *Criminal Law: The General Part* (2nd edn 1961), that there were only three possible exceptions to the common law rule that “there is no vicarious responsibility in crime” (namely criminal libel, common law public nuisance and contempt of court). It is necessary to remember, on the other hand, that the issue of vicarious liability was not argued before their Lordships and that Lord Scott was the only one to express such a firm view.
200. Furthermore, I have in mind the words of Moore-Bick LJ in *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065, 1080:

“47. There undoubtedly are strong arguments of principle in favour of limiting the application of an avowedly punitive award to those who are personally at fault, who, in all but a tiny minority of cases brought against the police, could confidently be expected not to include the chief constable. However, since the power to award exemplary damages rests on policy rather than principle, it seems to me that the question whether awards can be made against persons whose liability is vicarious only must also be answered by resort to considerations of policy rather than strict principle. While the common law continues to recognise a power to award exemplary damages in respect of wrongdoing by servants of the government of a kind that has a direct effect on civil liberties, which for my own part I think it should, I think that it is desirable as a matter of policy that the courts should be able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question. Only by this means can awards of an adequate amount be made

against those who bear public responsibility for the conduct of the officers concerned.

48. It was assumed in *Kuddus*' case [2002] 2 AC 122, as in all previous cases, that an award of exemplary damages could be made against the chief constable (indeed, the chief constable did not seek to argue to the contrary), but this continuous assumption does not in my view amount to an authoritative decision on the question. We are, therefore, free to reach our own decision. As I have indicated, I would be in favour of holding that a substantial award of exemplary damages can be made against a chief officer of police under section 88 of the Police Act 1996 in accordance with the principles set out in *Thompson*'s case [1998] QB 498, but even if I were of a different view, I think that in a matter of this kind this court should be slow to disturb an understanding of the law that has existed for over 40 years and on the basis of which many decisions at the highest level have proceeded."
201. It may be argued, as Mr Warby contends, that the acknowledgment of vicarious liability in the context of exemplary damages in such cases as *Rowlands* and *Thompson* should be taken to extend only as far as Lord Devlin's first category (i.e. cases where there has been oppressive or arbitrary conduct on the part of a public official). It is necessary also to remember that these cases were in a particular statutory context, namely that of the extension of liability to chief officers of police contained in s.88 of the Police Act 1996. It cannot, however, be said that there is no corresponding "understanding" in relation to tort cases falling outside that context. The matter is considered, for example, by the learned editors of *Gatley on Libel and Slander* (10th edn) at paras 9.16 and 9.18. Reference is there made both to the case of *Thompson* in the Court of Appeal and to *Kuddus* in the House of Lords:
- "At the moment it is established that there is vicarious liability for exemplary damages, though the House of Lords has indicated that the matter needs further consideration and it has been said that 'vicarious punishment, via an award of exemplary damages, is contrary to principle and should be rejected'. However, since the reach of vicarious *liability* in tort law is much wider than in the criminal law, it may be asked why this should not be carried through into damages. In most libel cases the defendant, or the principal defendant, will be a media corporation but the state of mind of the journalist and *a fortiori* of any higher officer such as an editor will, of course, be imputed to the corporation and it is irrelevant that the intended gain will come to the corporation rather than to the individual."
202. I have in mind also that some consideration has been given to the question of vicarious liability, or at least an assumption has been made in that respect, by the Court of Appeal in *Maxwell v Pressdram Ltd* [1987] 1 WLR 298, 309D (*per* Kerr LJ,

with whom Parker LJ agreed) and in *Riches v News Group Newspapers Ltd* [1986] QB 256.

