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No. HC-2016-001130

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY ENTERPRISE COURT**

Rolls Building
20th May 2016

B e f o r e :

MR. JUSTICE BIRSS

HEYTHROP ZOOLOGICAL GARDENS LIMITED

(t/a AMAZING ANIMALS)

JAMES SPENCER CLUBB

Claimants

- and -

CAPTIVE ANIMALS PROTECTION SOCIETY

Defendant

**MS. J. WELLS (instructed by Bindmans Solicitors) appeared on behalf of the Claimants.
MR. D. HIRST (instructed by Roythornes Solicitors) appeared on behalf of the Defendant.**

HTML VERSION OF JUDGMENT

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MR. JUSTICE BIRSS:

1. Heythrop Zoological Gardens Limited (trading as "Amazing Animals") provides animals to the film and television industry including lions, sloths, monkeys, tigers and other creatures. Heythrop's evidence emphasises the paramount importance which it places on the welfare of all the animals in its care.

2. The Captive Animals Protection Society ("CAPS") is a campaigning charity which aims to stop the exploitation of animals, particularly in circuses, zoos and in the exotic pets trade.
3. What happened in this case is as follows: Heythrop's Zoological Garden Zoo is closed to the public, but it has open days. Ms. Wright and Ms. Eyre, who are described as investigators for CAPS, visited the zoo in September 2015. They took photographs and videos along with numerous other members of the public. The number of members of the public was about a hundred or possibly more. Unless it is necessary to be specific from now on, I will refer to photographs or images as to include both still photographs and video.
4. Photographs were used by the charity in articles which were posted on the internet (at least one or two on CAPS own website) in about February 2016. The images show animals being used for entertainment. CAPS describes what is shown as animals being made to perform tricks in public. CAPS also says that the images show inhumane conditions in which some of the animals are kept and show some of them exhibiting stereotypical behaviours, such as waving their heads from side to side, which is consistent with being kept in inhumane conditions.
5. There is no dispute that on the open day Heythrop put on for what it regards as an entertaining animal show for its visitors. Heythrop denies any inhumane treatment for any of its animals. For Heythrop the welfare of the animals in its care is paramount.
6. CAPS' articles led to comment in the wider press. There was an article in the Daily Mail and also recently, on 6th May 2016, there was an article in The Times newspaper which referred to the photographs (although it did not reproduce them). Mr. Chris Packham, who is a well-known television presenter involved in wildlife and animals, refused to work with an animal which he understood had been provided by Amazing Animals recently and that was also a matter of press comment.
7. Heythrop have sued and seek an interim injunction based on three causes of action. The first is breach of contract on the basis that part of the ticket contract which all visitors entered into includes a Code of Conduct. That Code provides that photographs may only be used for personal use, may not be uploaded to the internet and not used for any commercial or financial gain. All of that is subject to the permission of Heythrop. Heythrop also says that the Code of Conduct was prominently displayed around the zoo and, importantly for the contract case, prominently displayed at the entrance gate so that it would be visible before anyone bought a ticket at the entrance.
8. The second cause of action is breach of confidence on the basis that the photographs are to be regarded, in all the circumstances, as embodying confidential information. The bulk of the relevant photographs were taken in September 2015 by Ms Wright or Ms Eyre. A few of the photographs which were used by CAPS were not taken in September 2015 but were taken by a member of the public in 2013 and CAPS has also used some photographs from a person described as a "whistleblower" who is an ex-employee of the claimants.
9. The third cause of action is a breach of "non-property" performance rights under s.182 and s.183 of the Copyright, Designs and Patents Act 1988. The relevant performer, according to the claimant, was Mr. Clubb. He is the second claimant and a director of Heythrop. The claimants submit that the entertaining animal show was a "performance" under s.180 in which performer's rights subsist. It submits that that right was breached under s.182 because the performance was filmed, in other words a recording was made of a performance without Mr. Clubb's consent. The reason filming was without consent was because the consent was limited by the Code of Conduct. That only permitted filming for personal use and the people making the film (the investigators or CAPS acting via the investigators) were not making it for their personal use. Moreover publication of that video footage on the internet was a breach of the performer's rights under s.183 as it amounts to showing or playing in public or communicating to the public a substantial part of the performance without consent by means of a recording made without consent.
10. CAPS' case on the merits as regards these three causes of action is as follows: First, CAPS denies that the Code of Conduct was there at all, but certainly not at the gate. Therefore, since the Code was not displayed at the gate, it cannot form part of the contract for entry to the zoo. Second, CAPS denies that

the subject matter of the photographs was confidential. It contends that the claimants have not identified the confidential information relied on with any specificity. CAPS argues that, for example, a picture of a tiger cannot have the necessary quality of confidence (see *Coco v. Clark* [1969] RPC 41) because we all know what a tiger looks like. CAPS also contends that no obligation of confidence was imparted on the investigators since the Code of Conduct was not part of the contract for entry and nor was the Code drawn to the investigators' attention. CAPS submits that the public were taking numerous photographs on the day and so photographs of the same nature taken at the same time cannot be confidential either. CAPS also denies that the use of the photographs could be a breach of confidence in any event. That is because the use made of them was and is in order to expose matters of specific public interest. The matters of public interest are the alleged inhumane treatment of the animals and the use by Heythrop of the animals to put on entertainment shows and to do tricks.

