A Court of Appeal

HRH Prince of Wales *v* Associated Newspapers Ltd

[2006] EWHC 522 (Ch)

[2006] EWCA Civ 1776

B

2006 Feb 21, 22, 23; March 17 — Blackburne J

2006 Nov 27, 28; Dec 21 — Lord Phillips of Worth Matravers CJ, Sir Anthony Clarke MR and May LJ

C *Confidential information Disclosure Public interest Claimant's handwritten travel journal circulated in confidence to chosen individuals Unauthorised disclosure by employee in breach of contract Newspaper publishing extracts from journal Whether violating claimant's right to privacy Whether contractual duty of confidence affecting newspaper's right to freedom of expression Whether publication justified in public interest Human Rights Act 1998 (c 42), Sch 1, Pt I, arts 8, 10*

D The claimant, the Prince of Wales, kept handwritten travel journals recording his views and impressions of overseas visits, which were photocopied by a member of his private office and circulated to chosen individuals in an envelope marked "private and confidential". G, who was employed in the claimant's private office under a contract which provided that any information relating to the claimant that she acquired during the course of her employment was subject to an undertaking of confidence and was not to be disclosed to any unauthorised person, supplied the E defendant newspaper publisher with typed copies of eight of the claimant's journals. The newspaper published substantial extracts from one of the journals, which related to the claimant's visit to Hong Kong in 1997 when the colony was handed over to the Republic of China and which included a description of a banquet which the Chinese President had attended, which the claimant described in a manner that was disparaging of the formalities and of the behaviour of the Chinese participants. The claimant, contending that the publication interfered with his right to respect for his F private life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms[1], commenced proceedings for breach of confidence and infringement of copyright and applied for summary judgment pursuant to CPR Pt 24. The judge granted summary judgment in relation to the Hong Kong travel journal.

On the newspaper's appeal

Held, dismissing the appeal, that, whether a publication or threatened publication involved a breach of a relationship of confidence, an interference with privacy or both, it was necessary to consider whether those matters justified the G interference with the right to freedom of expression under article 10 which would be involved if the publication were made the subject of a judicial sanction; that if no breach of a confidential relationship were involved, the balance to be struck would be between article 8 and article 10 rights and it would usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information; that if the disclosure related to information received in confidence, that factor was, of itself, capable of justifying restrictions on H freedom of expression; that there was an important public interest in the observance of duties of confidence, and those who engaged employees or entered into other relationships which carried with them a duty of confidence ought to be able to be

[1] Human Rights Act 1998, Sch 1, Pt I, art 8: see post, p 80, para 86.
Art 10: see post, pp 80–81, para 87.

confident that they could disclose, without risk of wider publication, information they legitimately wished to keep confidential; that the test was whether a fetter of the right of freedom of expression was, in the particular circumstances, necessary in a democratic society; that a significant element to be weighed in the balance was the importance in a democratic society of upholding duties of confidence created between individuals; that it was not simply a question of whether the information was a matter of public interest but whether, in all the circumstances, it was in the public interest that the duty of confidence should be breached; that, in applying the test of proportionality, the nature of the relationship giving rise to the duty of confidentiality might be important, although the extent to which a contract added to the weight of duty of confidence arising out of a confidential relationship would depend upon the facts of the individual case; that, on the facts, the information in the claimant's travel journal was obviously confidential and of a private nature and the claimant could reasonably expect that it would remain confidential; that, therefore, the publication by the newspaper of extracts from it interfered with his right under article 8 to respect for his private life; that G was employed in circumstances and under a contract that placed her under a duty to keep the contents of the journal confidential; that the nature both of the information and of the relationship of confidence under which it had been received weighed heavily in the balance in favour of the claimant; that, by contrast, the contribution which the journal or the newspaper articles made to providing information on any matters of public interest was minimal; that the significance of the interference with article 8 rights effected by the newspaper's publication of information in the journal outweighed the significance of the interference with article 10 rights which would have been involved had the newspaper been prevented from publishing that information; that, even if the significance of the fact that the information published had been revealed to G in confidence were ignored, the claimant had an unanswerable claim for breach of privacy and, when the breach of a confidential relationship was added to the balance, the claimant's case was overwhelming; and that, accordingly, the judge had been right to grant the claimant summary judgment (post, paras 35–39, 41–43, 46, 65–69, 70–74, 84).

Campbell v MGN Ltd [2004] 2 AC 457, HL(E) considered.

Decision of Blackburne J [2006] EWHC 522 (Ch); post, p 60E et seq affirmed.

The following cases are referred to in the judgment of the Court of Appeal:

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 WLR 776; [1988] 3 All ER 545, HL(E)

Campbell v Frisbee [2002] EWCA Civ 1374; [2003] ICR 141, CA

Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)

Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595; [2006] QB 125; [2005] 3 WLR 881; [2005] 4 All ER 128, CA

Editions Plon v France (2004) 42 EHRR 705

Fressoz and Roire v France (1999) 31 EHRR 28

Hosking v Runting [2004] NZCA 34; [2005] 1 NZLR 1

Lion Laboratories Ltd v Evans [1985] QB 526; [1984] 3 WLR 539; [1984] 2 All ER 417, CA

London Regional Transport v Mayor of London [2001] EWCA Civ 1491; [2003] EMLR 88, CA

M v Secretary of State for Work and Pensions [2006] UKHL 11; [2006] 2 AC 91; [2006] 2 WLR 637; [2006] 4 All ER 929, HL(E)

McKennitt v Ash [2005] EWHC 3003 (QB); [2006] EMLR 178; [2006] EWCA Civ 1714; [2008] QB 73; [2007] 3 WLR 194, CA

S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)

Von Hannover v Germany (2004) 40 EHRR 1

The following additional cases were cited in argument in the Court of Appeal:

A v B [2005] EWHC 1651 (QB); [2005] EMLR 851
A v B plc [2002] EWCA Civ 337; [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA
Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142; [2002] Ch 149; [2001] 3 WLR 1368; [2001] 4 All ER 666, CA
Bladet Tromsø v Norway (1999) 29 EHRR 125
Designers Guild Ltd v Russell Williams (Textiles) Ltd (trading as Washington DC) [2000] 1 WLR 2416; [2001] 1 All ER 700, HL(E)
Galloway v Telegraph Group Ltd [2006] EWCA Civ 17; [2006] EMLR 221, CA
Goodwin v United Kingdom (1996) 22 EHRR 123
Gourguénidzé v Georgia (Application No 71678/01) (unreported) 17 October 2006, ECtHR
Halford v United Kingdom (1997) 24 EHRR 523
Hubbard v Vosper [1972] 2 QB 84; [1972] 2 WLR 389; [1972] 1 All ER 1023, CA
Leempoel v Belgium (Application No 64772/01) (unreported) 9 November 2006, ECtHR
Maccaba v Lichtenstein [2004] EWHC 1579 (QB); [2005] EMLR 109
Malisiewicz Gąsior v Poland (Application No 43797/98) (unreported) 6 April 2006, ECtHR
Service Corpn International plc v Channel Four Television Corpn [1999] EMLR 83

The following additional cases, although not cited, were referred to in the skeleton arguments before the Court of Appeal:

Coco v A N Clark (Engineers) Ltd [1969] RPC 41
Hyde Park Residence Ltd v Yelland [2001] Ch 143; [2000] 3 WLR 215, CA
Jersild v Denmark (1994) 19 EHRR 1
Laserdisken ApS v Kulturministeriet (Case C 479/04) [2006] ECR I 8089, ECJ
McDonald's Corpn v Steel [1995] 3 All ER 615, CA
Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605, CA
R (ProLife Alliance) v British Broadcasting Corpn [2003] UKHL 23; [2004] 1 AC 185; [2003] 2 WLR 1403; [2003] 2 All ER 977, HL(E)
Schering Chemicals Ltd v Falkman Ltd [1982] QB 1; [1981] 2 WLR 848; [1981] 2 All ER 321, CA
Tennant (Lady Anne) v Associated Newspapers Group Ltd [1979] FSR 298
Thompson v United Kingdom (2004) 40 EHRR 245
Thorgeirson v Iceland (1992) 14 EHRR 843
Woodward v Hutchins [1977] 1 WLR 760; [1977] 2 All ER 751, CA
X v Persons Unknown [2006] EWHC 2783 (QB); [2007] EMLR 290

The following cases are referred to in the judgment of Blackburne J:

A v B [2005] EWHC 1651 (QB); [2005] EMLR 851
A v B plc [2002] EWCA Civ 337; [2003] QB 195; [2002] 3 WLR 542; [2002] 2 All ER 545, CA
Ashdown v Telegraph Group Ltd [2001] Ch 685; [2001] 2 WLR 967; [2002] 2 All ER 370; [2001] EWCA Civ 1142; [2002] Ch 149; [2001] 3 WLR 1368; [2001] 4 All ER 666, CA
Campbell v MGN Ltd [2004] UKHL 22; [2004] 2 AC 457; [2004] 2 WLR 1232; [2004] 2 All ER 995, HL(E)
Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595; [2006] QB 125; [2005] 3 WLR 881; [2005] 4 All ER 128, CA
Fressoz and Roire v France (1999) 31 EHRR 28
Jersild v Denmark (1994) 19 EHRR 1
Lion Laboratories Ltd v Evans [1985] QB 526; [1984] 3 WLR 539; [1984] 2 All ER 417, CA

McKennitt v Ash [2005] EWHC 3003 (QB); [2006] EMLR 178
Mersey Care NHS Trust v Ackroyd [2003] EWCA Civ 663; [2003] EMLR 820, CA
Microsoft Corpn v Plato Technology Ltd (unreported) 15 July 1999; Court of Appeal (Civil Division) Transcript, No 1239 of 1999, CA
Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289
Partco Group Ltd v Wragg [2002] EWCA Civ 594; [2002] 2 Lloyd's Rep 343, CA
Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605; [1999] FSR 610, CA
S (A Child) (Identification: Restrictions on Publication), In re [2004] UKHL 47; [2005] 1 AC 593; [2004] 3 WLR 1129; [2004] 4 All ER 683, HL(E)
Service Corpn International plc v Channel Four Television Corpn [1999] EMLR 83
Swain v Hillman [2001] 1 All ER 91, CA
Three Rivers District Council v Governor and Company of the Bank of England (No 3) [2001] UKHL 16; [2003] 2 AC 1; [2001] 2 All ER 513, HL(E)
Von Hannover v Germany (2004) 40 EHRR 1

No additional cases were cited in argument.

APPLICATION for summary judgment

The claimant, HRH the Prince of Wales, applied for summary judgment pursuant to CPR r 24.2 on his claim against the defendant, Associated Newspapers Ltd, for breach of confidence and infringement of copyright arising from articles and editorial comment which had been published by the defendant in the "Mail on Sunday" on 13 November 2005.

The facts are stated in the judgment.

Hugh Tomlinson QC and *Lindsay Lane* for the claimant.
Mark Warby QC and *Christina Michalos* for the defendant.

Cur adv vult

17 March. **BLACKBURNE J** handed down the following judgment.

Introduction

1 This is an application by the claimant, HRH the Prince of Wales, for summary judgment against the defendant, Associated Newspapers Ltd, for breach of confidence and infringement of copyright. It arises out of articles, including an editorial comment, which appeared in the "Mail on Sunday" on 13 November 2005. For convenience I refer to that edition of the newspaper as "the 13 November edition".

2 The defendant is the publisher of the "Mail on Sunday". The articles were based upon, and contained extracts from, the contents of a typed-up copy of a journal written by the claimant containing impressions and reflections on his visit to Hong Kong between 27 June and 3 July 1997 on the occasion of the formal handover of Hong Kong to the Republic of China. The claimant represented Her Majesty the Queen at the handing-over ceremony. He also attended other events associated with the handover. The journal, referred to in evidence and in argument as the Hong Kong journal, was handwritten by the claimant during the course of his return journey.

3 The claim is not confined to the Hong Kong journal. It extends to copies of seven other journals of the claimant concerned with overseas tours which he has undertaken.

A 4 The claimant contends that the journals set out his private and personal thoughts and impressions of the tours to which they relate, that these matters were not and (with the exception of the contents of the Hong Kong journal) are still not in the public domain and constitute his confidential information. He contends that prior to publishing the article based on the Hong Kong journal in its 13 November edition the defendant was put on notice of this fact.

B 5 The claimant further alleges that the journals are original literary works within the meaning of the Copyright, Designs and Patents Act 1988, that copyright in them belongs to himself as their author and that by reproducing extracts from the Hong Kong journal in the 13 November edition and by copying and continuing in possession of all eight journals in the course of its business, knowing or having reason to believe that they are C infringing copies of copyright works, the defendant has infringed his copyright in them.

6 The contents of the Hong Kong journal are now fully in the public domain. Much of its contents had been revealed in the course of the articles appearing in the 13 November edition. The contents are referred to in the evidence and counsel's skeleton arguments. During the course of the hearing before me, the claimant consented to the press reading the full contents of D that journal. The claimant cannot, therefore, and does not seek to restrain disclosure of any information in that journal. But he does seek an order restraining the defendant from using or disclosing the contents of the other seven journals. He also seeks an order restraining further infringement of his copyright in all eight journals and an order requiring the defendant to deliver up all copies of them in its possession, power, custody or control. He also E seeks an inquiry as to damages for breach of confidence and copyright infringement.

7 The defendant denies any wrongdoing. It contends that the information in the Hong Kong journal was not confidential and denies that the claimant had any reasonable expectation that it would be kept from the public. It contends that the information in the journal was not intimate personal information but information relating to the claimant's public life F and to a "zone of his life" which he had previously put in the public domain. It claims that, as a result, much of the information was already in the public domain and that other elements of it were of the same or substantially similar character as information that the claimant had made public. It alleges that in any event the information concerned the claimant's political opinions which the electorate had a right to know as being within the ambit G of the Freedom of Information Act 2000, alternatively because it relates to the claimant's political behaviour whereby, departing from established constitutional conventions affecting the heir to the throne, the claimant has intervened in and lobbied on political issues. Alternatively, and for the same reasons, there was a powerful public interest in the disclosure to the public of the information which outweighed any right of confidence the claimant might otherwise have.

H 8 The defendant further contends that the use of extracts from the Hong Kong journal did not infringe copyright as the use was not of a substantial part and in any event amounted to fair dealing for the purpose of reporting current events and, or alternatively, for the purpose of criticism and review, alternatively publication of it was in the public interest. It contends that the

limited use in the 13 November edition made of the claimant's own words was fair and in the public interest because it was a necessary, alternatively legitimate, means of providing the public with accurate information on matters of public interest.

