In other words, it is important to bear in mind that not every recipient of a public authority promise can commit the resources to rely to their detriment but that it may remain important to protect such individuals from the moral detriment which results when a public authority resiles without adequate justification.

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CONFIDENTIALITY AND INTRUSION: BUILDING STORM DEFENCES RATHER THAN TRYING TO HOLD BACK THE TIDE

THE image of King Canute trying to hold back the tide is a popular one used to critique attempts by national courts to restrain the publication of private information in the face of a global and online media. The truth, or at least the allegation, will out. The issue is certainly not a new one. The futility of an injunction in England and Wales, given extensive publication out of the jurisdiction, played a key role in the *Spycatcher* litigation in the late 1980s. Such futility is a feature of confidentiality or secrecy: the tide of information cannot be held back in an information age. In *PJS v News Group Newspapers* [2016] UKSC 26, the Supreme Court, endorsing an approach developed by the High Court in several earlier authorities, distinguished between protecting confidentiality and preventing intrusion as twin rationales for the tort of misuse of private information. The intrusion of a pending media storm in the jurisdiction, repeating allegations already widely available, was a further misuse of private information and could usefully be restrained in England and Wales. Even where confidentiality had already been lost, privacy injunctions could continue to play a useful role as a defence against the significant additional intrusion, at least where it could be practicably restrained, and the pending media storm that would accompany a lifting of the injunction represented one such case.

The defendant made an application to set aside an interim injunction restraining the publication of details of alleged extra-marital sexual activities between the claimant and another couple. The claimant and his partner were well known in entertainment and had two young children. He had successfully obtained an interim injunction in January 2016. However, by April 2016, the details had been published in print and online media by news organisations in the US, Canada and Scotland and were also widely available on social media. The defendant argued that the injunction now served no further useful purpose and was an unjustified interference with the defendant's Article 10 ECHR rights. The relevant private information was already in the public domain.

The majority of the Supreme Court distinguished between the protection of confidentiality and the prevention of intrusion. Lord Neuberger commented that, had confidentiality or secrecy been the basis of the case, then an application for an injunction "would have substantial difficulties" (at [57]). However, he distinguished confidentiality from intrusion and held that "claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone" (at [58]). Lord Mance held that the repetition of private information was "capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made" (at [32]).

The Supreme Court endorsed the approach developed by the High Court in a number of authorities emphasising the role of intrusion in the "repetition of known facts" (*JIH v News Group Newspapers Ltd.* [2010] EWHC 2818 (QB); [2011] EMLR 9, at [59], per Tugendhat J). Lord Mance, at [29], endorsed paragraphs [23]–[26] of Eady J.'s judgment in *CTB v News Group Newspapers Ltd.* [2011] EWHC 1326 (QB), in which he said that "the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with intrusion … so long as the court is in a position to prevent *some* of that intrusion and distress, depending on the individual circumstances, it may be appropriate to maintain that degree of protection" (emphasis in original). Similarly, Lord Mance quoted with approval Tugendhat J. in *CTB v News Group Newspapers Ltd.* [2011] EWHC 1334 (QB), at [3], who said "if the purpose of this injunction were to preserve a secret, it would have failed its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed". MacDonald J. had also approved of these comments in *H v A (No 2)* [2015] EWHC 2630 (Fam); [2016] 1 F.C.R 338, at [47]. Lord Neuberger also referred to a range of High Court decisions concerning intrusion to demonstrate a "clear, principled and consistent approach at first instance" by "highly respected" judges who were mainly "highly experienced in media law and practice" (at [58]–[60]). He also endorsed their approach.

Placing emphasis on the role of the tort of misuse of private information and privacy injunctions in preventing intrusion into private life has two important and desirable effects and should be welcomed.

First, the endorsement by the Supreme Court of a broadening of the purpose of the tort of misuse of private information beyond confidentiality or secrecy to intrusion secures a more modest but realistic remedy. Privacy injunctions are only enforceable within the jurisdiction. A focus on intrusion within the jurisdiction results in a more realistic treatment than attempts to limit global disclosure which are not backed by adequate enforcement mechanisms. A focus on intrusion avoids the "King Canute" criticism by focusing on a more achievable objective. The majority held that the injunction would continue to serve a useful purpose in preventing the further intrusion that would result from the "media storm" that would

otherwise follow in England and Wales (at [35]). It therefore sought to relieve the claimant of intrusion only within the jurisdiction, to the extent it could, in particular by focusing on print media and online publishers based in England and Wales. The Court also recognised that an injunction would not stem the flow of information forever, even to the claimant's children (at [9]). Recognising the value of a local respite, the more modest remedy is a positive development.