11. Third, as regards performer's rights, CAPS denies that an animal show is capable of being a "performance" under s.180(2) CDPA 1988 because the real performers were animals not the human being (Mr Clubb). Animals are not "individuals" under the Act nor can they be qualifying individuals. CAPS denies a breach under s.182 or s.183 on the basis that because the Code of Conduct was not part of the contract it cannot be said that the videos or photos were taken without permission. Moreover, it relies on a defence of fair dealing in relation to its publications.
12. In reply on the contract, Heythrop says that the fact the CAPS investigators claim they did not see the notice is not determinative. Based on the well-known authority of *Olley v. Marlborough Court* [1949] 1 KB 532, Heythrop contends it is enough if the notice was reasonably prominent and as to that Heythrop contends the evidence of Mr. Clubb shows that it was. There was a further debate about whether the terms were sufficiently unusual to require to be brought specifically to the attention of any visitors, but I do not need to be concerned with that.
13. Turning to the interim injunction application, Heythrop contends that the interim injunction should be granted on a number of bases. On the contract claim, based on *Doherty v. Allman* [1878] 3 App Cas 709, Heythrop submits that prima facie the court ought to grant an injunction since there is a clear breach of contract and therefore an entitlement to relief. Subject to that and taking all three causes of action, Heythrop submits the correct approach is that based on *American Cyanamid* [1975] AC 396. There is a risk of irreparable harm to the claimant. The risk is high. The publication has already caused significant commercial damage to its business and there is evidence that contracts have been stopped, for example with the BBC. This harm is likely to continue. Although the initial publication took place in February the matter is still current and is still causing damage. Heythrop refers to the article in The Times about a week ago. Heythrop submits that the unquantifiable harm caused to CAPS by the injunction would be low and, if CAPS wins the case, it can always use the photographs afterwards. CAPS has very little money; its funds are held by another charitable trust and so it could not pay any damages to Heythrop in any event.
14. One point that was raised in the evidence was a concern about whether publication of these photographs would increase the risk of harassment to staff from animal rights extremists. Although that concern was mentioned, the point was not pressed and I am satisfied that there is no material risk of that in this case caused by this coverage.
15. CAPS contends that the real complaint in this case is a complaint of damage to reputation and that this raises the familiar problems of whether there should be pre-trial restraint in libel cases (citing *Bonnard v. Perryman* [1891] 2 Ch 269). CAPS submits that freedom of speech is a very important consideration in this case and the fact that Heythrop did not sue for libel does not change that. Counsel referred to a series of cases which involved attempts to avoid the rule in *Bonnard v. Perryman* by relying on causes of action other than libel, such as breach of confidence. These attempts failed. The cases mentioned were *Woodward v. Hutchins* [1977] 1 WLR 760, *Service Corporation v. Channel 4* [1999] EMLR 83, *Tillery Valley* [2004] EWHC 1075 (Ch), *Terry v. Persons Unknown* [2010] EMLR 16 and *Viagogo v Myles* [2012] EWHC 433 (Ch).
16. CAPS also contends that this case engages s.12 of the Human Rights Act (see *Cream Holdings v. Banerjee* [2005] 1 AC 253) and involves a balance of rights protected by Art.10 (freedom of speech) of the Convention against other rights also protected by the Convention. CAPS contends that its conduct

is entirely journalistic in nature and that the claimant cannot show that it is more likely than not that its claims will succeed and so no injunction should be granted.

17. The matter was called on on Tuesday of this week, I heard the case and indicated I would give judgment today (Friday). That gave me the opportunity to reflect on it, but it also gave me the opportunity to watch the videos produced by CAPS and some stills which were taken from them. I was provided with a USB stick in order to do this. Counsel also made some brief further written submissions arising from that, which I have taken into account.
18. In the meantime, yesterday, the Supreme Court gave judgment in *PJS v. Newsgroup Corporation* [2016] UKSC 26. As that case is concerned with s.12 and application of *Cream Holdings*, the judgment was clearly pertinent to this case albeit, as a case concerned with privacy, it is concerned with balancing different rights (i.e. Art 8 rights) against Art.10. I indicated to the parties that I did not see any reason to delay giving this judgment, but while not inviting further submissions, I would accept brief written submissions arising from *PJS* as long as they were no more than three hundred words in length. In the event, the claimants did not consider they needed to add anything. The defendant sent me brief written submissions for which I am grateful and which I have taken into account.