9 The defendant denies that the claimant suffered any loss as a result of the publication complained of, contends that claims to injunctions and delivery up should be dismissed, that use of the Hong Kong journal could be lawfully repeated if the defendant so chose and that, for similar reasons, it would be entitled to publish articles using information or extracts from the other journals although it has no present intention of doing so. On the contrary, it has undertaken to give the claimant notice if it formed such an intention with the result that all relief should be denied in any event.

CPR r 24.2

10 This being an application for summary judgment made under CPR r 24.2, I must be satisfied, if the claimant is to succeed, that the defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why it should be disposed of at trial. Mr Hugh Tomlinson, who appeared with Ms Lindsay Lane for the claimant, reminded me that the power to grant summary judgment has been described as a "salutary" one which it is important that judges make use of in appropriate cases, that it is not sufficient to defeat the application that the defendant shows a case which is no better than arguable and that, although the application is not to be treated as a summary trial, this does not mean that the court must uncritically accept any assertion of fact.

11 Equally, Mr Mark Warby, who appeared with Ms Christina Michalos for the defendant, reminded me that to defeat the application a defendant need do no more than show that his defence has a prospect of success which is real as distinct from merely fanciful. He pointed to Lord Hobhouse of Woodborough's observation in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, 282, para 158 that the "criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality". Referring to passages from *Swain v Hillman* [2001] 1 All ER 91, 92J, the *Three Rivers* case, para 95 and *Partco Group Ltd v Wragg* [2002] 2 Lloyd's Rep 343, 352, he reminded me that the court should consider the merits of the defendant's case only to the extent necessary to determine whether they are sufficient for the case to proceed to trial and that the court should not try issues of fact raised by credible evidence and, as a rule, should decline to entertain prolonged and serious argument in a complex case. Nor, he said, referring to further observations in *Partco v Wragg,* is summary judgment appropriate in a case raising novel issues in a developing area of jurisprudence where decisions should be based upon actual findings of fact. Relying on a dictum of May LJ in *Mersey Care NHS Trust v Ackroyd* [2003] EMLR 820, para 70, he submitted that it would be exceptional to grant summary judgment where to do so would interfere with a journalist's right to freedom of speech under article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1988, without first examining the facts of the particular case.

A **12** I bear all of those observations in mind as I approach both the factual background to this claim and the legal principles which apply to it.

The factual background

(a) How the journals came to be written and what happened to them afterwards

B **13** The claimant's evidence is contained in the witness statements of Sir Michael Peat and Sir Stephen Lamport. Sir Michael is the claimant's principal private secretary. He was appointed to that post in 2002. Sir Stephen was Sir Michael's predecessor and served as the claimant's private secretary between 1996 and 2002. Their evidence is to the effect that for some 30 years the claimant has kept handwritten journals recording his personal impressions and private views of his overseas tours. Sir Stephen C described them as "candid and very personal, and intended as a private historical record". Each journal is written immediately following the tour to which it relates. The journals are written wholly by the claimant and are not subject to any revision or editing after they have been completed.

14 On his return to this country the completed handwritten journal is photocopied by a member of staff in the claimant's private office and D circulated to members of his family, close friends and advisers. The claimant does this because he finds it valuable and interesting to have the views of family and friends in response to what he has written. For this purpose he draws up a list of those to whom a particular journal is to be circulated. Accompanying the copy is a handwritten letter from the claimant, or more recently a typed letter from his personal assistant or secretary, to the E recipient in question. The copy journal and accompanying letter are sent in an envelope marked "Private and Confidential".

15 The journals are kept under lock and key in the claimant's correspondence archive at Highgrove. A photocopy is kept under lock and key with the overseas tour records at St James's Palace. Sir Stephen Lamport comments that "thereafter access was limited to four authorised members of staff".

F **16** The claimant does not intend or wish to publish the journals. It is expected that they will be placed in the royal archive after his death. It is possible that after his death edited extracts from some of them may be published. Typed copies of the journals are not kept and the claimant has informed Sir Michael that he has not given consent to the making of typed copies of any of them.

G **17** The Hong Kong journal was written in accordance with the claimant's usual practice. It was written on the return flight. Some 14 copies were sent to close friends. As some of them were addressed to married couples, it is believed that there were 21 recipients of them.

18 The only persons with legitimate access to the journals are the limited number of employees in the claimant's private office, all of whom, past and present, have signed confidentiality undertakings, and those to H whom the journals are sent by the claimant. In his second witness statement Sir Michael Peat states that he has contacted all of the recipients of the Hong Kong journal and each has personally confirmed that the copy sent to that recipient was kept safely and that neither the original nor a copy was given to the "Mail on Sunday" or to any third party. Sir Michael also states that

the only politician who has received copies of any of the journals is a person named on the list of recipients of the Hong Kong journal. Although the list of recipients of that journal has been kept confidential, it is no secret, because the matter was mentioned during the course of hearing, that the politician in question was Mr Nicolas Soames MP who is described as a close friend of the claimant.

19 The defendant's evidence about the circumstances in which the journals came to be made and distributed comes principally from Mr Mark Bolland. Mr Bolland was assistant private secretary to the claimant from 1996 to 1997 and served as his deputy private secretary from 1997 to 2002.

20 Much of Mr Bolland's evidence relates to what he describes as "the Prince's role and his perception of it", namely, quoting the current version of the claimant's website, (i) his role as the Queen's representative, (ii) his work for charity and (iii) his role "promoting and protecting national traditions, virtues and excellence". He expands at some length upon this third aspect of the claimant's role, expresses the view (and gives as an example his opposition to genetically modified foods) that the claimant did not always avoid politically contentious issues but observes that "he [the claimant] was never party-political, but to argue that he was not political was difficult". He refers to the claimant's "very definite aim" as being "to influence opinion", which, he says, the claimant saw as part of the job of the heir apparent, which he carried out "in a very considered, thoughtful and researched way".

21 Mr Bolland goes on to state that the claimant viewed the media as a useful vehicle for getting across to the wider public his views on issues that were important to him. Mr Bolland gives examples and cites the 1994 authorised biography of the claimant by Mr Jonathan Dimbleby. He goes on to comment on the circumstance surrounding the claimant's non-attendance at a return banquet at the Chinese Embassy given by the then President of China during his state visit to this country in 1999. Mr Bolland expresses the view that the claimant failed to attend "as a deliberate snub to the Chinese" and because "he wanted to make a public stand against the Chinese". He states that the claimant staged his boycott notwithstanding attempts to persuade him otherwise. Mr Bolland goes on to state that the claimant instructed him to draw to the media's attention his boycotting of the banquet, that he did so and that the claimant was delighted at the resulting coverage.

22 Coming to the claimant's journals, Mr Bolland describes them as "just an account of his travels" which the claimant would view "both as a historical record and as a bit of fun". He points out that it was a secretary called Sarah Goodall who dealt with the journals, not Mr Bolland himself. Ms Goodall's task, he says, was to photocopy them once the claimant had finished writing them up. He does not suggest that typed-up copies of the journals were made. He goes on to say that

> "I believe the Prince would hand Sarah [Goodall] a handwritten list of those to whom the journal should be sent after each trip and later on he would ask her to send them to more people as and when he met someone he thought would be interested."

He then explains that "each recipient would receive the journal under cover of a typed but personally signed letter from the Prince or of a handwritten

A letter from him" adding that "all the private secretaries, myself included, got copies of the journals". He then continues:

> "I do not believe that any full record was kept of the numerous people who received the journals, but I would estimate that at least 50 to 75 people would have received each of the journals. I know that the recipients of some of the journals included, for example, some politicians,
B media people, journalists and actors as well as friends of the Prince."

Mr Bolland does not say who any of those persons were.

23 In para 41 of his witness statement Mr Bolland says:

> "The journals were not regarded by the Prince or by anyone in his office as being especially 'secret' or as scandalous documents or anything like that. They were not marked 'secret' at all. Nor were they treated in
C the same way as documents which were regarded as secret or highly confidential."

24 He then refers to the existence of differing levels of security for the treatment of confidential documents "none of which applied to the travel journals", contrasting this with the handling (in locked boxes) of, typically,
D papers from the cabinet or government briefings. He then adds:

> "Anything particularly sensitive would be handed personally to the Prince. But no such concern was paid to the journals, which were not regarded as secret in this way. There was a very relaxed attitude to their contents."

25 The only other evidence from the defendant's side relating to these
E matters comes from Mr Peter Wright who since 1988 has been the editor of the "Mail on Sunday". He refers to an unnamed source whose identity, as a journalistic source, Mr Wright is not willing to reveal. Mr Wright understands this unnamed source to have had "legitimate access" to the journals and quotes the source as stating that the journals were not treated as confidential or secret documents, that staff were encouraged to read the
F journals and that no one would have been surprised or cross if secretarial staff made copies and took them home. The secret source is further quoted as stating that the copies of the journals would be sent to senior officials, such as Mr Bolland, and more junior officials who had been on the trip. He states that the secret source gave him 16 names of people to whom the journals had been circulated and told him that the names "were just a sample of the full list, which by the late 1990s varied from trip to trip but generally
G ran to between 50 and about 75 people". He then states that among the names the secret source provided to him were those of the present Prime Minister, one former Prime Minister, and three other senior politicians, each of whom had been a cabinet minister, as well as a number of other public figures.

26 Sir Stephen Lamport takes issue with Mr Bolland's description of
H procedures in the claimant's private office relating to the treatment of documents, including correspondence. He states that the journals were not sent round indiscriminately, were not sent to casual acquaintances (but only to recipients hand-picked by the claimant), were not treated like routine correspondence and were not routinely circulated to employees in the private office. He states that it was not the case that staff generally were

encouraged to read the journals. Nor, he says, were members of staff permitted to take copies of them. As to the number of recipients of the journals, Sir Stephen says this varied depending on the nature of the visit covered. He states that the number of recipients grew with time but that in his experience (his period as the claimant's private secretary coincided with the period of Mr Bolland's employment in the claimant's service) the numbers of recipients never exceeded 40 and was often lower. He adds that Mr Bolland was not involved in the process of circulating the journals and disagrees with Mr Bolland's estimate that the journals were sent to at least 50 to 75 people. (In his second witness statement Sir Michael Peat states, quoting the assistant treasurer and records manager in the claimant's private office, that no single journal has been sent to more than 46 recipients, that the number was often lower and that, with the exception of Mr Soames, no journal has been sent to any minister or politician.) Sir Stephen regards as "preposterous" Mr Wright's assertions, based on his unnamed source, that no one would have been surprised or cross if secretarial staff made copies of the journals and took them home. He states that Ms Goodall who was responsible for photocopying the manuscript originals of the journals and posting them (with the claimant's covering letter) to the recipients was not given permission to retain any copies for herself. He further states that the journals were not intended for circulation to ministers or as a means to set out the claimant's opinions on public issues. He states that they were not sent round indiscriminately nor were they sent to casual acquaintances. He says that they were not sent, for example, to the Foreign Office or to British diplomats.

(b) The Hong Kong journal

27 In evidence was a copy of the typed version of this journal which came into the defendant's possession in the way that I will shortly describe. It is not a long document. It is headed "The Handover of Hong Kong—or 'The Great Chinese Takeaway' June 27–July 3 1997".

28 The claimant starts with a brief reference to the flight out to Hong Kong, mentioning that he was seated in what is normally club class whereas some of the others whom he names were travelling first class. He comments on the high temperature and intense humidity on landing and describes the claimant's pleasure at being once more on the Royal Yacht *Britannia* on which he was to be based during his stay. He describes his sadness that this was to be the last time he would be using it on an overseas tour. He reflects on the general sadness of others and on the surprise of visiting dignitaries that it was to be decommissioned. He mentions a whistlestop tour around the ship by the Prime Minister and Mrs Blair and regrets that they were not able to attend a reception or dinner on board and hear people's reactions. He laments that, being in such a hurry, the Prime Minister can never really learn about anything. He reflects on how decisions are taken based on market research or focus groups or on papers produced by political advisers or civil servants and how none will have experienced the matters about which they are taking decisions.

29 He refers briefly to attending a reception in Government House and how that was followed by a dinner on the Royal Yacht *Britannia* at which he sat next to a Mr Tung, the person whom the Chinese Government had

A selected to take over from Mr Patten, the retiring British governor. He describes how he found Mr Tung, refers to Mr Tung's assurance that the Chinese Government wanted to show the Taiwanese that Hong Kong would continue to thrive as part of one country with two systems. He refers to the outward optimism of the local people about the immediate future of Hong Kong but also to a concern on their part about creeping corruption and the slow erosion of the rule of law. He also refers to a concern about the Chinese B army and the temptation of its poorly paid solders, on discovering how much things cost in Hong Kong, to intimidate or threaten local people.

30 He refers in the briefest terms to his engagements on the second day of his visit, culminating in a dinner on board the Royal Yacht *Britannia* attended by the Commonwealth Secretary General and the United States Secretary of State whom he found to be of good value and well disposed towards C the United Kingdom. He mentions two of the topics they talked about, but does not refer to what anyone said about these or any other matters.

31 He gives an equally brief account of his engagements during the early part of the third day of his tour. He mentions seeing the Prime Minister on his short visit to Royal Yacht *Britannia*. He refers to having a very good talk with him, describes what an enjoyable person the Prime Minister was to talk to and what a good listener he appeared to be. He describes how the Prime D Minister understood the need for Britain to find a fresh national direction in order to overcome apathy and loss of self-belief. He refers to having mentioned to the Prime Minister that the best way was to concentrate on the things that Britain does best as a nation and try to work out how they can be put to best use in a modern context. With that brief exception, the claimant does not refer to what he and Prime Minister talked about.

E 32 He then goes on to describe the farewell ceremony in a nearby stadium. There is a short paragraph describing the reactions of the Patten family to their farewell-taking of staff at Government House and how, following a soothing cup of tea, they all set off to the stadium for the first part of the handover ceremonies. He refers to the fact that it was raining, to Mr Patten's speech which, he emphasises, had not been shown to the Chinese, and to his emotions at the playing of Elgar's Nimrod Variation F after the speech. He describes, in amusing terms, the difficulty of having to deliver a speech in the midst of a noisy and heavy rainstorm. He describes how, soaked to the skin, he went back to the Royal Yacht *Britannia* to have a bath before attending a banquet for thousands at Hong Kong's main convention centre and how, being in the bath, he missed a fireworks display.