203. In these circumstances, I do not believe it would be right for me, sitting at first instance, to conclude that exemplary damages (if otherwise appropriate) *could* not be awarded merely because this Defendant's liability would be on a purely vicarious basis. In the light of the authorities I have cited, it seems to me that such a ruling could probably at this stage only be made by the House of Lords.
204. Having postponed the issue for findings of fact to be made (against the possibility of a successful appeal), I shall now address the relevant evidence.
205. It is right to say at the outset that the Claimant's pleading on the essential elements for Lord Devlin's second category was sparse, to say the least. It is an important principle that when trying to fix a corporation with legal responsibility for the state of mind of one or more of its employees it is not legitimate to combine elements from different employees in order to arrive at a notional corporate state of mind (not corresponding to that of any one individual): see e.g. *Z Ltd v A-Z, AA-LL* [1981] QB 558, 581-582. The Claimant's case, for reasons that are fairly obvious, fell short of pinpointing any specific individual(s) as having on or about 28-29 March either of the relevant states of mind. There was a whole raft of witnesses whose statements were not cross-examined to and who denied any calculation as to the advantages and disadvantages (financial or otherwise). Nothing in cross-examination of Messrs Myler and Thurlbeck provided support, either, for either recklessness as to unlawful conduct or calculation as to the advantages to be gained.
206. It is true that *ex post facto* there has been a certain amount of promotional material founded upon the popularity of this story. Claims have been made, for example, that "our enormous growth has been driven by web exclusives like our Max Mosley video" and "Since releasing the Max Mosley orgy video on notw.co.uk, traffic on the site has increased by 600%". It may show cynicism, but in itself could not establish a pre-publication calculation of the kind contemplated by Lord Devlin. In any event, the mere fact that a media group is run for profit does not provide the evidence of calculation. That is common ground.
207. In the context of privacy, it is obvious that there is a good deal of scope for differing assessments to be made, in advance of publication, on such issues as whether there is a reasonable expectation of privacy or a genuine public interest such as to justify intrusion. It is unlikely to be as clear cut as whether (say) words are defamatory or untrue. Those are relatively clear concepts but "public interest" is more elusive. I cannot know to what extent Mr Thurlbeck, Mr Myler or anyone else involved in the decision to publish knew or thought about the law. I am not entitled to know. There is no doubt that they had on hand throughout advice from their experienced and much respected in-house lawyer, Mr Tom Crone, but what passed between them is privileged and I cannot speculate. Nor are they in any way to be criticised for not waiving legal professional privilege, as Mr Price seemed to imply.
208. I am not in a position to accept the submission that any of the relevant individuals must have known at the time that the publication would be unlawful (in the sense that no public interest defence could succeed). As Mr Myler commented in the witness box, "That is what we are here to find out". Nor can I conclude that one or other of

them was genuinely indifferent to whether there was a public interest defence (a state of mind that could be equated to recklessness). They may not have given it close analysis and one could no doubt criticise the quality of the journalism which led to the coverage actually given, but that is not the same as genuine indifference to the lawfulness of this conduct.

209. It is also clear that one of the main reasons for keeping the story “under wraps” until the last possible moment was to avoid the possibility of an interlocutory injunction. That would avoid delaying publication and, in a privacy context, would generally mean that a potential claimant would not trouble to institute any legal proceedings at all. Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain. Even so, it would not be right to equate such tactics with deliberately or recklessly committing a wrong.
210. I conclude, therefore, that even if exemplary damages were available in a case of this kind the evidence would not establish sufficiently clearly that either of the relevant states of mind was present. Accordingly, the necessary ingredients are lacking to justify even considering whether punishment would be appropriate.
211. If damages are appropriate at all, they must be confined to a compensatory award (which can include an element of aggravation, if appropriate). It is to that issue that I should now turn.

The nature of compensatory damages in privacy cases

212. So far there have been very few awards of damages for infringement of privacy and they have all been pitched at relatively modest levels compared with some defamation awards: see e.g. *Campbell* (cited above), *Lady Archer v Williams* [2003] EMLR 38, *Douglas v Hello! Ltd* [2003] 3 All ER 996 and *McKennitt v Ash* [2006] EMLR 178. There have been some settlements which have been mentioned in the newspapers, but those are of no value as precedents or as setting any kind of tariff.
213. The claim is limited to damage inflicted in this jurisdiction and there are, or may be, other claims to be pursued in foreign jurisdictions. This may be artificial in some respects, but it has to be acknowledged.
214. Because both libel and breach of privacy are concerned with compensating for infringements of Article 8, there is clearly some scope for analogy. On the other hand, it is important to remember that this case is not directly concerned with compensating for, or vindicating, injury to *reputation*. The claim was not brought in libel. The distinctive functions of a defamation claim do not arise. The purpose of damages, therefore, must be to address the specific public policy factors in play when there has been “an old fashioned breach of confidence” and/or an unauthorised revelation of personal information. It would seem that the law is concerned to protect such matters as personal dignity, autonomy and integrity.
215. It has to be recognised, of course, that at first sight these notions appear somewhat incongruous when introduced in the present context. But, as I have already said in the context of liability, one must beware of being distracted by considerations which relate purely to taste or moral disapproval. One should be careful not to dismiss matters going to personal dignity because a particular sexual activity or inclination