The Evidence

19. There is a witness statement from Mr Clubb, the second claimant, who is a director of Heythrop. He explains who he is, who Heythrop are and what happened from Heythrop's point of view, the concerns they have and the reasons for this application. There is also a witness statement from Hannah Francombe, who is an administrative assistant at Heythrop. She explains how the tickets were sold and how the Code of Conduct was brought to visitors' attention. A point on Ms. Francombe's evidence is that it is not specific relating to the question of whether the Code of Conduct notice was in position at the gate, which is an important issue in the contract claim. There is also evidence from Mr. Russ, who is a solicitor for Heythrop, and he explains how Heythrop puts its case.
20. For the defendants there were three witness statements. The main one is from Nicola O'Brien. She is the campaign director of CAPS. She explains who CAPS are and what happened from CAPS' point of view. Then I have witness statements from Suzie Wright and Angela Eyre. They are the individual investigators who visited Heythrop in September 2015 and took the photographs. They are not employees, but no point has been taken on that. The argument is that the ticket contract which was entered into between Heythrop and Ms. Wright or Ms. Eyre was entered into on behalf of CAPS and therefore would be binding on CAPS. No point is taken about that before me.

Causes of Action

Contract

21. There is a straight dispute of fact about whether the Code of Conduct notice was where it would have needed to be in order to make it part of the contract. Mr. Clubb says it was, essentially, because that is how he always sets up his business and he checks. His evidence is that it was there at the relevant time. Ms. Wright and Ms. Eyre say it wasn't there, they did not see it. They also point to the absence of notices elsewhere in the zoo. That is relevant because Mr. Clubb's evidence was that they were posted all over the zoo, albeit that the relevant one in legal terms is the one at the gate. But CAPS says it can be seen from the photographs taken by the investigators that there were not notices all over the rest of the zoo. This is relied on to undermine Mr. Clubb's evidence. I have mentioned Ms. Francombe's evidence already.
22. There is a photograph of the ticket office on the day of the visit, which was taken by a third party and has been posted on the internet (coincidentally). It is right to say that this photograph does not show a notice on the gate, but Mr. Clubb's answer to that is that he does not agree that the time of the photograph (which is shown on the version on the internet) can be correct based on what can be seen on the image. What it looks like, says Mr. Clubb, is an image taken later in the day when the arrangements were being tidied up and that would explain why the notice is no longer visible.

23. As the parties recognise, I cannot resolve this factual dispute on this application. Both sides, in my judgment, have a perfectly sensible arguable case on the merits in relation to the contract claim. Accordingly *Doherty v. Allman* is not relevant. This is not a case of a clear breach of contract. The issues are properly arguable either way depending on a disputed fact which could only be resolved at trial. I should note that this contract argument only applies to the 2015 photographs and not to the 2013 or the whistleblower photographs.

Breach of confidence

24. The claimants submit that the photographs can have protection under the law of confidence on their own - as distinct from any question whether the events which were photographed are confidential. This is based on the case known as *Douglas v. Hello* or *OBG v. Allan* [2007] UKHL 21 and in particular to the judgment of Lord Hoffman at paras.112 to 118. The point is that in *Douglas v. Hello* the photographs themselves had a commercial value, which was illustrated by the fact that OK Magazine had paid for the exclusive rights to the photographs of the celebrity wedding, and so those photographs could be protected as confidential information irrespective of whether the events photographed could be said to be confidential.
25. I take from that case that photographs are capable of being treated as confidential information protectable under the law of confidence, even if the events depicted in the images were not. It all depends on the facts. Accordingly I do not accept a key aspect of the defendant's case that the breach of confidence claim can effectively be discounted because the confidential information is not properly identified or because the photographs are to be regarded as just an images of animals. The fact that we know what a tiger looks like is not the issue. Moreover, since it is part of Heythrop's business to sell images of its animals, there is nothing inherently odd about the proposition that photographs of its animals are protectable although that may be a different in relation to photographs of the surroundings.
26. Nevertheless, the facts of this case are different from those in *Douglas v Hello*. First, in *Douglas v. Hello*, the wedding guests all knew that the wedding would be covered by the magazine. It is less clear in this case that the restrictive terms were brought to the visitor's attention, which takes one back to the disputed issue of fact about the Code of Conduct. Second, in this case the public were free to take photographs, although the Code of Conduct (assuming it is applicable) restricts that use to personal use and purports to forbid visitors from putting them on the internet. I say purports because the evidence is clear that the public in fact do post on the internet images of the Heythrop Zoo which they have taken on the open days. I acknowledge that the fact that a large number of such photographs have been posted on the internet does not necessarily mean that there is a very large number of different people doing it.
27. What of the public interest argument as an answer to breach of confidence? This is an important element in CAPS' defence and in my judgment it may apply. On the face of it the material is relevant to a campaign on a matter of current public debate about the use of animals in entertainment and possible inhumane treatment.
28. In relation to the 2013 photographs, breach of confidence is the only claim which is available to Heythrop. The evidence on that is that the Code of Conduct was brought to the attention of the relevant visitors. This evidence is more certain than it was in relation to 2015 because of the way in which tickets were being sold for the 2013 event. So I should accept for this purpose that the Code of Conduct applies to the 2013 photographs.
29. As regards the whistleblower, the confidentiality argument is different. It is an obligation owed by an employee. That is a stronger case for the claimants than the 2015 photographs but equally the public interest defence in that respect is also somewhat stronger since the particular photographs which were derived from the whistleblower are specifically said to show inhumane treatment of an animal (I think it is a polar bear).
30. So, overall, on breach of confidence the position is that the parties have an arguable cases on each side, both as a claim and as a defence.