33 He mentions that he sat next to the Chinese foreign minister at the G banquet, refers to the elaborate arrangements, which he deplores, that had been worked out by officials of both sides to ensure that when he met the Chinese President there was no loss of face on either side. He describes how having detached himself from what he refers to as "the group of appalling old waxworks" who accompanied him the Chinese President, placed opposite British dignitaries including himself, read a prepared statement to which he, the claimant, had to deliver an impromptu reply. He refers to the H speech which the Chinese President then delivered, describes how it was loudly cheered by the assembled audience of party faithful and how, at the conclusion of this "Soviet-style display" Chinese soldiers hauled down the Union Jack and raised the Chinese flag. He remarks, amusingly, on how there was a device to make the flags flutter. He refers to the ceremony ending

with a group photograph and handshakes. He then reflects on how they were leaving Hong Kong to her fate, expressed a hope that a particular local political leader would not be arrested when he staged a midnight demonstration and comments on the successes achieved by Britain in Hong Kong. A

34 He refers to the differences of approach to the future of Hong Kong in the lead-up to the handover between, on the one hand, Sinologists, supported by a former British Prime Minister and his foreign secretary, who had favoured the establishment several years ahead of actual handover of a joint transitional government to avoid upsetting the Chinese and, on the other hand, those like Mr Patten who told him that the process of democratisation in Hong Kong should have begun as soon as the Sino-British agreement of 1984 had been signed even if that would have upset the Chinese. The claimant goes on to reflect that if the Sinologists' line had been followed he does not think that Britain would have left Hong Kong with such an open demonstration of warmth and affection and that Britain could be justly proud of two main elements of its legacy, the rule of law and the English language, observing that the British Council office in Hong Kong would be the biggest in the world and of enormous importance in China. B C

35 After setting down these reflections he then describes the return to the Royal Yacht *Britannia* along a jetty lined with well-wishers and friends and former associates of Mr Patten, and the yacht's emotional departure. He describes how as he stood on the deck he looked at the departing Hong Kong skyline and told himself that perhaps it was good for the soul to have to say goodbye to Hong Kong and the Royal Yacht *Britannia* in the same year. D

36 The remaining one-third or so of the journal is devoted to the journey from Hong Kong to the Philippines and his brief stopover in Manila before boarding his flight home to this country. He describes a storm which was encountered on the way and a rendezvous with a Royal Navy task group which had been just out of sight during the handover. He describes a steam-past and subsequent fleet manoeuvres which the admiral in command was determined to carry out despite the awful weather and says how moving the steam-past was. He mentions that the task group had been shadowed by Chinese intelligence-gathering and electronic-eavesdropping ships, observing that this was reminiscent of the Soviets when he had been in the Royal Navy over 20 years earlier and that it was no wonder that other countries in the area were getting uneasy about the Chinese and seemed pleased to see the task group. He describes how reassuring and comforting it was to have the presence of the accompanying task group during the passage to Manila. He describes very briefly one or two of the naval manoeuvres which took place and his pride at the professionalism of what he witnessed. E F G

37 In his account of the very short stopover at Manila he refers in the briefest terms to taking farewell of the Patten family and of the Royal Yacht *Britannia*, calling on the Philippines President, a visit he made to a part of the old city, a hotel reception and an official dinner with the President and the delayed departure of the flight home. He reflects on how friendly and warm-hearted the Philippines were and how increasingly crucial the Far East would become as the Chinese develop and exercise their power in the region. He hopes that Britain is able to maintain her presence in the area. The journal concludes that Britain should seek to maximise and exploit her military H

A skills and states that it would be a tragedy and a waste to squander over 300 years of accumulated expertise.

38 I have thought it right to summarise in some detail the contents of the Hong Kong journal to indicate its general nature and to enable a proper assessment to be made of the defendant's arguments in favour of overriding any confidentiality in them which the claimant is otherwise able to establish.

B

(c) How the defendant obtained copies of the journals

39 According to the defendant's evidence, in early May 2005 Ms Katie Nicholl, who is the diary editor of the "Mail on Sunday", was approached by an "intermediary" whom the defendant is unwilling to identify offering to sell copies of some of the claimant's journals. The intermediary claimed that the person offering the journals had come by them legitimately, that the C source was a man who had worked for the claimant and that the identity of the source would not be disclosed.

40 It appears that Ms Nicholl met the intermediary and was shown a handwritten copy of the Hong Kong journal. After informing the intermediary that the "Mail on Sunday" was interested in the journals, she was later sent typed copies of the eight journals by the intermediary. No D payment was made for these copies and the handwritten copies shown to Ms Nicholl were not passed to the defendant. Ms Nicholl then entered into negotiations with the intermediary for the acquisition of the journals provided the "Mail on Sunday" was satisfied, as it later was, that the journals were authentic. Nothing came of the negotiations at that stage. Time passed.

E **41** On Friday, 14 October 2005 Mr Wright (the "Mail on Sunday's" editor) instructed Ms Nicholl to tell the intermediary that the defendant had another source who also had copies of the journals. (Pausing at this point, it is not suggested that this further source supplied any copies of the journals to the defendant.) Ms Nicholl informed the intermediary that the "Mail on Sunday" wished to publish the journals from his source but that if that source no longer wished to proceed the documents would be obtained from F another source.

42 Shortly afterwards, that same day, Ms Nicholl received a call from a Ms Sarah Goodall, a former employee in the claimant's office. Mr Wright knew from what he had been told by his new source that Ms Goodall had worked for the claimant at St James's Palace. Ms Goodall said that the documents were hers and that she wanted them returned to her that day. G This surprised the defendant which had understood from the intermediary that the source of the typed journals was male.

43 Later that afternoon Mr John Wellington, the managing editor of the "Mail on Sunday", met Ms Goodall. According to Mr Wellington, Ms Goodall was "very agitated and wanted to just take the material and go", claimed that earlier in the year she was short of money and talked to the intermediary about selling the journals, and claimed that she was a recipient H of the journals in her own right. She went on to say that Ms Nicholl had called the intermediary that morning (14 October) putting pressure on him by saying that the paper had another source. Mr Wellington understood that Ms Goodall had got cold feet about the whole project and wanted to stop it. She told him that she did not need the journals project any more, that she

had told Ms Nicholl on the telephone earlier that, if she did not get the material back within half hour, she would call Clarence House and that, as Ms Nicholl delayed, she had indeed made the threatened call. A

44 By now Mr Wellington had decided to give Ms Goodall the benefit of the doubt that she was the source. He had no reason to think otherwise and her insistence that she had obtained the journals legitimately matched the account the "Mail on Sunday" had been given by the intermediary. Mr Wellington, therefore, handed her one set of the documents. This occurred despite the intermediary's denial that Ms Goodall had been the source of them. B

45 That same day (after copies of the journals had been given to Ms Goodall) Ms Nicholl contacted the intermediary and raised what Ms Goodall had said. The intermediary told her that the journals had not come from Ms Goodall and that the source was someone else. The intermediary also said that Ms Goodall had not contacted "the Palace" about the matter as she had claimed to have done. C

46 On Tuesday, 1 November Mr Wellington again spoke to Ms Goodall, told her what the intermediary had said and tried to get her to explain herself. She replied that she did not know why the intermediary had said what he was reported as saying to the "Mail on Sunday". She suggested that the intermediary had wanted to confuse the defendant so that it would be unable to identify her as the source. D

47 So much for the defendant's account of the matter. I now turn to the claimant's account.

48 According to the evidence of Sir Michael Peat, on 14 October 2005 Ms Goodall approached Mr Paddy Harverson, who is the claimant's communications secretary, and told him that when she had worked in the claimant's private office, she had made copies of extract from the journals and had recently tried to sell them to the "Mail on Sunday", having asked a friend to make the necessary approach. She claimed that her friend had supplied the "Mail on Sunday" with copies of the journals, that she had later consulted a lawyer and been told not to sell the copy journals and had then asked the friend to retrieve them. She said that the friend had attempted unsuccessfully to do so. E F

49 At this point the claimant's solicitors were consulted. In turn they contacted the defendant's legal adviser to say that the contents of the journals were confidential and that publishing them would be a misuse of private information and an infringement of copyright. The solicitors also pointed out that the copy journals had been removed from the claimant's office without permission and should, therefore, be returned. Later that same day, 14 October, Ms Goodall phoned Mr Harverson to say that the copy journals had been returned to her by the "Mail on Sunday" and that she wanted to return them. Arrangements to do so were made and on Monday, 17 October Ms Goodall went to the claimant's office and returned the copies. She assured Mr Harverson that the copies she was returning were the only copies that had been made. G

50 Ms Goodall had been employed in the claimant's private office between May 1988 and December 2000. She had given the usual undertakings of confidentiality. She was dismissed following a disciplinary hearing (unrelated to the issues in this litigation) and had been asked to ensure that all property in her possession belonging to the claimant's H

household was returned. She had not been authorised to make typed copies of the journals or to remove photocopies of them from the private office.

(d) Events leading to the commencement of these proceedings

51 On 5 November 2005 Ms Nicholl telephoned the claimant's press office and asked for comments on various excerpts from the Hong Kong journal which she read out over the telephone and which she said were going to be published by the "Mail on Sunday". Solicitors became involved. The upshot was that the defendant gave an undertaking not to publish any material from the Hong Kong journal the following day.

52 On 10 November 2005 the defendant wrote to the claimant's solicitors stating that it intended to publish articles drawing on the Hong Kong journal. That evening Sir Michael Peat telephoned the editor of the "Mail on Sunday" to make clear that the publication of the material from the Hong Kong journal would amount to a breach both of copyright and of the claimant's confidence in the material. A letter was written the following day confirming what had been said. The letter continued:

> "1. It is unacceptable for staff in His Royal Highness's office to feel free to copy private and confidential documents and to pass them either to members of the public or to the press. A private office cannot be run on this basis and behaviour of this kind flies in the fact of the trust and confidence that is necessary in any employment relationship. By publishing this material, you would be condoning this behaviour.
>
> 2. The purpose of the journals is to record the Prince of Wales's personal and private thoughts and observations, and they are clearly confidential. While it is true that some comments are about public matters, they continue to be confidential despite your assertion to the contrary. The journals are certainly not written with a view to the press cherry picking from them items of interest.
>
> 3. It will be especially unfortunate, following what is a complete betrayal of trust (if not by Miss Goodall then by another person in a similar position of trust), if the 'Mail on Sunday' associates itself with this betrayal . . ."

53 On the same day the claimant's solicitors wrote to the defendant making clear that the claimant did not consent to the publication of the material from his private journals and threatened proceedings if the defendant went ahead. The defendant, nevertheless, published substantial extracts from the Hong Kong journal in its 13 November edition of the "Mail on Sunday". The present proceedings were begun five days later on 18 November 2005.

(e) The "Mail on Sunday" articles

54 The front page article, headed "Appalling Waxworks", starts by stating that "Scathingly candid remarks Prince Charles has made about the Beijing leadership can be revealed today—just days after the Chinese president completed his controversial state visit to Britain".

55 The article focuses upon the comments in the Hong Kong journal about the Chinese and, referring to the claimant's criticism of political advisers and focus groups, states that the Prime Minister did not emerge

unscathed from the journal. It speculates that the claimant's remarks threatened to "spark a diplomatic row between Britain and the Chinese". It refers to the then very recently completed three-day visit of the Chinese President to Britain and to the claimant's absence from a state banquet at Buckingham Palace held in the President's honour.

56 In a two-page inner spread, the newspaper describes the journal as an "unflinchingly frank and highly perceptive . . . record" of the handover of Hong Kong to China over eight years earlier. The whole two-page spread is headed by the description of the Hong Kong journal as "a remarkable historical document, which could define [the claimant] as one of the greatest chroniclers of our time". The article asserts that the journal was, like others written after foreign trips, photocopied and posted to "between 50 and 100 friends, relatives, courtiers and political contacts" but notes a claim by Clarence House challenging that number. It refers to the claimant's quest to find ways of "overcoming apathy" by forging a "fresh national direction". It refers to the journal's reference to Britain needing to focus on its traditional strengths with a view to working out how they can be put to best use in a modern context.

57 The article highlights the various disparaging remarks in the Hong Kong journal about the Chinese Government, including the reference in the journal's title to "the Great Chinese Takeaway". The article repeats the journal's reference to the Prime Minister's use of market research and focus groups, describes the journal as revealing the claimant's "sensitive grasp of Sino-British relations", refers to the claimant's comments in the journal on the differences between those who had favoured a transitional government in advance of the 1997 handover and those who favoured taking what the article describes as "a robust line with Beijing" stating that the claimant sided firmly with the latter. The article ends with a reference to the claimant "having boycotted a banquet during the last Chinese state visit six years ago" and that he had done so in support of the exiled Dalai Lama, whom the claimant had entertained at Highgrove. It ends with a further reference to the claimant's absence from the then very recent dinner in Buckingham Palace which he had not attended, owing to what it reports the claimant's aides as saying was his tiredness on his return from a tour in the United States.

58 A further article on the same two-page spread takes as its theme the "centuries-old convention that the monarchy does not get involved in politics" and that members of the Royal Family should not express views which could leave them exposed to accusations that they are taking a position on controversial party issues. It claims that the claimant's journals fly in the face of that convention, that the claimant ventures into the political arena and that the journals provide a fascinating insight into how the claimant "discreetly contributes to the formation of foreign policy". The article then repeats some of the claimant's comments in his Hong Kong journal voicing concern about the Chinese which the writer of the article seeks to liken to similar concerns shared by human rights campaigners and security officials in this country. This article, like the previous one, then refers to the claimant's absence from the then recently held state banquet for the Chinese President at Buckingham Palace and the reasons which "courtiers" had given for his absence. It contrasts those remarks with a comment by "a former aide" inferring that, like his action in boycotting a

A Chinese Embassy banquet held by the then Chinese President on his visit to this country in 1999, the claimant was motivated by the same concerns when absent on this occasion from the banquet.

59 The article repeats the claim that between 50 and 100 copies of the Hong Kong journal had been sent out claiming that the recipients included "leading political figures, including John Major, Douglas Hurd, Tony Blair
B and, on one occasion, Peter Mandelson". It acknowledges that the recipients would vary from tour to tour and claims support for this understanding from "an unofficial Clarence House source who said that journals were distributed to an audience of 75". It contrasts this with "a senior Clarence House official" insisting that just five or six copies were sent out. It refers to concerns on the part of aides of the claimant that "publication of the journals would not be in the national interest" and that the claimant could
C be "compromised" if he were not free to express his views frankly without them becoming public knowledge. The article then refers to how during the 1990s the journals were said to have been freely circulated within the claimant's office and then repeats some of the matters which have since appeared in the evidence of Mr Bolland and Mr Wright. The article then goes on to assert that the distribution of documents became more restricted
D after the appointment of Sir Michael Peat and what it refers to as a review by the cabinet office. The article ends by referring to the freedom enjoyed by the author and broadcaster Jonathan Dimbleby (as mentioned by him in the preface to his biography of the claimant published in 1994) "to comb through the claimant's archives at St James's Palace and at Windsor Castle, where an entire floor is filled with scores of thousands of documents and
E memoranda accumulated over the last four decades" and to the further comment by Mr Dimbleby that he had been "free to read his journals, diaries and many thousands of the letters which he has written assiduously since childhood" and from which he had been "free to quote extensively".