itself may seem undignified. After all, sexual activity is rarely dignified. That is far from saying, however, that intrusions into a person's sexual tastes and privacy cannot infringe the right to dignity protected by Article 8. The Strasbourg jurisprudence demonstrates the contrary.

216. Thus it is reasonable to suppose that damages for such an infringement may include distress, hurt feelings and loss of dignity. The scale of the distress and indignity in this case is difficult to comprehend. It is probably unprecedented. Apart from distress, there is another factor which probably has to be taken into account of a less tangible nature. It is accepted in recent jurisprudence that a legitimate consideration is that of vindication to mark the infringement of a right: see e.g. *Ashley v Chief Constable of Sussex* [2008] 2 WLR 975 at [21]-[22] and *Chester v Afshar* [2005] 1 AC 134 at [87]. Again, it should be stressed that this is different from vindication of reputation (long recognised as a proper factor in the award of libel damages). It is simply to mark the fact that either the state or a relevant individual has taken away or undermined the right of another – in this case taken away a person's dignity and struck at the core of his personality. It is a relevant factor, but the underlying policy is to ensure that an infringed right is met with “an adequate remedy”. If other factors mean that significant damages are to be awarded, in any event, the element of vindication does not need to be reflected in an even higher award. As Lord Scott observed in *Ashley, ibid*, “ ... there is no reason why an award of compensatory damages should not also fulfil a vindicatory purpose”.
217. If the objective is to provide an adequate remedy for the infringement of a right, it would not be served effectively if the court were merely to award nominal damages out of distaste for what the newspaper had revealed. As I have said, that should not be the court's concern. It would demonstrate that the judge had been distracted from the main task. The danger would be that the more unconventional the taste, and the greater the embarrassment caused by the revelation, the less effective would be the vindication. The easier it would be for the media to hound minorities.
218. These are the elements which need to be recognised in an award of damages in this field but, of course, they must be proportionate and not open to the criticism of arbitrariness: see e.g. *Tolstoy Miloslavsky v UK* (1995) 20 EHRR 442. It has been recognised since the Court of Appeal decision in *John v MGN Ltd* [1997] QB 586 that there must be a readily identifiable scale in the field of defamation so as to avoid, as far as possible, the vices pointed out in Strasbourg. The guidance there provided can to that extent be transferred to the present environment. Thus, it will be legitimate, in particular, to pay some attention to the current levels of personal injury awards in order to help maintain a sense of proportion.
219. It is common knowledge that general damages for pain and suffering are relatively low compared to awards made in the past in respect of some of the more serious defamation claims. In recent years, however, the practice has developed of acknowledging informally a ceiling in the libel context, broadly geared to that in personal injury awards. There are difficulties about this, as the editors of *Gatley on Libel and Slander* (10th edn) point out at para. 9.6, because in truth there is no real comparison.
220. The ceiling in personal injury cases is now of the order of £220,000, which is intended to be appropriate for the worst types of injury, such as quadriplegia or severe

brain damage. At every level of compensation, there are obvious incongruities if one tries to compare a possible libel award with the level of harm which a similar figure would reflect in the personal injury field. An award of £50,000, for example, would probably be appropriate for a moderately serious libel published in the national newspapers, but there is something of a mismatch if one tries to equate it in any real sense to injuries that would attract a similar level of award. Examples might include severe back injuries with unsightly scarring and impaired bowel and bladder function, or asbestos-related lung cancer with protracted symptoms (although less painful than in a case of mesothelioma). People recover significantly less, usually, for the total loss of one eye.