Performer's rights

31. Section 180(2) provides:

"(2) In this Part - 'performance' means -

(a) a dramatic performance (which includes dance and mime),

(b) a musical performance,

(c) a reading or recitation of a literary work, or

(d) a performance of a variety act or any similar presentation,

which is, or so far as it is, a live performance given by one or more individuals; [...]"

32. For this case the relevant part of s180(2) is sub-paragraph (d) which refers to "a performance of a variety act or any similar presentation". Sir Richard Arnold is the author of a text book *Performer's Rights*, the fifth edition which was published in 2015. In paras. 2.15 to 2.17, he discusses the definition of performances of variety acts and the considerations which might apply. There Sir Richard explains that, if the word "variety" was given its ordinary English meaning as in a dictionary, this leads to a conclusion that the only things which could fall within the section would already have fallen within sub-paragraphs (a), (b) or (c) and so that construction makes "variety act" mere surplusage and would not be correct. I respectfully agree.

33. The learned author also explains that from his researches it would appear that the term "variety act" stems from a report of the Whitford Committee, which used the term "variety artistes" compendiously to refer to performers such as magicians, clowns, jugglers, acrobats and the like (and may ultimately derive from the name of a group called the Variety Artistes Federation mentioned in the Report of the Gregory Committee). Neither I nor counsel have done the research referred to by Sir Richard, but I have every reason to take it as accurate. On the face of it the reasoning produces a result which seem to me to be an appropriate way of looking at the meaning of this sub-section.

34. So far there has been no mention of what one might call an animal act, albeit that one does or did see them in circuses. There was reference in the argument before me to the well-known television programme, *Britain's Got Talent*, to illustrate the argument. It is fair to call *Britain's Got Talent* a variety show. If you watch it, you will see a succession of performers including singers, dancers and animal acts (usually dog acts). Why, one might ask rhetorically, should the animal acts not acquire performer's rights when the first two kinds clearly do? Sir Richard's book at para.2.33 addresses this issue, as follows:

"It has been suggested that, in the context of circus performances, a performance by animals should nevertheless be regarded as a performance given by an individual, namely the trainer, notwithstanding that the animals are not individuals. This is to stretch the concept of an interpretative performance nearly to breaking point, but it may be justifiable on grounds of policy."

35. If I may say so, I see the force of the observations made there.

36. Turning to the performance in this case, the evidence is that these shows are rehearsed and are put on repeatedly more than once a day. That may be significant in that, whatever may be the answer to the question of whether improvisations ought to be protected by performer's rights, the fact that the presentation is rehearsed makes the claim to performer's rights stronger.

37. I have watched the videos (not the whole of the longer ones). The material can be divided into two kinds. The first kind involves a handler standing by an animal, such as a sloth, and speaking about it enthusiastically. While there may be no formal script, this is clearly something that has been rehearsed and would be described in ordinary language as a performance. I would hold that this qualifies as a performance by an individual within the meaning of s.180. The animal is almost like a prop although I would not go as far as calling it merely ancillary. The handler's performance is a key part of what the audience is watching. One could give a talk like this about a sloth without the sloth being physically

present. Really there is no argument that that sort of thing would qualify as a performance by an individual under s.180(2). However this first kind is not the sort of performance used which appeared in the CAPS articles. I have described for the purpose of comparison with the second kind, which is used in the articles.