60 Another article, also on the two-page spread, headed "poignant, insightful and witty", claims that the claimant's use of his journals to engage in political debate will "ensure their place in history" and that they also
F "establish him as a literary figure of genuine stature". The major part of the article is concerned with the claimant's "anger" at the government's decision to decommission the Royal Yacht *Britannia*. It refers to the passage in the Hong Kong journal in which the claimant regrets that the Prime Minister and his wife had no time to attend a reception or dinner on the Royal Yacht *Britannia* and hear people's reactions to the decommissioning and to the
G further passage in which he comments that, being in such a hurry, the Prime Minister is unable to learn anything. It also refers to the further passage from the journal in which the claimant shows sympathy for the Prime Minister in view of the hurried life he leads while criticising his reliance on market research and focus groups or on papers produced by political advisers or civil servants. The article also refers briefly to the feelings, as the claimant witnessed them, and the other actions of the Patten family as they
H made their farewells to Government House and its staff on leaving Hong Kong. It then refers to the passage in the Hong Kong journal where the claimant expresses surprise at travelling out club class on the flight to Hong Kong when well-known current and former politicians were travelling first class. It ends with the following flourish:

"Through their freshness, directness and popular appeal, these journals place the Prince alongside the very best modern diarists such as former Tory MP Alan Clark. When his recollections are published—as Clarence House says they eventually will be—they will surely sell like hot cakes."

61 The editorial comment appearing on a later page in the 13 November edition is short and I shall set it out in full. Headed "Insight of a wise man who is truly fit to be our King" it reads:

"The reflections of the Prince of Wales on the handover of Hong Kong, which we have now glimpsed for the first time, reveal a thoughtful, perceptive man, deeply committed to the country whose king he will one day be, and its institutions—especially the armed forces.

"They also show that he has a good sense of proportion, even despite his Eeyore-like conviction that nothing good is ever going to happen to him and his often justified view that modern governments want to steal the privileges of the Crown for themselves.

"He grasps that, just because monarchy's flummery is sometimes ridiculous, that does not mean it is redundant. These diaries help to make the case for kingship in general, its continuity, long memory and immunity from political fashion.

"Here is a man who has for years had a front seat at the great events in our history, even though he has had no control over them. He has met world leaders when they have had their guard down, seen the backstage tussles of diplomacy at first hand, watched our own politicians as they scurry fretfully to and fro on their way up and on their way down.

"True, he has not had to fight for his position. But, equally importantly, he has not had to sell his soul to hang on to it. By now he has built up a great balance of wisdom, direct knowledge and experience which are evident in his dry, detached commentaries.

"They suggest that he is thoroughly fitted for the task that he will one day inherit. And when, in the distant future, they come to be published in full, they are likely to offer one of the most remarkable and honest historical documents of our age."

Comments on the evidence

62 Although the parties' accounts of events differ in a number of respects which the court cannot resolve on an application for summary judgment, Mr Tomlinson, nevertheless, submitted that the evidence was sufficiently clear on matters which are relevant to a summary determination of the claim to enable such a determination to be made even though there may be differences of detail. He highlighted three particular points: (i) the extent to which the journals were treated as confidential in the claimant's private office, (ii) the number of people to whom the journals were circulated and (iii) the source of the journals obtained by the defendant.

63 Before I come to those three points, I must first refer to what Mr Warby described as key factual background. He highlighted ten matters. They were: (i) the circumstances in which the eight journals were created; (ii) the nature of the information in the journals; (iii) the nature, basis, content and timing of the articles appearing in the 13 November

A edition; (iv) the nature and circulation of the journals; (v) whether the copy of the Hong Kong journal which came into the defendant's possession was an unauthorised copy and if it was whether the defendant knew this at the time of publication of the articles in the 13 November edition; (vi) the claimant's own conduct and attitude towards the contents of the journals and his other writings; (vii) the claimant's "other political disclosures"; (viii) the claimant's public conduct in relation to China and its regime; B (ix) the claimant's other political behaviour; and (x) the relationship between the claimant's political behaviour and the constitutional conventions applicable to the monarchy and the heir to the throne. I have listed them in a slightly different order from the order in which they were listed by Mr Warby.

64 What is said by the defendant about each of those items is, in C summary form, as follows (taking them in the order listed above).

(1) The claimant's role on his 1997 visit to Hong Kong was that of an official representative on a diplomatic, public mission on behalf of the Queen and this country. The information in the Hong Kong journal derived from such activities and the same is true of the seven other journals in respect of other overseas tours.

D (2) The journals are records of the claimant's public activities, in the sense that they deal with official tours, coupled with observations and opinions deriving from those activities. In the nature of things, many of the events with which the journals deal are public, meaning that they are matters of public record or observation, for example the public ceremonies at the Hong Kong handover. The opinions expressed in the Hong Kong journal are "essentially political in content" in that they arise out of public events E connected with the claimant's official duties.

(3) The nature, basis, content and timing of the articles appear from the articles themselves (which I have summarised). The articles were published in the wake of the claimant's non-attendance at the 2005 banquet at Buckingham Palace for the President of China.

(4) The journals were not created merely for personal contemplation by the claimant but were created for the purpose of circulation with the F intention of affecting others' opinions. They were circulated to at least 50 to 75 persons, including politicians. The claimant is uncertain and his evidence has changed over just how many copies of the journals were sent out, including in particular the Hong Kong journal in that further names were added to the original list of recipients with the result that the claimant's total was now 21.

G (5) The defendant disputes, because it says it did not itself know, whether the copies of the journals which it received were unauthorised.

(6) The claimant not only circulated the journals widely himself but, in the past, has allowed his biographer, Mr Jonathan Dimbleby, free access to past journals and other similar documents and permitted disclosure of them at Mr Dimbleby's sole discretion. As a result, the claimant's political opinions are well known.

H (7) Mr Dimbleby's biography of the claimant discloses much information about the claimant's political views. In the same year that the biography appeared, 1994, there was an "authorised documentary" of the claimant in the course of which the claimant made other such disclosures. These are disclosures by the claimant of information that might otherwise have been

considered private. No one who reads the newspapers in this country with more than a casual eye over the past 20 years could fail to be aware of the claimant's speeches and writings on political matters.

(8) Contrary to the wishes and policy of the government, the claimant has consistently been hostile to the communist regime in China and has made deliberate public statements of his opposition to it by boycotting state banquets for the Chinese President in 1999 and 2005 and causing the media to report the former boycott as a political statement. On several occasions he has met the Dalai Lama who is persona non grata with the Chinese. Inconsistently, he has caused public denials to be issued in 1999 that he had snubbed the Chinese.

(9) The claimant accompanies his public political statements by frequent behind-the-scenes lobbying of politicians on a range of policy issues and has "bombarded" ministers with correspondence. Such activity is far from welcomed by the elected politicians who are targeted in this way and is considered wholly inappropriate for the heir to the throne. The claimant's description of himself as a "dissident" (as referred to in Mr Bolland's evidence) is an appropriate tag.

(10) The claimant's political behaviour has long been constitutionally controversial. Constitutional experts have expressed the view that the claimant is under a duty to maintain political neutrality because of the need to avoid partisanship when he becomes the monarch. Frequent objections to his behaviour have been voiced by politicians and commentators. It departs from the constitutional norms.

65 Mr Warby also referred to what he described as "a striking fact" that while damage is alleged in the claim to have occurred, no details have been provided and no evidence has been given on the claimant's behalf of any damage.

66 Subject only to what is meant by "political" and the reference to "widely" in the sixth item, Mr Tomlinson says that there is no dispute about the matters set out in the first, second, third and sixth of those items (as summarised above). Nor is it in dispute that no evidence of any particular damage has been given. There are, he says, issues arising out of the matters alleged in the fourth and fifth items which need to be addressed. These are the matters highlighted by Mr Tomlinson (as mentioned above) and to which I shall return shortly. There is, he says, much in the last four items with which the claimant takes issue but which, the claimant accepts, cannot be resolved on an application for summary judgment. Mr Tomlinson's central submission, which I shall return to in more detail later, is that, even if the facts are exactly as the defendant says in relation to those four items, they are irrelevant to the resolution of the issues in this action. I was, therefore, invited to proceed as if what is in them is true.

67 That brings me to the three matters identified by Mr Tomlinson where there are differences between the parties and which, he accepts, are material to the issues which arise on this application.

(1) The treatment and purpose of the journals and the numbers circulated

68 I will deal compositely with the first and second of the points identified by Mr Tomlinson, namely the extent to which the journals were treated as confidential, the number of people to whom they were circulated

A and the purpose in circulating them. This is the issue identified in the fourth of the ten items highlighted by Mr Warby.

69 The defendant relies in this respect on the evidence of Mr Bolland and Mr Wright. It is difficult, however, to attach any weight to the assertions made by Mr Wright to the effect that, according to his independent source—named as "the second source", the journals were not
B treated as confidential or secret by the claimant's staff and no one would have been surprised or cross if secretarial staff made copies and took them home. Mr Wright has no first hand knowledge of these matters. He does not identify his source and makes clear his unwillingness to do so. He does not indicate whether the source was speaking on the basis of first-hand knowledge or was merely repeating matters reported to him/her by another.

70 On the other hand the conduct of Ms Goodall to which, as reported
C by both sides, I have referred in some detail, is almost wholly antithetical to the notion that the journals were not treated by staff as confidential. If staff were free to take and keep copies of them on the footing that they were not confidential, her anxiety to retrieve the copies she claims she had made available to the defendant and return them to the claimant's private office is inexplicable.

D 71 The only "first-hand" knowledge to be set against the clear evidence of Sir Stephen Lamport and Sir Michael Peat that the journals were confidential and were treated as such in the claimant's private office and against the inferences to be drawn from Ms Goodall's conduct is that of Mr Bolland. But it is to be noted that even Mr Bolland did not say that the journals were not in any sense treated as confidential. He goes no further than to say that "there was a very relaxed attitude" in the private office to the
E contents of the journals. He contrasts this with the treatment of certain documents, for example papers from the cabinet or government briefings, which, not surprisingly, were treated as "extremely confidential". Indeed, he refers to the journals as not being regarded by the claimant or anyone in his office as "*especially* 'secret' or as scandalous documents or anything like that" (emphasis added).

F 72 As to the more general assertion that the claimant's intention in circulating his journals was to influence others' opinions—presumably their political opinions otherwise the point is of no relevance—there is, as Mr Tomlinson pointed out, no evidence at all that this was his purpose. Mr Bolland certainly does not say so. On the contrary, Mr Bolland's evidence about the journals is, as I have already mentioned, that the claimant viewed them "both as a historical record and as a bit of fun" and that the
G claimant "would try to make them amusing". As Mr Tomlinson submitted, although this being a summary judgment hearing the court cannot investigate the credibility of witnesses or the value of their evidence, the court is entitled to assume that the defendant has put its evidence at its highest. What Mr Bolland says is, for all practical purposes, the defendant's evidence on this issue. Moreover, Mr Tomlinson pointed out, it is not said by the defendant that there is other evidence or that there are other witnesses
H whom they have not yet been able to approach who can confirm what Mr Bolland says.

73 Even allowing for the differences of emphasis between the claimant's witnesses on the one hand and Mr Bolland on the other, it is obvious that the claimant regarded his journals as private and confidential. The envelopes in

which copies were circulated to persons outside the private office were so marked. It is also obvious that staff within the private office were not free to treat them as other than confidential any more than they were free to treat other matters which came to their knowledge when working in the private office as anything other than confidential. The unchallenged evidence was that the employment contracts of persons in the claimant's service made abundantly clear that any information concerning the claimant which came to the employee's knowledge during that person's employment in the claimant's service was subject to an undertaking of confidence and was not to be revealed to any unauthorised person. There is nothing in the evidence—except, at most, the assertion of the unnamed source whom the defendant is not willing to identify and who is referred to in Mr Wright's witness statement—to say that the purpose of the journals was to influence political opinions. Indeed, one only has to read the Hong Kong journal to appreciate how lame the suggestion is that that might be its purpose.

74 As to the number of people to whom journals were circulated, the point is only relevant if it can be said that the distribution of the journals was so widespread that it could not be supposed that there was any expectation that their contents would be kept confidential. Discounting the assertion of the unnamed source referred to in Mr Wright's evidence (in particular his claim that recipients included the present and a past Prime Minister, other senior politicians and a number of other public figures) the evidence was that the recipients were individually selected by the claimant, that each received his/her copy under cover of a signed letter from the claimant and that the maximum number of recipients of any one journal was 46 (according to the evidence of Sir Michael Peat) and 75 (according to the evidence of Mr Bolland). The claimant's evidence, which on this point was not directly controverted by any evidence from the defendant, was that 14 copies of the Hong Kong journal were distributed and that, taking into account copies addressed to married couples, the number of recipients was 21.

75 There is plainly an issue over just how many copies of each journal were sent and to whom which cannot be resolved on an application of this kind. But whether the upper figure is 46 or 75 (or some figure in between) does not matter. Even if the figure is as many as 75, this does not mean that the journals are not to be treated as confidential. The celebrated wedding reception which featured in *Douglas v Hello! Ltd (No 3)* [2006] QB 125 and which was found to be a private event so as to lend support to the conclusion that the publication by the defendant of unauthorised photographs of the reception constituted a breach of confidence, was attended by 350 wedding guests.

76 Mr Bolland claims that the recipients included "some politicians, media people, journalists and actors". He is unspecific as to who these persons were. He does not say which journals went to which persons. He does not suggest—and there is no evidence before the court to suggest—that the Hong Kong journal was sent to any journalist or politician other than Mr Soames or that any of the other seven were. But whether or not the recipients did include, for example, journalists the striking feature of the evidence is the absence of any suggestion that any recipients of the journals have in the past felt free, without first obtaining the claimant's consent, to publicise the contents of any of the journals. This is all the more striking

A given that, as is common ground, the claimant's habit of producing handwritten journals of his overseas visits goes back very many years.