Second, a shift from confidentiality or secrecy to intrusion permitted the court to move from a rather abstract notion of the "public domain" to a more concrete notion of the harms that disclosure in a particular location and medium would do to the claimant and his family.

The majority's adoption of an intrusion-based approach allowed it to focus in a concrete manner on the harm that the claimant and his family might suffer. Lord Mance pointed to the "further unrestricted and extensive coverage in hard copy as well as other media in England and Wales" (at [1]) that would result from setting aside the injunction. He added that it would "add extensively, and in a qualitatively different medium" (at [1]) to the invasion of privacy suffered by the claimant and his family. Lord Mance considered that "open hard copy exposure, as well no doubt as further internet exposure, is likely to add significantly to the overall intrusiveness and distress involved" (at [25]). There was a "qualitative difference in intrusiveness and distress likely to be involved" (at [35]). For Lord Mance, a national print "media storm" would "add a different and in some respects more enduring dimension to the existing invasions of privacy being perpetrated in the internet" (at [45]).

Lord Neuberger (at [68]) took a similar view of the difference between Internet dissemination and national print media:

> It is one thing for what should be private information to be unlawfully disseminated: it is quite another for that information to be recorded in eye-catching headlines and sensational terms in a national newspaper, or to be freely available on search engines in this jurisdiction to anyone searching for PJS or YMA, or indeed AB, by name in a different connection.

For Lord Neuberger, "the perception that a story in a newspaper has greater influence, credibility and reach, as well greater potential for intrusion, than the same story on the internet" (at [69]) was an important consideration.

By contrast, for Lord Toulson in dissent, the fact that confidentiality had been lost was decisive as "the court needs to be very cautious about granting an injunction preventing publication of what is widely known, if it is not to lose public respect for the law by giving the appearance of being out of touch with reality" (at [88]). For Lord Toulson, the "world of public information is interactive and indivisible" (at [89]).

The judgments highlight the conceptual differences underlying the intrusion and confidentiality approaches. For the focus on confidentiality, the "public domain" is global, interconnected and abstract. Information is either "out there" or it is not and, once it is "out there", it is futile to attempt to intervene. This encourages an all-or-nothing approach to injunctions. Intrusion concentrates on the local and concrete harm to the claimant at a particular time. It is more sensitive to where, when and how that repetition occurs and the harm it entails to the particular claimant. This encourages a more nuanced and sensitive approach.

Although privacy injunctions may not be able to hold back the tide, they can provide defences allowing time and space, free from the intrusion of a media storm, for private and family life. Rather than fear that public respect for the law will be weakened, this modest but realistic remedy aimed at concrete relief should do much to strengthen respect for the law.

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VARYING CONTRACTS

MWB Business Exchange Centres Ltd. v Rock Advertising Ltd. [2016] EWCA Civ 553 deals with a number of important issues concerning variation of contracts. Rock occupied as licensee premises managed by MWB. In August 2011, Rock decided to expand its business, and entered into a written agreement with MWB for larger premises for 12 months beginning 1 November 2011. The licence fee was agreed to be £3,500 per month for the first three months, and then £4,433.34 from 1 February 2012. Unfortunately, Rock's business was not as successful as hoped and, by late February 2012, it had incurred arrears of over £12,000. MWB gave notice purporting to terminate the agreement, but the parties then orally agreed to reschedule the licence fee payments due from February to October 2012: Rock would pay less than the originally agreed amount for the first few months, but after that would pay more, with the result that the arrears would be cleared by the end of the year. Pursuant to this agreement, Rock paid £3,500 to MWB, which was the first instalment due in accordance with the revised payment schedule. However, MWB subsequently changed its mind and sued for the arrears. MWB presented two arguments why Rock could not rely upon the oral variation. First, MWB pointed to an anti-oral variation clause in the written contract. Second, MWB relied upon *Foakes v Beer* (1884) 9 App. Cas. 605 for the proposition that the variation was not supported by consideration. Both arguments failed before a unanimous Court of Appeal (Arden, Kitchin and McCombe L.JJ.).