38. The second kind is an event like a traditional circus act with a trainer and animals such as lions or tigers. The trainer in this case is Mr. Clubb. He is there in the cage with two sticks and causes the animals to perform tricks like standing on their hind legs on a stool with their front paws in the air. He is talking most of time. I think his words are directed at the animals rather than at the audience and that make this different from the first kind of performance I have described. It is clear that in this presentation the audience's attention is focussed on the animals much more than it was in the first kind of performance. One could not do this sort of thing without the big cats. Does that mean that the only performer is a lion? That is the question I have to decide. It is a bit like the well-known monkey-selfie case which arose in the USA. If there is no human performer at all then it is hard to see how there could be a "performance" under the Act.
39. The point was made that Mr. Clubb had his back to the audience a lot, but I do not regard that as relevant. Many performers perform with their backs to the audience, at least for some of the time.
40. I find that this is the kind of thing which the words "variety act or similar presentation" are apt to include. If one asks oneself what the human being is doing, the answer is that they are giving a performance, albeit they are doing it with animals. Without Mr Clubb there would be no show at all. Also without Mr Clubb there would just be two lions pacing in a cage. That would not be a performance at all. It is the intervention of the human being which makes the event worth watching from the audience's point of view. While clearly they are there to see the animals and not the trainer, the overall show involves both the human and the animal working together. It cannot be said that this is merely a performance by animals. It is a performance by both animals and a human being in which each plays a necessary part. I do not believe it is much of a stretch to say that this falls within s.180(2) (d) and, as Sir Richard Arnold identified, there are good policy reasons why it should. In my judgment there is a much more than a merely arguable case that performer's rights subsist. There is a good case.
41. The question is whether the performer's rights have been breached. That relates to s.182 and 183. The breach depends first on the question of consent and that, in turn, depends on the Code of Conduct which limited the consent to the taking of the photographs and the video for personal use only etc.. Clearly, the CAPS' investigators were not taking photographs for personal use; but, as I have said, that issue depends on the Code of Conduct being applicable and therefore turns on a disputed issue of fact. The question whether the extract from the performance which is shown in the video clips that have appeared on CAPS' website amounts to an infringement because it is a substantial part of the original performance is more than arguable. The extract may be a small part of the performance measured in time, but it is representative. The relevant test for substantial part is qualitative not quantitative. What has been taken, in my judgment, does represent the whole performance.
42. Critically though CAPS relies on fair dealing for the purposes of criticism or review. Section 30 of the 1988 Act provides for fair dealing in the context of copyright. For performer's rights the corresponding defence is in para. 2(1) of schedule 2 of the 1988 Act provides:

"2 (1) Fair dealing with a performance or recording for the purpose of criticism or review, of that or another performance or recording, or of a work, does not infringe any [performer's rights] provided that the performance or recording has been made available to the public.

[...]

(2) Expression used in this paragraphs have the same meaning as in section 30"
43. This defence was not addressed in detail in argument. Mr. Hirst submitted that CAPS had a good defence. Even if, which CAPS did not accept, the comments by CAPS on the use of animals in the performance to perform tricks were libellous, the use could still be fair dealing and the proper remedy for Heythrop would be in defamation, citing Pro Sieben Media v Carlton UK Television [1999] 1

WLR 605. Neither side referred to the possible distinction between criticism of the performance itself (or what would be the "work" under s30) and criticism of the actions of individuals discussed in *Ashdown v Telegraph Group* [2001] EWCA Civ 1142. Neither side also referred to the requirement for the performance to have been made available to the public, although since public could watch it, I will take it that element is satisfied.

44. Standing back, in my judgment there is a good arguable case that the fair dealing defence may apply. Therefore, overall, each side has an arguable case relating to performer's rights.

Causes of action together

45. Taking these matters together, the claimants have arguable causes of action. Some parts of those claims are strong, but other parts are at least properly arguable. Equally well, the defendant has fully arguable defences to all the claims, much but not all of which depends on the disputed issue of fact concerning the Code of Conduct.

Interim injunction

46. I turn to the issues arising from the application for an interim injunction. The major argument before me was whether this application should be regarded as an attempt to get around the approach to prior restraint in libel and the rule in *Bonnard v. Perryman*. CAPS say this is really a case about defamation and this can be seen because Heythrop places such reliance on damage to its reputation. Heythrop says this is not the correct analysis because Heythrop accepts that CAPS can publish the words in the form of the articles already published, or words to that effect, and Heythrop emphasises that it is the use of the pictures which is all that Heythrop seeks to restrain. Use of these pictures, says Heythrop, infringes its legal rights irrespective of defamation. It is true that the harm it relies on at this interim stage is harm to its business, losing contracts, for example, caused by injury to its reputation caused by this campaign. But Heythrop argues that it cannot be that if a claimant suffers harm to its business caused by arguable legal wrongs which the law recognises distinct from defamation, then that claimant is not entitled to rely on that kind of harm when seeking to enforce its legal rights. As for the engagement of Art.10 and *Cream Holdings*, Heythrop reserves the issue of whether Art.10 is engaged; but says that, even if it is, it makes no difference on the facts of this case because *Cream Holdings* shows that the standard ultimately is a flexible one or, I should say, can be a flexible one in an appropriate case.
47. Heythrop contends that when considering the three *American Cyanamid* factors - arguable case, unquantifiable harm and balance of convenience or justice - *Cream Holdings* simply serves to fortify the first of these factors. So, whereas outside the application of s.12 and under *American Cyanamid* what is needed at the first stage is an arguable case, if s.12 applies what is needed is a stronger case. But once that first test is satisfied the other factors of unquantifiable harm and balance of justice apply just as they would following *American Cyanamid* and in this case they favour the claimant.
48. CAPS submits that that is not right. It contends that freedom of speech and the importance of journalistic endeavour by organisations like CAPS to bring matters of public interest to the public's attention is crucial. It repeats its submission that the claim does not meet the *Cream Holdings* threshold nor, even taking a more flexible approach, does it justify injunction bearing in mind the clear journalistic nature of what CAPS is doing.
49. In my judgment, Art.10 is at least sufficiently engaged in this case to mean that the analysis of the governing law must start with s.12 and *Cream Holdings*. Section 12 provides as follows:
- "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
- (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied -
- (a) that the applicant has taken all practicable steps to notify the respondent;
- or