(2) The source of the defendant's copies of the eight journals

77 The other factual matter identified by Mr Tomlinson is the source of the defendants' copies of the eight journals and in particular whether the
B source had come by them legitimately. It is the fifth of Mr Warby's key background facts.

78 The defendant's evidence about this comes from Mr Wright. He refers to Ms Nicholl, the "Mail on Sunday's" diary editor, telling him what she had been told by the unnamed intermediary who, in turn, was reporting what the intermediary's unnamed source had said, namely that "the source was a man who had worked with the Prince in some way . . . had some
C involvement in the game of polo with the Prince and had travelled with him". Ms Nicholl's impression, according to Mr Wright, was that "the source was someone of some seniority who was one of the recipients of the journals and had received the journals legitimately".

79 As against that vague and (triple) hearsay account is the fact, apparent as much from the defendant's evidence as from the claimant's, that
D Ms Goodall, an ex-employee of the claimant and the person who, according to Mr Bolland, dealt with the journals, would photocopy them and then send them out and who, moreover, was in the claimant's service throughout the period when the eight journals were written, had approached the "Mail on Sunday" claiming that the documents—the typed-up journals—in the defendant's possession were hers and stating that she wanted them back.
E She made her approach on the very day, 14 October 2005, that Ms Nicholl had informed the intermediary (shortly before Ms Goodall's approach) that the defendant had another source for the journals and that it would obtain them from that source if the intermediary's source was not willing to proceed.

80 If Ms Goodall was not the source of the copies of the eight journals in the defendant's possession, the coincidence of her call to the defendant is
F remarkable indeed. Moreover, Ms Goodall was aware of the intermediary because, at her meeting with Mr Wellington later that same day, she mentioned the conversation which Ms Nicholl of the defendant had had with the intermediary that very day. This suggests, at the very least, that Ms Goodall knew who the intermediary was and was able to contact that person. The defendant evidently believed Ms Goodall's account because it
G gave copies of the journals to her to enable her to return them to Clarence House as she had made clear that she was anxious to do.

81 All of this comes from the defendant's own evidence. The claimant's evidence, which is entirely consistent with this, refers to Ms Goodall's admission to the claimant's press secretary that she had removed copies of the journals, had asked a friend to approach the defendant and that it was the friend who had supplied the copies to Ms Nicholl.

H 82 In short, the evidence is overwhelmingly that the source of the eight journals was Ms Goodall. On what I have read of the evidence I do not consider that the defendant has a realistic prospect of showing otherwise: its only contrary evidence depends on what the unidentified intermediary claims to have been told by an unnamed source.

83 Assuming that the copies came from Ms Goodall (or some other person, as yet unidentified, in the claimant's service) Mr Tomlinson submitted, and I agree, that the copies received by the defendant were not "legitimately" obtained since, on the unchallenged evidence from the claimant's side, persons in the claimant's service were subject to express duties of confidence in relation to items such as the journals. This must be so even if, as Mr Bolland claimed, copies of the (handwritten) journals were left around the claimant's private office. Mr Bolland does not suggest that anyone in that office had authority to make any typescripts of the journals. Moreover, as Mr Tomlinson further submitted, even if the source was one of the lawful recipients of the journal (and such a person would presumably have had to have been a recipient of all eight journals) he or she was, on the evidence, subject to an implied duty of confidence since, on the evidence, the journals were sent out to recipients in envelopes clearly marked "Private and Confidential".

84 In short, the evidence again points overwhelmingly to the conclusion that the copies of the journals received by the defendant were not legitimately obtained. The defendant's case that the copies received were legitimate copies rests entirely on what the unidentified intermediary claims to have been told by an unnamed source.

The claim in confidence

85 The modern starting point in a claim of this kind is the decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. In that case the claimant, a famous fashion model, sued the defendant for damages for breach of confidentiality by publishing details of the therapy she was receiving for drug addiction, including photographs of her in a street as she was leaving a self-help group meeting. Although the House was divided over whether publication of this information constituted an unjustified infringement of the claimant's right to privacy in respect of the details of her therapy (the majority finding that it did) there was no division of opinion over the relevant approach in law.

86 Central to the arguments in that case was the interaction of the rights and the qualifications of those rights set out in articles 8 and 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as set out in the Human Rights Act 1998, Schedule 1, Part I. Article 8 provides:

> "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."

87 Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information

A and ideas without interference by public authority and regardless of frontiers."

"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 prevention of disorder or crime, for the B 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."

88 In *Campbell's* case [2004] 2 AC 457 Lord Nicholls of Birkenhead, after explaining, at paras 17 and 18, that the values enshrined in articles 8 C and 10 were now part of the cause of action for breach of confidence, stated, at para 20, that the initial question was "whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life". He said, at para 21: "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." He made clear that this initial D question was distinct from the quite separate question which arises which is whether interference with the right by, for example, publication of the information, is justified by recourse to article 8(2) or by recourse to article 10 which, like article 8(2), recognises by article 10(2) that there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. He said, at para 20: "When both these articles are engaged a difficult question of proportionality may arise."

E 89 Lord Hope of Craighead referred to the exercise of balancing the competing rights of privacy and free speech enshrined in articles 8 and 10, once the initial threshold requirement of the need to demonstrate the private (or confidential) nature of what was (or was to be) published had been met, in the following terms [2004] 2 AC 457, para 105:

F "The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right G of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life."

90 Stressing the importance of the safeguards to be afforded to the press in a democratic society, Lord Hope cited *Jersild v Denmark* (1994) 19 EHRR 1, para 31 that "Not only does the press have the task of imparting H such information and ideas [i e information and ideas of public interest]: the public also has a right to receive them". In a later passage [2004] 2 AC 457, para 113, Lord Hope said:

"Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to

respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise."

91 Baroness Hale of Richmond put the matter as follows, at para 134:

"The position we have reached is that the exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential."

92 She later emphasised, at para 137:

"that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail."

93 She too pointed out that neither right takes precedence over the other, that both are qualified and, at para 139, that:

"They may respectively be interfered with or restricted provided that three conditions are fulfilled. (a) The interference or restriction must be 'in accordance with the law'; it must have a basis in national law which conforms to the Convention standards of legality. (b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for 'the protection of the rights and freedoms of others'. Article 10(2) provides for 'the protection of the reputation or rights of others' and for 'preventing the disclosure of information received in confidence'. The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights. (c) Above all, the interference or restriction must be 'necessary in a democratic society'; it must meet a 'pressing social need' and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both 'relevant' and 'sufficient' for this purpose."

94 Lady Hale went on to explain, at para 140, that application of the proportionality test

"is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a 'pressing social need' to protect it."

A **95** She added, at para 141, that the proportionality test in such a case

> "involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each."

B **96** In a later passage Lady Hale pointed out, at para 148, that, where freedom of expression was being asserted,

> "There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of
C the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals'
D potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made."

E **97** In *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17 Lord Steyn said that four principles emerged from the opinions in *Campbell v MGN Ltd* [2004] 2 AC 457 arising out of the interplay between articles 8 and 10:

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

98 With that brief introduction to the relevant principles I come next to the application of those principles to the facts as disclosed by the evidence. I propose to consider the two questions: namely, reasonable expectation of
G privacy and the carrying out of the balancing of the claimant's article 8 right to privacy against the defendant's article 10 right to freedom of expression, by reference to the Hong Kong journal and then to consider separately the position of the other seven journals.

(1) A reasonable expectation of privacy: the Hong Kong journal

H **99** Did the claimant have a reasonable expectation of privacy in respect of the contents of his Hong Kong journal? For the purpose of this application the question is whether the defendant has no real prospect of successfully contending that the claimant had no such expectation. If that question is resolved in the claimant's favour it is clear that at the time the

defendant made disclosures of the contents of the Hong Kong journal in the 13 November edition it was on notice of the claimant's claim to privacy in respect of the contents of that and the other journals: it was put on notice by both Sir Michael Peat and the claimant's solicitors.

100 The first point to note is that, whether the Hong Kong journal was circulated among up to 75 recipients (as Mr Bolland claims) rather than to no more than 21 recipients (as the claimant's evidence suggests), the information in it, that is to say the claimant's description of events during the Hong Kong tour and his impressions and views prompted by those events, was not in the public domain until the defendant issued its 13 November edition of the "Mail on Sunday" in which many of these matters were set out and commented upon. In *Douglas v Hello! Ltd (No 3)* [2006] QB 125, para 55, the Court of Appeal said:

> "information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others."

101 There is no suggestion in the evidence that the information in the Hong Kong journal was generally available to others.

102 It is perfectly plain that the claimant intended these journals to be and to remain confidential notwithstanding their circulation to hand-picked recipients. They were sent in envelopes marked "Private and Confidential". The fact that they could be read and, let it be assumed, were read by staff in the claimant's private office, all of whom on the claimant's uncontradicted evidence were subject to duties of confidentiality which clearly extended to matters such as the impressions and views of the claimant of the kind contained in the Hong Kong journal, does not in the least undermine this obvious fact. For the reasons already explained, there is no evidence—beyond, at the most, the assertions of the unnamed source referred to by Mr Wright—to indicate that the claimant had any intention, when writing and distributing his journals, to influence the political (or any other) opinions of those to whom they were sent. I reject Mr Warby's submission that Sir Michael Peat's comment that the claimant finds it valuable to have the views of those to whom he sends the journals in response to what he has written is indicative of a wish by the claimant to influence their opinions. But even if the claimant did have such an intention I cannot see why that fact should detract from his expectation of confidentiality in what he had written.

103 Was the claimant's expectation of privacy in respect of the contents of his journal a reasonable expectation? Mr Warby urged a number of reasons for submitting that it was not or—and this would be sufficient on an application of this kind—that there is a real prospect of showing that it was not. Some of those matters seem to me to go much more to the application of the proportionality test and the carrying out of the balancing exercise rather than to satisfaction of the threshold requirement but I accept, without going into the authorities, that the distinction is not always easy to draw.

104 The first was that the material in the Hong Kong journal did not relate to the claimant's private life in any significant way but rather to the public life of a public figure concerning political events, setting out views

A and impressions which Mr Warby described as "of a political character". By "political" Mr Warby meant, as he explained, issues of governmental policy and public governance. The information, he said, was obtained and the views were formed by the claimant in the course of official duties carried out on behalf of the nation and at public expense and, to that extent, were of a public and governmental nature rather than of a private and personal character and the fact that these matters were recorded in an unofficial B document does not undermine the point. At best, he said, the information was at the margin of the distinction between these two species of information. It was, he said, a world away from the type of "celebrity information" which has formed the staple fare of many of the post-Human Rights Act 1998 privacy claims.

105 Second, Mr Warby submitted that there can be no confidentiality, C or no reasonable expectation of confidentiality, in information which, if held by a public authority, would or may well be disclosable under the Freedom of Information Act 2000. As the claimant's Hong Kong visit was at public expense and was carried out on behalf of the public it is highly likely, said Mr Warby, that much of what the claimant did and said was recorded in reports to the Foreign Office or found its way on to other public records. Although the defendant was unable to produce any evidence to D indicate that such reporting had occurred, and although (as I was told) no Freedom of Information Act request has yet been made, it was "likely" he said to be there and, if it was, would be disclosable in the course of preparation for a trial or would be obtained under the Act before the claim came on for trial.

106 Third, Mr Warby submitted that the claimant is the epitome of the E public figure referred to by Lord Woolf CJ in *A v B plc* [2003] QB 195 ("the Flitcroft case"), who has courted public attention and has done so for views of the same or a similar kind to those contained in the Hong Kong journal. The claimant, he said, has made no secret of his views of the Chinese Government, his boycotting (as the defendant contends it to have been) of the 1999 Chinese Embassy banquet, his reception of the Dalai Lama, and his views on politicians as publicised in Mr Dimbleby's biography and on other F matters of a political nature. Not only, said Mr Warby, has the claimant never before brought proceedings or even complained to any newspaper on those occasions when his otherwise secret communications with ministers have been leaked to the press but, according to the evidence of Mr Richard Kay, the Daily Mail's royal correspondent for 17 years until 2003 and currently the diary editor of that newspaper, he has on at least one occasion, G in September 2002, expressly authorised disclosure of an otherwise secret communication, namely a letter said to have been sent by the claimant to the then Lord Chancellor decrying the litigation culture in this country. As a result, the claimant has, it was submitted, "opened up to legitimate public scrutiny" this "zone" of his life and, having made these matters "public property", cannot now claim a reasonable expectation of privacy in respect of the contents of a journal which covers similar matters.

H 107 Fourth, Mr Warby submitted that as a persistent and ardent lobbyist of ministers and others on a range of public issues, wielding the influence which only his special status can provide, the electorate has the right to know his views in order to assess and evaluate the conduct of the government. This was said to lead to the conclusion (as I understood the submission) that the

claimant could not have any reasonable expectation of privacy in respect of information of a similar political nature merely because it is contained in one of his journals.

108 Fifth, the "political behaviour" of the claimant as heir to the throne is such as to represent, it was said, a marked departure from established constitutional conventions, alternatively an attempt to alter such conventions and establish new ones, both of which matters raise questions whether such behaviour is "democratically acceptable" and about which the electorate has a right to know and reach a decision. As with the previous matter, I understood the submission to be that the claimant could not have any reasonable expectation of privacy in respect of information, so far as contained in his journals, which might reasonably be thought to cast light upon this topic.

109 Sixth, the claimant could not reasonably expect that, having, as the evidence strongly suggested, deliberately boycotted the 1999 Chinese Embassy banquet and intentionally made himself unavailable for the 2005 Buckingham Palace banquet, any information in his Hong Kong journal which might throw light on that matter should be kept confidential.

110 As I have mentioned, several of these matters—particularly the last three—seem to me to go to the proportionality test and balancing exercise and not to whether the claimant had any reasonable expectation of privacy in respect of information contained in his Hong Kong journal. That apart, I am very firmly of the view that, whether taken individually or together, the matters to which Mr Warby referred me do not justify the conclusion that the claimant had no reasonable expectation of privacy in the contents of that journal.

111 The fact that the journal deals with events most of which are a matter of public record is irrelevant. The point about the Hong Kong journal is that it was a record of the claimant's impressions of the events in which he took part on the occasion of his Hong Kong tour. It is his impressions and the musings prompted by those events (and, it may be said, the choice of the events themselves) which are what is significant about the journal.