221. This merely illustrates the limits of useful comparison. It is as well to have in mind the remarks of Hirst LJ in *Jones v Pollard* [1997] EMLR 233, 257:

“I cannot accept that the main purpose of *John* was to establish a ceiling, if by that is meant that in the most serious cases awards of general damages at the very top of the JSB range would normally be appropriate. Such cases comprise quadriplegia, very severe brain damage where ‘in the most severe cases the plaintiff will be in a vegetative state ... unable to obey commands, with no language functions and the need for 24 hour nursing care’, and total blindness and deafness. For my part, save possibly in the most exceptional cases, I find it difficult to imagine any defamation action where even the most severe damage to reputation, accompanied by maximum aggravation, would be comparable with such appalling physical injuries. The purpose of the personal injuries comparison sanction in *John* is in my judgment to assist juries and the Court of Appeal to maintain a sense of proportion, by drawing a comparison between any prospective award of damages for defamation with the type of personal injury which would lead to a similar award, without of course seeking any precise correlation.”

It is also to be borne in mind that some heads of damage reflected in libel awards, such as aggravation and vindication, have no direct point of comparison in personal injury cases.

222. It must be recognised that it may be appropriate to take into account any aggravating conduct in privacy cases on the part of the defendant which increases the hurt to the claimant’s feelings or “rubs salt in the wound”. As Lord Reid said, in the context of defamation, in *Cassell v Broome* at p.1085:

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

awarding as damages the largest sum that could fairly be regarded as compensation.”

223. It would thus seem to be appropriate to pay regard to such matters as the “follow up” of 6 April. I was asked by Mr Warby not to hold it against the Defendant that it had fought the case – a factor which would often be relevant to libel damages. It is fair to say that in defamation cases it would be less likely to aggravate damages where the defendant had not chosen to renew the attack on the claimant’s reputation; in other words, there could be a significant difference in this respect as between a defence of (say) qualified privilege and one of justification. In this litigation, the conduct of the Defendant’s case has not involved further intrusions into privacy. Considerable discretion has been shown in not referring, more than absolutely necessary, to embarrassing or intimate matters from the video recordings. There have, it is true, been attacks on the Claimant’s character (references to “depravity” and so forth), but this is not a defamation case and reputation is not in issue. It would not be right to increase damages because of attacks on character which the Defendant, if sued for libel, would wish to defend. Nevertheless, in advancing its case on public interest, the Nazi and concentration camp allegations were persisted in publicly and without success. That is therefore a legitimate element to take into account and to reflect in any award.
224. So too, it may be appropriate that a claimant’s conduct should be taken into account (as it is in libel cases). Logically, it may be said, a claimant’s conduct has nothing to do with whether or not his privacy has been invaded or the impact upon his feelings caused by such an intrusion. There is no doctrine of contributory negligence. On the other hand, the extent to which his own conduct has contributed to the nature and scale of the distress *might* be a relevant factor on causation. Has he, for example, put himself in a predicament by his own choice which contributed to his distress and loss of dignity?
225. To what extent is he the author of his own misfortune? Many would think that if a prominent man puts himself, year after year, into the hands (literally and metaphorically) of prostitutes (or even professional dominatrices) he is gambling in placing so much trust in them. There is a risk of exposure or blackmail inherent in such a course of conduct. In this particular case, the evidence is that the Claimant had received a warning from Lord Stevens that he was being watched by some unidentified group of people hostile to him. This was at the end of February. He had also received a similar tip from Mr Bernie Ecclestone in January. He had taken the matter sufficiently seriously to arrange instruction for himself in spotting or avoiding surveillance. Yet he continued to arrange parties, such as those on 8 and 28 March, knowing of the heightened risk.
226. To a casual observer, therefore, and especially with the benefit of hindsight, it might seem that the Claimant’s behaviour was reckless and almost self-destructive. This does not excuse the intrusion into his privacy but it might be a relevant factor to take into account when assessing causal responsibility for what happened. It could be thought unreasonable to absolve him of all responsibility for placing himself and his family in the predicament in which they now find themselves. It is part and parcel of human dignity that one must take at least some responsibility for one’s own actions. On the other hand, I have no evidence to suggest that the surveillance he was warned against had any connection with Woman E or the *News of the World*.