(b) that there are compelling reasons why the respondent should not be notified.

(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.

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

(a) the extent to which -

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

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

(b) any relevant privacy code."

50. The key passage in ***Cream Holdings*** is para.22:

"In my view section 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is -8- necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

51. The claimant cited a judgment of mine in ***Interflora v. Marks and Spencer*** [2014] EWHC 4168 (Ch). That case involved Art.10, but it was a trademark case. It did not involve privacy or Art.8. I adhere to what I said in that judgment at paras.16 to 27 and then also paras.36 to 37. I will refer only to two particular parts. At para.27 I attempted to summarise as briefly as possible what Lord Nichols was explaining in ***Cream Holdings*** as:

"...in general, the threshold for the test of likelihood means 'probably will win', 'more likely than not', but there are clear exceptions and in the end, the court has to conduct a careful balancing of rights and freedoms."

52. Also in paras.36 and 37, I said:

"(36) Despite Mr. Silverleaf's submission, I am struck by the nature of the Court of Appeal's decision [*in the same case*] and its approach in this case. It seems to me that, given the Court of Appeal in this case, it is impossible to say that Interflora are more likely

than not to win. So, if a proper approach under section 12(3) to this case requires the balance to tip in favour of the claimant on the merits, then I should not grant an injunction.

(37) However, it seems to me that in a case like this, it is not enough to stop there. *Cream Holdings* shows that the balance of rights and of harm, and so on, may well mean that an interim injunction is appropriate even if the court cannot say that the claimant will probably win. In my judgment, this is especially so where, as here, this is in no sense a weak case by the claimant. As I said, the merits are finely balanced. It is clear to me that the merits come well past satisfying the *American Cyanamid* level."

53. One thing is missing from para.37 is a reference to a previous decision of mine in *Volkswagen v. Garcia* [2013] EWHC 1832 (Ch). I must say I thought I had referred to it when I gave that *Interflora* judgment but clearly did not. *Volkswagen* was a case in which the right sought to be protected was the alleged confidentiality in a secret encryption algorithm used in anti-theft devices in millions of motor vehicles. The application was seeking to restrain the publication of the entire algorithm in an academic journal. It was not an overwhelming case of breach of confidence. The academics had solid arguments that no breach had occurred. They said they had reverse engineered the algorithm and they maintained that the sort of publication they sought to make was what one can call "high value speech" published in an academic journal. But at the interim stage the key thing in the balance was that the attempt to restrain publication was not there to protect the reputation of Volkswagen, but was there to protect the security of a very large number of motor cars from being stolen. I refer to what I said at paras.40 to 44:

"(40) If I thought the purpose of this injunction was to save Volkswagen's embarrassment I would not hesitate to refuse it. The paper in its redacted form will not prevent the defendants from saying that they have, in fact, derived the Megamos Crypto algorithm and that there is, in fact, an attack based on its weakness. Moreover, relevant people, Thales, EM, Delphi and Volkswagen, now know what the problem is. They have a chance to do something about it.

(41) I sympathise with the defendants to some extent, in that they engaged in what they regarded as responsible disclosure when they told EM in November 2012. However, when Volkswagen raised the problem a few weeks ago, in my judgment, it was not consistent with the idea of responsible disclosure for the defendants to simply say, "We are going ahead anyway". It may well not be the defendants' fault that Volkswagen were not told earlier, but once the defendants were told about Volkswagen's concern a responsible academic, concerned with responsible disclosure, would have realised that publication should be delayed, at least for a reasonable period, to allow for discussion with Volkswagen. Instead, the defendants have forced this interim injunction application to be dealt with in less than a month. A responsible approach would be to recognise the legitimacy of the interest in protecting the security of motor vehicles.

(42) I also note that the defendants refuse, in fact, to even redact Definition 3.8, as asked for by EM and Delphi at a meeting in June. I think the defendants' mantra of "responsible disclosure" is no such thing. It is a self-justification by defendants for the conduct they have already decided to undertake and it is not the action of responsible academics.