112 To an extent, as Mr Tomlinson conceded, the claimant's reflections appearing from that journal can be said in the widest sense to be political but I fail to see why that fact should mean that the claimant can have no reasonable expectation of privacy in respect of what he has written. No less immaterial are that the claimant is, assuming he is, a persistent and effective lobbyist, that he is in a position to wield influence, that he is heir to the throne and that in the way he goes about these activities he may not be acting in accordance with constitutional convention. Also immaterial in my view is the fact that the public is curious to know what the claimant thinks about the events in which he participates on the nation's behalf.

113 Nor do I see how recourse to the Freedom of Information Act 2000 assists the defendant. There is no evidence that the claimant has filed with a public authority any records of the tours to which the eight journals relate. There is certainly no evidence that he has ever filed with any public authority a copy of any of the eight journals. The possibility that he may have done is speculation without the least evidential foundation.

114 The fact that the Hong Kong journal is not of a highly personal or private nature, in the sense that it does not deal with matters of an intimate

A or medical nature or about members of his family and that its contents are a very long way from the often salacious celebrity information that sometimes features in privacy claims, does not rob the claimant of a reasonable expectation of privacy in the matters to which in his Hong Kong journal he refers.

115 In particular, I dissent from the view that, by speaking out publicly both in speeches and in published articles on issues which in the widest B sense are political, the claimant has somehow forfeited any reasonable expectation of privacy in respect of such matters when committed to a handwritten journal not intended by the claimant to be open to public scrutiny. Were it otherwise no politician could ever have any reasonable expectation of privacy in a private diary in which he expresses political views. In this respect there is, to my mind, a world of difference between this C case and the situation discussed in *A v B* [2005] EMLR 851 where by going public on some aspects of his private life—in that case it was the claimant's drug-taking—a person may no longer reasonably expect to maintain privacy, whatever his personal wishes, in respect of related matters. Whether in any case this is so and what in such circumstances the "zone" is of the person's life that is thereby opened up to legitimate public scrutiny— D matters which were discussed in *A v B* [2005] EMLR 851, para 28—must turn on the particular facts of the case. This is not such a case.

116 For these reasons, the claimant establishes, and does so without any real prospect of the defendant demonstrating to the contrary, that he had a reasonable expectation of privacy in the contents of the Hong Kong journal.

(2) The balancing exercise

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117 I have already set out what the balancing exercise—sometimes known as the parallel analysis—involves. Before coming to the parties' submissions on the matter two particular points need to be made.

118 The first is that it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is F interesting to the public and, therefore, in a newspaper's commercial interest to publish. This is particularly so in the case of someone like the claimant whose every thought and action is, in some quarters at least, a matter of endless fascination.

119 The second is to note that there is a particular tension where a public figure is involved. In the Flitcroft case [2003] QB 195, 208, Lord G Woolf CJ pointed out that a public figure must, because of his public position, "expect and accept that his actions will be more closely scrutinised by the media" and that "Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure". He said that "If you have courted public attention then you have less ground to object to the intrusion which follows". He nevertheless made clear that "A public figure is entitled to a H private life". In *Campbell v MGN Ltd* [2004] 2 AC 457, para 50, Lord Hoffmann emphasised that human rights law has identified "private information as something worth protecting as an aspect of human autonomy and dignity" and, at para 51, that the new approach to an action for unjustified publication of personal information

"focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people." A

120 In *McKennitt v Ash* [2006] EMLR 178 Eady J summarised the importance of this consideration, to which impetus has been given by recent Strasbourg jurisprudence (in particular *Von Hannover v Germany* (2004) 40 EHRR 1), when he said [2006] EMLR 178, para 57: B

"It is clear that there is a significant shift taking place as between, on the one hand, freedom of expression for the media and the corresponding interest of the public to receive information, and, on the other hand, the legitimate expectation of citizens to have their private lives protected. As was made clear [in the *Von Hannover* case 40 EHRR 1, para 77], even where there is a genuine public interest, alongside a commercial interest C in the media in publishing articles or photographs, sometimes such interests would have to yield to the individual citizen's right to the effective protection of private life."

121 He also warned, at para 95, that, in the case of information about well known persons, it was necessary, in order to protect the legitimate rights of such persons to a private life, "to scrutinise with care any claims to D public interest—which are sometimes made by the media and their representatives on a rather formulaic basis".

122 I come then to the balancing exercise. The starting point is to identify what for the purposes of article 8(2) the legitimate aim is which is said to justify interference with the claimant's right of privacy in respect of the contents of the Hong Kong journal enshrined by article 8(1) and why it is E necessary that that right should be interfered with.

123 Mr Warby identified as the legitimate aim the electorate's right to receive information of four kinds: (i) information which will enable it to understand the nature of the lobbying to which their elected leaders are subject; (ii) information which will enable it to assess and pass judgment on the political conduct of the heir to the throne; (iii) information which will F assist it to evaluate the conduct of the claimant in failing to take part in the Chinese Embassy banquet of 1999 and the Buckingham Palace banquet of 2005; and (iv) information which corrects the claimant's own public statements about his non-attendance at the 1999 banquet.

124 Mr Warby submitted that the relevant context for these claims was: (i) the claimant's status as a persistent and influential lobbyist of ministers and other elected politicians on a range of issues of public interest; (ii) his G status as heir to the throne and the expectation that as future King he should maintain political neutrality, comparing that status and expectation with the claimant's involvement in matters of controversy; (iii) his willingness, when it suits him, to make available otherwise confidential documents to enable his views on political matters to be conveyed (for example by means of the authorised biography written by Mr Jonathan Dimbleby); (iv) the strong H perception, not least from the evidence of Mr Bolland, that the claimant deliberately boycotted the return banquet in the Chinese Embassy in 1999 which was to be contrasted with his subsequent public denials of any such intention; and (v) more generally, the claimant's dislike of the Chinese Government. It was necessary in a democracy, said Mr Warby, that a

A newspaper such as the defendant's should be free to make disclosures from the claimant's Hong Kong journal which touch on these matters. The price of political activism, he said, is transparency.

125 Mr Warby submitted that, given the limited weight to be attributed to the claimant's right of privacy (assuming the claimant was able to establish it) in the contents of the Hong Kong journal (in that they dealt with the claimant's participation in public events and set out his views and B impressions of those events, many of which were political in nature, and did not deal with matters of a personal or family nature), and given also his willingness by speech and articles and by allowing persons such as Mr Dimbleby when writing his biography in 1994 to have access to a whole range of his otherwise confidential papers and, not least, to have access to travel journals, it was proportionate to the legitimate aim earlier identified C to interfere with the claimant's right of privacy to the extent that the defendant had done so in the articles which appeared in the 13 November edition. He submitted that there was a pressing social need for the interference since the aims identified were for the protection of the rights and freedoms of the electorate. He further submitted that the defendant was entitled in accordance with well-established Strasbourg jurisprudence to a wide latitude in the presentation and details of the information from the D Hong Kong journal contained in the articles and that the defendant had not overstepped those bounds.

126 Coming to the article 10 analysis, although Mr Warby accepted that a legitimate aim to justify interference with the defendant's article 10 right had been identified—namely protecting the claimant's confidentiality in the Hong Kong journal—he submitted, nevertheless, that E the weight to be attributed to that aim was, in view of the journal's contents, so slight that it could not outweigh the importance of the defendant's right to impart (and the public's corresponding right to receive) the information, views and opinions on the topics covered in the articles.

127 In short, he submitted, the analysis yields the same result in both cases, namely that the claimant's right of privacy in respect of the contents of the Hong Kong journal was legitimately overridden.

F **128** It is necessary in my view to examine carefully what the Hong Kong journal actually says and what the articles appearing in the 13 November edition seek to draw from that journal.

129 As to the claimant's activities as a lobbyist and the concerns to which that fact is said to give rise, there is no mention of lobbying ministers or other politicians in the articles and (with one exception which I will come G to) no suggestion in them that any of the information in the journal casts any light on communications between the claimant and ministers. It is in any event no secret that the claimant writes to ministers. It is mentioned in Mr Dimbleby's book. The Hong Kong journal contributes nothing to the subject and the articles have nothing to say about the matter either.

130 What then of the claimant's political conduct as heir to the throne and in particular any concern that he may be acting contrary to what H constitutional convention requires of him? Again, there is nothing in the articles to suggest that his conduct is being assessed and a judgment made about it. There is not a hint of this in the editorial comment. The articles certainly assert that the Hong Kong journal shows that the claimant entertains strong views about the Chinese Government and other matters.

They do not suggest that, for example, the claimant used the opportunity of his Hong Kong tour to involve himself in contentious matters or to press his views on others. The most that is said in the articles is that "the memoirs"—plural—"provide a fascinating insight into how [the claimant] discreetly contributes to the formation of foreign policy". Having read and re-read the Hong Kong journal it is not evident how that particular memoir enables such a conclusion to be reached unless it is because the claimant briefly shared the company (during the tour) of the Prime Minister during which he suggested, in what is the only specific reference to the claimant expressing any views to a British politician, that the best way for Britain to find a fresh national direction was "to concentrate on all the things that we do best as a nation and try to work out how they can be put to best use in a modern context". It might be thought that that is an expression of view couched at a very high level of generality.

131 What then of the contribution that the Hong Kong journal makes to the claimant's absence from the 1999 and 2005 banquets, the debate that those absences have prompted and the controversy over whether privately the claimant had arranged for the media to understand that his absence was intended to show his disapproval of the Chinese Government when he was denying publicly that that was the reason for his absence? The Hong Kong journal certainly shows the claimant's scepticism of the Chinese Government and its ways and his fears for the future on that account. But it is difficult to see how his comments on these matters cast any but the most peripheral light on his absence two years later from the 1999 embassy banquet, let alone his absence from a banquet eight years later.

132 The conclusion from all of this can only be that the contribution that the Hong Kong journal makes to any public debate or to any process of informing the electorate about the various matters identified by Mr Warby in the course of his submissions is at best minimal.

133 In these circumstances it is to my mind impossible to say that the disclosures made by the defendant from the journal's contents are *necessary* in a democratic society for the protection of the rights and freedoms of others and that, in consequence, the claimant's entitlement to confidentiality in respect of that journal should be overridden. Not the least of the considerations that must be weighed in the scales is the claimant's countervailing claim to what was described in argument as "his private space": the right to be able to commit his private thoughts to writing and keep them private, the more so as he is inescapably a public figure who is subject to constant and intense media interest. The fact that the contents of the Hong Kong journal are not at the most intimate end of the privacy spectrum does not, to my mind, lessen the force of this countervailing claim. The claimant is as much entitled to enjoy confidentiality for his private thoughts as an aspect of his own "human autonomy and dignity" as is any other.

134 What then of the other side of the equation? The defendant's right to freedom of expression enshrined in article 10 is obviously extremely important. The vital role of the press in a modern democracy is not in doubt. But article 10(2) makes explicit that the exercise of the right to freedom of expression carries responsibilities, one of which is preventing the disclosure of information received in confidence. That plainly includes the right to protect the confidentiality of a private journal.

A 135 Mr Tomlinson submitted that this is a case where interference with the defendant's article 10(1) right is justified under article 10(2). He submitted that there is a strong public (as well as the claimant's own private) interest in preserving the confidentiality of private journals and communications within private offices. He submitted that it is clear from the editorial comment in the 13 November edition, and from the other articles, that the defendant does not suggest that the Hong Kong journal reveals
B material about the claimant previously unknown to the public which casts doubt on his suitability to perform his public functions or which casts new light on his opinions on public issues or which contributes to any current political debate. He submitted that it is clear from the presentation of the material in the 13 November edition that its primary importance is said to be as a "historic document". He submitted that, in any event, the interference
C with the defendant's article 10 right is a limited one. The defendant was not prevented from publishing information derived from the Hong Kong journal. It has exercised its freedom of expression. The interference is limited to compensation in respect of that publication.

136 Overall, he submitted that the "parallel analysis" reveals that an interference with the claimant's article 8 rights is not justified while
D interference with the defendant's article 10 rights is justified. He submitted that the "public interest" considerations all point one way.

137 I agree. Mr Tomlinson submitted that it would be remarkable if in a case of this sort there were to be a public interest justification for disclosure where it is not alleged that any of the traditionally recognised categories apply. There was no question of exposure of any kind of wrongdoing or of hypocrisy, or, given the defendant's case, of exposure of anything new about
E the claimant's opinions. He accepted, of course, that the public interest in disclosure of matters of confidence is not limited in the way that it was once thought to be and must be approached more generally.

138 Standing back from the matter in the way that Mr Tomlinson suggested, it would indeed be remarkable if, in the interests of press freedom, the claimant cannot enjoy confidentiality in the musings and reflections
F which "as a bit of fun" (to quote Mr Bolland) the claimant chose to commit to paper in the course of his return flight to this country.

139 I must finally ask myself whether these are matters which should not be resolved on an application for summary judgment but should be left to a trial because the defendant has a real prospect of defending the claim at trial or because there is some other compelling reason why the claim should be disposed of at trial.

G 140 I am not persuaded that the matter should go to trial. The parallel analysis depends upon an examination of the contents of the Hong Kong journal and the use made of those contents in the 13 November edition. There is no issue about the extent of the claimant's various public activities both as heir to the throne and otherwise and also in respect of his "political" views and lobbying of ministers; for the purpose of this application it has been assumed on the claimant's behalf that these matters
H are as the defendant states them to be. The only factual issues are those identified earlier which go to whether the claimant had a reasonable expectation of privacy in the contents of his journals. Stripping away those differences in the evidence which go to matters of detail, there is, for the reasons set out earlier, no real prospect of the defendant showing that

the claimant did not have that reasonable expectation of privacy or that, at the time of publication of the 13 November edition, the defendant was not fully on notice of the claimant's claim to confidence and the reasons for it.

141 The claim for breach of confidence in respect of the Hong Kong journal, therefore, succeeds. As already noted, the relief sought is limited to compensation for the breach.

The other journals

142 I have thus far concentrated on the Hong Kong journal and whether the claimant establishes liability in the defendant for breach of his right of privacy in respect of the contents of that document.

143 What about the other seven journals? There is no evidence before the court to indicate what they contain. Beyond the fact that they are travel journals and concern overseas tours and that they were written and circulated in circumstances similar to the Hong Kong journal, I know nothing about them. In contrast to the Hong Kong journal I am not supplied with any lists of recipients. I am not told to how many persons each of those journals was sent.

144 According to the evidence of Elizabeth Hartley (a partner in Reynolds Porter Chamberlain, the solicitors acting for the defendant) the other journals are of a "similar nature" to the Hong Kong journal. According to Mr Wright they "contain many matters of considerable legitimate interest to the public". Whether that is right or not I am in no position to say.