227. An issue to which attention was directed in counsel's submissions was that of deterrence. Passing reference has been made in the authorities from time to time to this concept, but it seems at least questionable whether deterrence should have a distinct (as opposed to a merely incidental) role to play in the award of compensatory damages. It is a notion more naturally associated with punishment. It often comes into the court's assessment of an appropriate punishment for prevalent criminal offences. There is also the anomaly to be considered, already mentioned in the context of exemplary damages; namely, that if damages are paid to an individual for the purpose of deterring the defendant (or others) it would naturally be seen as an undeserved windfall.
228. Furthermore, if deterrence is to have any prospect of success it would be necessary to take into account (as with exemplary damages) the means of the relevant defendant (often a newspaper group). Any award against the present Defendant would have to be so large that it would fail the test of proportionality when seen as fulfilling a compensatory function. There is also a concomitant danger in including a large element of deterrence by way of "chilling effect".
229. It would in my judgment not be consistent with the approach of the Court of Appeal in *John v MGN Ltd* to impose, *solely* for the sake of deterrence, a large award of damages unrelated to any recognised scale or tariff. For this purpose, as I have said, I need to have well in mind the tariff applied over the last 10 years so far as defamation awards are concerned. It is true that the approach was questioned in *Gleaner Company Ltd v Abrahams* [2004] 1 AC 628, but I must nevertheless do my best to avoid any appearance of arbitrariness and keep the award in proportion.
230. I am conscious naturally that the analogy with defamation can only be pressed so far. I have already emphasised that injury to reputation is not a directly relevant factor, but it is also to be remembered that libel damages can achieve one objective that is impossible in privacy cases. Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between. Thus, if journalists successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them and (as Mr Thurlbeck put it in his 2 April email) that the news agenda will move on.
231. Notwithstanding all this, it has to be accepted that an infringement of privacy cannot ever be effectively compensated by a monetary award. Judges cannot achieve what is, in the nature of things, impossible. That unpalatable fact cannot be mitigated by simply adding a few noughts to the number first thought of. Accordingly, it seems to me that the only realistic course is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of *solatium* to the injured party. That is all that can be done in circumstances where the traditional object of *restitutio* is not available. At the same time, the figure selected should not be such that it could be interpreted as minimising the scale of the wrong done or the damage it has caused.

Overall conclusion

232. I decided that the Claimant had a reasonable expectation of privacy in relation to sexual activities (albeit unconventional) carried on between consenting adults on private property. I found that there was no evidence that the gathering on 28 March 2008 was intended to be an enactment of Nazi behaviour or adoption of any of its attitudes. Nor was it in fact. I see no genuine basis at all for the suggestion that the participants mocked the victims of the Holocaust.
233. There was bondage, beating and domination which seem to be typical of S and M behaviour. But there was no public interest or other justification for the clandestine recording, for the publication of the resulting information and still photographs, or for the placing of the video extracts on the *News of the World* website – all of this on a massive scale. Of course, I accept that such behaviour is viewed by some people with distaste and moral disapproval, but in the light of modern rights-based jurisprudence that does not provide any justification for the intrusion on the personal privacy of the Claimant.
234. It is perhaps worth adding that there is nothing “landmark” about this decision. It is simply the application to rather unusual facts of recently developed but established principles. Nor can it seriously be suggested that the case is likely to inhibit serious investigative journalism into crime or wrongdoing, where the public interest is more genuinely engaged.
235. It is necessary, therefore, to afford an adequate financial remedy for the purpose of acknowledging the infringement and compensating, to some extent, for the injury to feelings, the embarrassment and distress caused. I am not persuaded that it is right to extend the application of exemplary (or punitive) damages into this field or to include an additional element specifically directed towards “deterrence”. That does not seem to me to be a legitimate exercise in awarding compensatory damages.
236. It has to be recognised that no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined. What can be achieved by a monetary award in the circumstances is limited. Any award must be proportionate and avoid the appearance of arbitrariness. I have come to the conclusion that the right award, taking all these considerations into account, is £60,000.