(43) On material as it is, the claimants have much more than a merely arguable case. Albeit that the merits are not overwhelming, I find that the merits are sufficiently strong to justify interference with academic freedom and freedom of expression in this case pending trial.

(44) I recognise the high value of academic free speech, but there is another high value, the security of millions of Volkswagen cars."

54. I turn to the recent decision (yesterday) of the Supreme Court in *PJS v. Newsgroup*. Many cases in which s12 comes into play are privacy cases in which Art.8 rights and Art.10 rights have to be balanced. Yesterday's *PJS* case was one of those. I refer to paras.19 and 20 of the judgment of Lord Mance:

"19. There is, as all members of the Supreme Court conclude, a clear error of law in the Court of Appeal's reasoning in relation to section 12. For reasons given in para 20 below, it consists in the self-direction that section 12 'enhances the weight which article 10 rights carry in the balancing exercise' (para 40). The Court of Appeal's further self-direction, that section 12 'raises the hurdle which the claimant must overcome in order to obtain an interim injunction' is unexceptionable, in so far as section 12 replaces the general *American Cyanamid* test, focused on the balance of convenience, with a test of whether the appellant is 'likely to establish that publication should not be allowed' at trial. The position was stated more particularly by Lord Nichols in *Cream Holdings v Banerjee* [2004] UKHL 44, para 22:

[...]

20. The Court of Appeal's initial self-direction is however contrary to considerable authority, including authority at the highest level, which establishes that, even at the interlocutory stage, (i) neither article has preference over the other, (ii) where their values are in conflict, what is necessary is an intense focus on the comparative importance of the rights being claimed in the individual case, (iii) the justifications for interfering with or restricting each right must be taken into account and (iv) the proportionality test must be applied: see eg *In Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593, para 17, per Lord Steyn, with whom all other members of the House agreed; *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73, para 47, per Buxton LJ, with whom the other members of the Court agreed; and *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), para 28, per Eady J, describing this as a "very well established" methodology. The exercise of balancing article 8 and article 10 rights has been described as "analogous to the exercise of a discretion": *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554, para 8). While that is at best only an analogy, the exercise is certainly one which, if undertaken on a correct basis, will not readily attract appellate intervention. The Court of Appeal's error in its initial self-direction is, however, one of potential significance, since it necessarily affects the balance. By itself it would require the Supreme Court to re-exercise the discretion which the Court of Appeal exercised in setting aside the injunction which it had previously granted. But there are further aspects of the Court of Appeal's treatment of the issues which together lead to the same conclusion."

55. Paragraph 19 deals with the point that s.12 can be said to raise the hurdle which the claimant must overcome to obtain an interim injunction to something higher than the *American Cyanamid* test and approves the Court of Appeal's way of putting that. Ultimately paragraph 20 is a summary of the right approach and it is the approach I propose to follow.
56. Balancing the privacy rights of celebrities and freedom of speech rights presents a particular set of problems which are some way from the facts of the case before me. In my judgment what *PJS* does show is that CAPS's submission that one can simply characterise an interim injunction claim which relies on other causes of action apart from defamation as merely an attempt to circumvent a clear *Bonnard v Perryman* principle and stop there, cannot be a complete statement of the position. The correct approach must be based on s.12 and *Cream Holdings*. That involves identifying the nature of the rights relied on by the claimant in support of its claim for an interim injunction and carrying out the required balancing exercise. It does not add much to the analysis to seek to answer the question whether the claim is an attempt to circumvent a rule in defamation. I do not mean to suggest that I doubt that the outcome reached in cases which did not involve privacy like *Service Corporation*, *Tillery Valley* and *Viagogo*.

The balance of rights in this case

57. The claimants have property and economic rights. They are protected not by Art.8, but the property rights are protected expressly by Art 1 of Protocol 1 of the convention. It is somewhat ironic that the performance rights in this case can be referred to as "non-property" rights as distinct from the

performer's property rights (s191A 1988 Act) but it seems to me that they can still be protected by Art.1, Protocol 1.