145 The defendant's position about these other journals is that it has not yet formed any intention to publish any of the information contained in them. It has also made clear that if it decides that it does plan to publish anything from them it will not do so without giving the claimant a minimum of 24 hours' notice of its intention to do so. In that way, it says, the claimant will have an opportunity to submit to the decision of the court the question whether, in the circumstances prevailing at that time, publication is in all the circumstances legitimate. (In passing I would comment, although the matter does not arise on this application, that, given the very many months during which the defendant has been in possession of copies of the seven other journals and has, therefore, had the opportunity to examine whatever it is that those journals say, the provision to the claimant of a minimum of 24 hours' notice of any intention to make disclosures from them would seem to be unreasonably short in any event. I would have thought that a minimum of seven days' notice would have been the least that the claimant could reasonably expect.)

146 The claimant's application for summary judgment in respect of its confidence claim extends as much to the other journals as it does to the Hong Kong journal. Indeed, in one respect, it goes further in that whereas in the case of the Hong Kong journal it does not seek and, now that the contents of that journal are fully in the public domain, cannot seek any injunction to protect any right of confidence in them but merely limits its claim to damages (for which purpose it seeks an inquiry), in the case of the other seven journals it seeks an injunction to restrain the defendant from using or disclosing their contents. In other words, it seeks an injunction to restrain

A the defendant from exercising its article 10 right to freedom of expression in respect of any of the information contained in those seven journals.

147 On what I have seen in the evidence there is every reason for concluding that the claimant establishes, as much in relation to the other seven journals as he does in relation to the Hong Kong journal, a reasonable expectation of privacy in respect of their contents. That said, I am not willing on a summary application of this kind and without B knowing anything of what the journals say to shut out the defendant from arguing at trial that the court should not prevent by a permanent injunction the further use by the defendant of information contained in those other journals when, for all the court knows, circumstances may arise which may make the disclosure an entirely appropriate exercise of the defendant's right of freedom of expression. Strasbourg and domestic jurisprudence C on the operation of the right to freedom of expression enshrined in article 10 makes clear that to justify making any order of the kind which the claimant seeks evidence is required to demonstrate that this is a necessary step. At the very least the court must know what the other journals contain.

148 I am, therefore, only willing on this application to give the claimant D relief for that part of his confidence claim which relates to the Hong Kong journal. Given that its contents are already in the public domain that relief will be confined to an inquiry as to damages in respect of any loss that the claimant can demonstrate that he has suffered by reason of the defendant's breach of his right of confidence in it. I should add that it was not suggested that because the claimant's evidence does not touch on what damage if any he has suffered as a result of the breach of his right of confidence in respect of E the contents of the Hong Kong journal he is not for that reason entitled to an inquiry.

The claim in copyright

149 There is no doubt that copyright subsists in the journals and that the claimant is the author of them. There is no suggestion that any of them F have been copied from other sources. The journals are, for copyright purposes, original literary works in that original skill and labour were expended in their creation. The contrary is not arguable. (For what it is worth, the defendant itself said, in one of the articles which appeared in the 13 November edition, that the journals established the claimant as "a literary figure of genuine stature".)

G **150** The only issues which arise are, first, whether the claimant is the owner of copyright in the journals, second, if he is, whether the defendant has infringed his copyright in the journals (or any of them), third, whether, if infringement is otherwise established, the defendant can available itself of any and if so what defences to infringement and, fourth, what relief the claimant should obtain for whatever infringements are established.

H

(1) Copyright ownership

151 As undisputed creator of the journals, the claimant is the author of them for copyright purposes and, as such, the first owner of copyright in them: see sections 9(1) and 11(1) of the Copyright, Designs and Patents Act

1988. There is no suggestion that he has assigned or otherwise dealt with copyright in the works. The only point raised is a contention that the journals are subject to Crown copyright.

152 Section 163 of the 1988 Act, which deals with Crown copyright, provides:

> "(1) Where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties . . . (b) Her Majesty is the first owner of any copyright in the work.
>
> "(2) Copyright in such a work is referred to in this Part as 'Crown copyright' . . ."

153 There are two answers to this contention. The first is that the claimant is not an official or servant of the Crown in the sense intended by that subsection, namely someone engaged in the service of the executive branch of government: see *Laddie, Prescott & Vitoria*, *The Modern Law of Copyright and Designs*, 3rd ed (2000), para 36.4. The fact that some or all of the claimant's overseas tours are at taxpayers' expense does not make him an official or servant of the Crown for the duration of the tour in question. Nor, because he may be deputising for the Queen, is he to be somehow regarded as "Her Majesty" for the purposes of the subsection.

154 The second answer is that, in any event, the journals were not made by the claimant "in the course of his duties". They were written by him in his own time and for his own purposes.

(2) Infringement

155 The acts of infringement that are alleged are of two kinds. The first, which concerns acts of primary infringement, consists of the copying of the journals and the issuing to the public of copies of the Hong Kong journal, in each case without the licence of the claimant as owner of the copyright in them.

156 It is not in dispute that the defendant made copies of all of the journals, each in its entirety, and did so without the claimant's licence. This occurred, at the latest, when one of the journals was given to Ms Goodall to return to the claimant and the defendant retained a further set for its own use. This is apparent from para 17 of Mr Wright's witness statement and para 11 of Mr Wellington's. It is not suggested that the defendant had been furnished by the unnamed intermediary with more than one copy of each journal. The making of copies without the claimant's licence was contrary to section 17 of the 1988 Act which prohibits the reproduction of the copyright work in any material form.

157 Copying for this purpose extends to reproduction of a substantial part of the work: see section 16(3) of the 1988 Act. It is not in dispute that parts of the Hong Kong journal were reproduced in the 13 November edition and that copies of that newspaper were distributed, by sale or otherwise, to the public. Subject only to whether the extracts so copied were a "substantial part" of the Hong Kong journal and to the so-called fair dealing defences, it is clear that the copying constituted an infringement of copyright contrary to section 17 of the 1988 Act and that the issue of copies to the public constituted an infringement of copyright contrary to section 18 of the 1988 Act. I will come shortly to those defences

A **158** The other act of infringement relied upon, which is in the nature of a secondary infringement, is possession by the defendant in the course of its business and without the claimant's consent as copyright owner of infringing copies of the eight journals knowing or having reason to believe that the copies are infringing copies, contrary to section 23 of the 1988 Act. The defendant admits possessing such copies. It is clearly on notice of the claimant's copyright claim to the eight journals. Whether or not the B defendant had reason to know in detail of these matters before the claim form was issued (I would be surprised if it did not) the claim to copyright and the reasons for it are explicitly set out in the particulars of claim. Aside from the Crown copyright contention, with which I have dealt, and a further and general contention that it was not in any event appropriate for the claimant to resort to copyright law to vindicate his privacy in the journals (a C submission I will come to later), the only defence raised in argument to this part of the copyright claim went to the appropriateness of the relief claimed, in particular whether, as the claimant seeks, I should order delivery up of the infringing copies in the defendant's possession and restrain the defendant from further copyright infringement.

D *(3) The defences raised*

(a) "Substantial part"

159 The defendant contends that what was reproduced in the articles published in the 13 November edition was not a substantial part of the Hong Kong journal. This defence, if it is good, goes only to the acts of infringement based on issuing copies to the public contrary to section 18. E The other infringing acts relate to the copying of the entirety of each journal.

160 The defendant has calculated that the extracts quoted verbatim from the journal add up to just over 15% of the whole. It is trite law, however, that substantiality in this context depends upon the quality of what is taken, not its quantity. The parts taken are set out in schedule 3 to the particulars of claim. Not only are they, as Mr Tomlinson and Ms Lane F pointed out in their skeleton argument, the parts of the Hong Kong journal which touch on the claimant's opinions and which, not surprisingly, are most likely to be of interest to the newspaper's readers, but they also are the parts which most exactly demonstrate what one of the articles described as the "poignant, insightful and witty" passages of the journal.

161 I am in no doubt that, taken as a whole, the extracts quoted form a G substantial part, qualitatively, of the Hong Kong journal. For what the point is worth I also consider that they are substantial in quantitative terms. Mr Warby referred only to the fact that the quotations from the articles were short and that the events concerned were well known and described in unoriginal terms. These matters do not go to the question of substantiality. The question is one of law. A trial will not add anything.

H *(b) The fair dealing defences*

162 These are two in number. Like the substantiality defence, these defences go only to reproduction of extracts from the Hong Kong journal. They do not affect the acts of infringement based upon making and possessing copies of the journals.

163 I will take the fair dealing defences in the order in which they were argued before me.

(i) Fair dealing for the purpose of reporting current events

164 Section 30(2) of the Copyright, Designs and Patents Act 1988 provides:

> "Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that . . . it is accompanied by a sufficient acknowledgement."

165 The test is objective. The words "reporting current events" are of wide and indefinite scope and require liberal interpretation: see *Pro Sieben Media AG v Carlton UK Television Ltd* [1999] 1 WLR 605, 614. The defence is intended to protect the role of the media in informing the public about matters of current concern to the public: see *Ashdown v Telegraph Group Ltd* [2002] Ch 149. That case concerned newspaper articles published in late November 1999 which quoted from a minute of an important and highly confidential meeting between, among others, the then leader of the Liberal Democrats and the Prime Minister, which had taken place two years earlier. The meeting had discussed possible future co-operation between the Liberal Democrats and the government. The Court of Appeal upheld the decision of Sir Andrew Morritt V-C [2001] Ch 685 to grant the claimant summary judgment in its claim alleging copyright infringement (there was also a claim in breach of confidence which, however, was not the subject of a summary judgment application). Accepting that, although it had taken place two years before the articles had appeared, the meeting was "arguably a matter of current interest to the public", the court stated [2002] Ch 149, para 64:

> "In a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest. It might impinge upon the way in which the public would vote at the next general election. The 'issues' identified by the 'Sunday Telegraph' may not themselves be 'events', but the existence of those issues may help to demonstrate the continuing public interest in a meeting two years earlier."

166 Mr Warby submitted that it is the "events" which need to be "current" not the words being used and that, in the instant case, the current events included the state visit of the President of China, the claimant's non-attendance at the Buckingham Palace banquet, relations generally between Britain and China, and the claimant's "political conduct and its constitutional implications".

167 Mr Tomlinson submitted that the claimant's opinions, so far as disclosed by the Hong Kong journal, are not in themselves a current event and that it is plain that the purpose of the articles in the 13 November edition was to reveal the contents of the Hong Kong journal and report on that revelation as itself a current event rather than to report on some other current event. He submitted that the vast majority of the articles was about

A the contents of the Hong Kong journal with very little attempt to relate those contents to any separate current event.

168 Although there is much in the articles which cannot conceivably relate to current events, for example the passages reproducing those extracts of the Hong Kong journal concerned with the decision to decommission the Royal Yacht *Britannia* and with the claimant's amused surprise that, on the
B flight out, he was travelling club class rather than first class, there are features of the articles which, in the very broadest sense, can arguably be said to relate to current events, taking that expression to include matters of current interest to the public, namely the light that his views on the Chinese Government might throw on his absence, a few days before the articles appeared, from the state banquet at Buckingham Palace held in honour of the visiting President of China. Beyond that matter, and, very possibly, the
C continuing public debate on the claimant's conduct of his role as heir to the throne and any faint light that his comments in the Hong Kong journal might be thought to cast on that matter, it is difficult to see to what other "current events" the extracts from the journal can be said to relate.

169 It is also necessary to consider whether the dealing was "fair". In *Ashdown's* case [2002] Ch 149, para 70, the Court of Appeal quoted as an
D accurate and helpful summary of the test of fair dealing the following passage, set out in para 20.16 of *Laddie, Prescott & Vitoria*, *The Modern Law of Copyright and Designs*:

> "It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact
E commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest
F grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked'
G information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

H **170** The court in *Ashdown's* case, at para 71, went on to observe that, although based on a summary of the authorities before the Human Rights Act 1998 came into force, the principles summarised in that citation were still important when balancing the public interest in freedom of expression against the interests of owners of copyright, while emphasising that it was

essential not to apply inflexibly tests based on precedent but to bear in mind that considerations of public interest were paramount.

171 The context for this observation was the court's consideration (para 67) of why it should ever be contrary to the public interest that a newspaper should have to pay compensation, or account for the profit made, when it makes unauthorised use of the work product of another and its conclusion that section 30 provides examples of situations where this may be justified when set against the fact, recognised by Strasbourg jurisprudence, that the award of damages may discourage the participation by the press in matters of public concern. This in turn led the court to conclude, at para 69, that the fair dealing defences under section 30 should lie

> "where the public interest in learning of the very words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account for profits."

Earlier in its judgment, at para 39, the court had observed:

> "in most circumstances, the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work, without copying the very words which that person has employed to convey the information or express the ideas. In such circumstances it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected."

The court, nevertheless, accepted, at para 43, that, as Strasbourg jurisprudence had recognised:

> "There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest."

172 Against that background, Mr Warby submitted that depending on the circumstances the actual words of the document may be of importance, not just the bald information contained in the document, so that in such a case it will be legitimate to use quotation rather than mere paraphrase or the reporting simply of the substance of the document. Taking each of the three matters referred to in the passage from *Laddie, Prescott & Vitoria*, he submitted that the defendant's use of extracts from the Hong Kong journal did not commercially compete in any way with the claimant's exploitation of that journal since it was not intended for commercial exploitation, that the material was not in any event confidential but had been widely circulated and that the defendant had used no more than a moderate amount of the work and had done so for the purpose of political reporting. In considering this last element it was appropriate, he said, to allow the defendant reasonable latitude as regards the selection of precise words and turns of phrase used and the extent to which they are extracted or shown in context. He referred to *Fressoz and Roire v France* (1999) 31 EHRR 28, para 54, emphasising that article 10 of the Convention on Human Rights leaves it to journalists to decides whether or not it is appropriate to reproduce particular material to ensure credibility where

A the disclosure is of information "on issues of general interest provided that they are acting in good faith and on an accurate factual basis and are providing 'reliable and precise' information in accordance with the ethics of journalism". He referred also to what Lord Hoffmann had stated in *Campbell v MGN Ltd* [2004] 2 AC 457, paras 62–63, that "The practical exigencies of journalism demand that some latitude must be given" and
B that "It is unreasonable to expect that in matters of judgment any more than accuracy of reporting, newspapers would always get it absolutely right".