58. For a commercial enterprise like Heythrop, whose business is in hiring out its animals and selling images of its animals, the contractual and confidentiality rights and the performer's rights play a legitimate role in protecting and furthering the legitimate aims of its business. Since Heythrop's rights protect a business I will take it they are protected by that Article. The defendant did not suggest otherwise. The claimant's business has a legitimate aim in preventing unfair competition and preventing a second commercial source of photographs/videos of the animals in its care being available. I say "commercial source" because its legitimate interests are concerned with competition. Unrestrained access to images on the internet could also interfere with its business. Overall then, the claimants' causes of action do protect legitimate commercial interests.
59. Considering the defendant, the publications in this case are clearly journalistic in nature (s.12(4) of the Human Rights Act) and that is high value speech, the protection of which is a key aspect of Art.10. The issue of animal treatment is clearly a matter of current public interest. That alone demonstrates that this case is a long way from a case about celebrity gossip. Also the question of the use of animals in entertainment and teaching animals to perform tricks for the public is also, in my judgment, a matter of current public interest. It is a topic on which the opinions of the public clearly vary. CAPS says this is immoral and view it as such and the claimants clearly profoundly disagree. Both sides' views are sincerely held.
60. CAPS is a charity and a campaigning organisation. Today campaigning organisations carry out an important journalistic function. This is also recognised in *Long Beach v. Global Witness* [2007] EWHC 1980 (QB), cited by CAPS. The fact that such organisations are not newspapers does not mean that they do not carry out a vital role in a democratic society which is, in effect, investigative journalism. It is true that the CAPS' website includes a button "Donate Now" alongside the article which the claimant referred to, but CAPS is not a business rival of Amazing Animals in any sense. Raising funds in this way is no different from a campaigning newspaper requiring people to pay for the newspaper or putting its contents on the internet behind a pay wall. I do not accept Heythrop's submission that anything can be made of the specific proximity of the button to the article. It does not turn what is clearly a journalistic article into some different form of non-journalistic commercial activity. It is also true that the CAPS website includes a further button which someone seeing the article could click on to complain to the BBC. That is part and parcel of the campaigning nature of the defendant's undertaking.
61. It is true that the campaign could still continue without the photographs but, in my judgment, that does not mean that the use of the photographs does not engage Art.10. These photographs provide evidence to support the opinions which CAPS is expressing and they lend weight to it. Including photographs in this way is a matter of journalistic judgment (see *Campbell v. Mirror Group*, [2004] 2 AC 457 at paras.112 and 113).
62. I turn to balance these factors. It seems to me the key things are this: First, this is not a claim brought to enforce economic rights against a commercial rival such as in *Interflora*. The publications in this case are journalistic. Second, although economic rights are being relied on, the key justification for interim injunction is injury to reputation. That injury then has a knock-on effect on the business, but it is harm to reputation which is at the core of the claim for the interim injunction. So this case is not like *Volkswagen* in which the important harm was not harm to reputation, but to thousands of motor vehicles being stolen. The harm relied on by Heythrop is not caused by competition from CAPS selling images of the animals so that the Amazing Animals business will sell fewer images nor is it a case in which an individual's privacy is in issue. The purpose and basis of the interim relief is the protection of harm to reputation of the claimant caused by publications of a clearly journalistic nature. In that sense it is like *Service Corp*, *Tillery Valley* and *Viagogo*.
63. Here the causes of action relied on are all economic in nature and they are ranged firmly against the right of freedom of speech being exercised in a campaigning journalistic manner and the harm relied on to justify the interim injunction is harm to reputation. For that reason there is no justification for

applying any sort of lower standard to the question of prospects of success than would be the general approach under s.12 identified in *Cream Holdings*, i.e. that success at trial is more likely than not.

64. Furthermore, I note that s12(3) refers to a likelihood that "publication will not be allowed". It seems to me that success required is not simply success in terms of the cause of action. It must be success relating to the prospects of obtaining an injunction based on that cause of action which would restrain publication.
65. Save for the whistleblower images, all the images are matters which the public could see on the open days and they are all images of a similar nature to images which already appear on the internet indexed by reference to Heythrop. That seriously undermines the likelihood that the court would finally restrain publication of those images even if a claim based on contract or confidence was well founded. Even if those claims were well founded, the remedy is likely to be damages. These publications do not compete with the claimant's business in selling animal photographs. Referring to the whistleblower images, the only cause of action is breach of confidence but those particular images have the strongest public interest defence in any event since they relate to alleged inhumane treatment of a polar bear and the conditions in which it was kept. As regards the claim based on performer's rights, given the journalistic nature of the publication there is a clearly arguable fair dealing defence.
66. Finally I will mention a factor which has concerned me, that is the finances of CAPS, which could be said to be particularly significant since I am considering the prospect of obtaining damages at trial rather than a final injunction. If the activities of the defendant were not so clearly journalistic in nature then I would conduct a closer analysis of the ability of CAPS to pay damages and I would have been concerned by the fact that the defendant is not likely to be in a position to pay very substantial damages in this case. However, campaigning charitable organisations will often have less financial strength than commercial claimants, although I should make it clear that I do not suggest Heythrop is a particularly large or rich organisation either. But when campaigning freedom of speech and harm to a commercial reputation are the key issues, it would not be welcome if the issue of interim relief were to turn on the relative financial strength of a campaigning charitable organisation like the defendants.
67. Overall, in my judgment there is not a sufficient likelihood that the claimant will obtain a final injunction at trial based on any of these causes of action to justify the interference with journalistic freedom of speech which an interim injunction would involve. I will refuse the interim injunction.

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