173 Mr Tomlinson submitted that, taking each of the considerations referred to in the passage from *Laddie, Prescott & Vitoria*, although it was true that the claimant has not sought to exploit commercially his Hong Kong journal and has no current intention of doing so it is possible, as Sir Michael
C Peat in his first witness statement made clear, that edited extracts may one day be published after the claimant's death. Second, he said, the Hong Kong journal has not been published or exposed to the public but its contents had been passed to the defendant in clear breach of confidence as the claimant, through his advisers, made clear to the defendant in advance of publication of the 13 November edition. Third, and in any event, the amount taken by
D the defendant for the Hong Kong journal was substantial and far greater than necessary to make any point about a current event, rather than merely giving publicity to the claimant's views.

174 In my judgment, there is no real prospect that this defence will succeed. The copy of the Hong Kong journal was obtained by the defendant as a result of a breach of confidence. The defendant was put on notice of the fact. On the evidence the defendant has no real prospect of showing
E otherwise. Taken as a whole, the articles were not confined, even allowing a reasonable margin of appreciation, to dealing with current events. The theme of the editorial content was the claimant's fitness to be King and his skills as a chronicler of historical events (a point emphasised by the heading at the top of the two-page spread). The significance of the journal's contents in explaining (to the very limited extent that it might be thought that they
F do) the claimant's non-attendance at the banquet in Buckingham Palace a few days earlier and his non-attendance at the embassy banquet six years earlier form only a part of the overall contents of the articles, as does any faint light that they throw on the claimant's conduct of his role as heir to the throne. The overall impression conveyed by the articles, which I am as well able on this application to assess as will a judge at a trial, is that the choice passages from the journal have been selected for publication and comment,
G and that this has been done with the purpose of reporting on the revelation of the contents of the journal as itself an event of interest. In *Ashdown v Telegraph Group Ltd* [2002] Ch 149, para 82, the Court of Appeal criticised the extent of the reproduction of the confidential minute in that case in the following terms:

> H "It appears to us that the minute was deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article and thus to appeal to the readership of the newspaper. Mr Ashdown's work product was deployed in the way that it was for reasons that were essentially journalistic in furtherance of the commercial interests of the Telegraph Group."

Those comments precisely reflect the view that I take of the use made by the defendant of the contents of the Hong Kong journal in the 13 November edition.

(ii) Fair dealing for the purpose of criticism or review

175 The relevant provision is section 30(1) of the Copyright, Designs and Patents Act 1988 which, so far as material, is as follows (incorporating amendments made by regulations 3 and 10(1) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498) with effect from 31 October 2003):

> "(1) Fair dealing with a work for the purpose of criticism or review . . . does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.
>
> "(1A) For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including—(a) the issue of copies to the public . . . but in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act."

176 The defendant's reliance on this provision is misplaced since it is plain that the Hong Kong journal has not been made available to the public. Circulation of copies of the journal to a number of carefully selected recipients, even if the overall total is as many as Mr Bolland claimed, does not amount to making it available to the public. The defendant has no real prospect of showing otherwise. Mr Warby endeavoured to persuade me that the journal was lawfully made available to the public by the defendant's own lawful publication of it for the purpose of reporting current events. But if it has been lawfully published for that purpose, the defendant has no need to rely on any defence under section 30(1) whereas, if it has not, the defence on his own argument does not lie. Since I do not consider that the extracts were lawfully published under section 30(2), or for that matter under any more general public interest defence (as to which see later), it follows that the point does not arise. I should add that the fact, if fact it be, that *information* contained in the journal has been lawfully published by the defendant, for example as a result of the parallel analysis which arises where the court is required to carry out a balancing exercise between articles 8 and 10 when considering whether the claimant's right of privacy in the contents of the journal is overridden, does not mean that the copyright work itself has been made available to the public.

177 The articles' description of the Hong Kong journal as "a remarkable historic document which could define [the claimant] as one of the greatest chroniclers of our time" and as "poignant, insightful and witty" and as revealing "a thoughtful perceptive man, deeply committed to its country whose King he will one day be" and as establishing the claimant "as a literary figure of genuine stature" lead me to the conclusion that the defendant would have had a reasonable prospect of establishing a fair dealing defence under section 30(1) if it could have established or, for present purposes, demonstrated a real prospect of establishing that the copyright work had already lawfully been made available to the public. This is because, taken as a whole, the articles seem to me to deal with the Hong

A Kong journal for the purpose of criticism or review, rather than for the purpose of reporting current events.

(c) A wider public interest defence?

178 Mr Warby submitted that if section 30(2) does not provide a defence the defendant can rely on a public interest defence under
B section 171(3) of the 1988 Act on the same grounds as are relied on in respect of the confidence claim.

179 Section 171(3) preserves the defence of public interest in copyright cases. In *Ashdown v Telegraph Group Ltd* [2002] Ch 149, para 58, the Court of Appeal made clear that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition and pointed out that, with the 1998 Act in force, "there is the
C clearest public interest in giving effect to the right to freedom of expression in those rare cases where this right trumps the rights conferred by the 1988 Act". The court emphasised, however, that it would be very rare for the public interest to justify the copying of the form of a work to which copyright attaches rather than refer simply to the information conveyed by the copyright work. This is no doubt because, as the court pointed out later
D in its judgment, at para 66, the fair dealing defences under section 30 will normally afford the court all the scope it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press and therefore "There will then be no need to give separate consideration to the availability of a public interest defence under section 171".

180 Mr Tomlinson pointed to those passages and submitted that the public interest must be greater to justify using the form of the words
E appearing in the copyright work than to justify the use of the information contained in the work. He submitted that in the absence of any specific clear public interest considerations, over and above those available under the fair dealing defences, it would be wholly disproportionate to extinguish the claimant's property rights in his copyright work, as will be the case if a public interest defence can be established. I agree. I can see no basis for
F supposing that, having no real prospect of establishing either of the fair dealing defences, the defendant has any greater prospect of establishing a public interest defence preserved by section 171(3). There is nothing in the material before me to indicate that this is or may be one of those rare cases where the public interest trumps the rights conferred by the 1988 Act. Mr Warby did not seriously suggest that this is or may be such a case.

G *(d) Surrogacy*

181 Mr Warby submitted that the copyright claim was put forward as a fall-back to the claim in privacy and that, given the stated absence of any intention on the claimant's part to publish the journals, the claim was not motivated by commercial considerations. The claimant's objective, he said, is to prevent disclosure of information rather than to protect the expression
H of his works or to sanction (by damages) the disclosure which has already occurred. He quoted from *Barendt*, *Freedom of Speech*, 2nd ed (2005), p 262 that

> "The use of copyright to protect personal privacy can be regarded as an abuse of the former right . . . It is surely wrong to allow a copyright

action to succeed, when it acts as a surrogate for a privacy claim which would, rightly or wrongly, almost certainly fail."

He cited as an illustration of this proposition the refusal of Lightman J in *Service Corpn International plc v Channel Four Television Corpn* [1999] EMLR 83 to grant an interim injunction to restrain the broadcasting by the defendant of a film indicating that the claimant engaged in malpractices in the conduct of one of its funeral homes.

182 In that case the claimant, aware that the defendant intended to broadcast the film, threatened that if it was shown a claim might be brought in defamation and for breach of confidence. In the event, the claims brought were for breach of confidence, breach of copyright and trespass. The judge, in dismissing the application for an interim injunction, found that there were no arguable causes of action in respect of any of those three claims, that the evidence suggested a good prospect of the defendants having a public interest defence to the copyright claim and that in any event the relief should be refused on discretionary grounds relating to limited prospects of success coupled with the public interest in disclosure of a matter deeply affecting the public, balance of convenience and delay. In the course of his judgment, Lightman J observed that if a claim based on some other cause of action was in reality a claim brought to protect reputation and reliance on the other cause of action was merely a device to circumvent the rule against the grant of an interlocutory injunction where the claim was in defamation and the defendant intended to plead justification (as seemed likely in the case of the claims advanced before him), then the overriding need to protect freedom of speech required the same rule to be applied.

183 I can quite see that the court will not countenance reliance on copyright to prevent disclosure of some kind of wrongdoing, such as was suggested by the evidence in the *Service Corpn* case. In the field of copyright this is a matter covered by the public interest defence preserved by section 171(3): see, for example, *Lion Laboratories Ltd v Evans* [1985] QB 526 discussed in *Ashdown v Telegraph Group Ltd* [2002] Ch 149. That is not this case. Nor, of course, is this a disguised claim in defamation. The contrary has not been suggested. Once one strips away any possible public interest defence and any suggestion that this is some kind of disguised claim to protect reputation, there is no scope in my view for arguing, as in effect the defendant does, that the court will only entertain a copyright action if the claimant can demonstrate an intention to publish his work or otherwise exploit it for some commercial purpose. As was pointed out in *Ashdown's* case, para 30, copyright is essentially a negative not a positive right. It gives the copyright owner the right to prevent others from doing what the 1988 Act recognises the owner alone as having a right to do. The right is not conditional, even inferentially let alone expressly, on an intention to exploit the copyright work commercially. Copyright is a property right. Subject to the "exceptions, exemptions and defences" provided for in the 1988 Act, including, residually, any general public interest defence, a copyright owner does not have to justify the assertion of his copyright. The fact alone that the copyright owner may have no present intention of exploiting his property right does not justify another in expropriating that right for himself for free. The fact, if fact it be, that the copyright owner asserts his copyright in a work in order to maintain privacy in the work does not appear to me to be any

A kind of abuse of his ownership right. The position is no different where the claim is advanced as an alternative or, as it is put, as a fall-back to a claim in privacy. It was not suggested in *Ashdown's* case that the fact that the claimant advanced a claim in confidence as well as in copyright (which alone was the subject of the summary judgment application) provided any kind of impediment.

B **184** In my judgment, there is no substance in this further suggested defence.

(4) Relief

185 The relief for his copyright claims which the claimant seeks in respect of the Hong Kong journal is an injunction to restrain further infringement of his copyright in the work and an inquiry as to damages in C respect of any loss which he can demonstrate that he has suffered arising out of the defendant's infringement of his copyright in it. He does not seek an account of profits.

186 In *Ashdown v Telegraph Group Ltd* [2002] Ch 149, paras 45, 46, the court recognised that, even in those rare cases where the right to freedom of expression comes into conflict with the protection afforded by the 1988 D Act, notwithstanding the express exceptions to be found in that Act, the court is bound, in so far as it is able, to apply the Act in a manner which accommodates the right to freedom of expression. It envisaged the first way in which it may be possible to do so might be by declining the discretionary relief of an injunction, commenting that usually such a step would be sufficient. The court went on to observe that if a newspaper considered it E necessary to copy the exact words created by another it could see no reason in principle why the newspaper should not indemnify the author for any loss caused to him. "Freedom of expression" the court said "should not normally carry with it the right to make free use of another's work".

187 In the present case I can see no reason why in respect of the Hong Kong journal the claimant should not be granted the inquiry as to damages which he seeks for copyright infringement, an injunction to prevent further F infringement of his copyright in that work and delivery up of all infringing copies of it in the defendant's possession, power, custody or control. Having established his cause of action, damages, if he can show any loss, seem to me to follow almost as a matter of course.

188 It was submitted on the defendant's behalf, however, that now that all of the information contained in the Hong Kong journal was in the public G domain, any further injunction to prevent copyright infringement would be inappropriate, that the defendant like the rest of the media was now entitled to deal fairly with the work under section 30 of the 1988 Act and, therefore, that the defendant should not be obliged to exercise those rights "in the shadow of contempt proceedings". I do not agree. There is nothing disproportionate in granting an injunction against further copyright infringement and an order for the delivery up of all infringing copies of that H journal. The defendant has already exercised its freedom of expression by commenting at length on its contents and quoting freely from it. The fact that all of the information contained in it is now in the public domain does not give the defendant, or anyone else, any right to infringe the claimant's copyright in the work. Any risk that the defendant runs from any further

attempt at a fair dealing with the journal does not, in the circumstances, seem to me disproportionate given the claimant's entitlement to protect his copyright interest in it.

189 As regards the other seven journals, the claimant seeks an injunction to prevent infringement of his copyright in them and the delivery up of all copies of them in the defendant's possession, power, custody or control, together with an inquiry as to damages in respect of any loss which he can show that he has suffered in consequence of these further acts of copyright infringement.

190 The defendant resists any relief in respect of the seven other journals, whether for an injunction to restrain any further infringement of copyright or for the delivery up of all infringing copies, or for damages, on the ground that, as I have already mentioned, although their contents were not put in evidence, they have been read by Mr Wright and by Elizabeth Hartley and their evidence, which the claimant has not attempted to contradict, is that "they are of a similar character" to the Hong Kong journal and "contain many matters of considerable legitimate interest to the public". Mr Warby submitted that if it is permissible to deal fairly with a copyright work for the purpose of section 30 it must be permissible to possess a copy of the work itself otherwise the right is rendered meaningless. Possession of a copy for such a purpose, he submitted, falls within the ambit of "dealing" for the permitted section 30 purpose. He further submitted that the court has never yet ordered delivery up of a work that a newspaper asserts is or may be in the public interest to publish merely because the copy of the work may infringe the copyright of the person seeking the order for its delivery up. He submitted that the court should, therefore, be slow to do so in this case, particularly as the defendant has undertaken not to publish any part of the contents of those seven journals without first giving the claimant's lawyers at least 24 hours' prior notice of its intention to do so. He drew my attention to passages in the judgments in *Microsoft Corpn v Plato Technology Ltd* (unreported) 15 July 1999; Court of Appeal (Civil Division) Transcript No 1239 of 1999 and *Ocular Sciences Ltd v Aspect Vision Care Ltd* [1997] RPC 289 to emphasise that relief by way of injunction or delivery up must be tailored to match the case and be fair to the defendants and that there may be circumstances where no relief by way of injunction or delivery up is appropriate.

191 Ms Lane submitted that the relief claimed in respect of the other seven journals is entirely standard. It cannot be right, she said, that merely on the off-chance that a person may be able to establish a fair dealing with a copyright work at some future date that person is to be permitted in the meantime, and for what may be an indefinite period of time, to make and retain infringing copies of the work and, for all the copyright owner knows, distribute copies to others, without risk of any kind of sanction. The fact that the defendant has not yet formed any intention to deal in any way with the other seven journals does not put it in any more favourable position. Nor does the fact that the person in possession of the infringing copy is a newspaper. For the court to decline any relief in such a case would, she said, be tantamount to robbing the copyright owner of his property in the work.

192 I see very great force in what Ms Lane submits. But I remind myself that this is an application for summary judgment. I regard as eminently

A arguable that, just as the defendant may be able to demonstrate at trial that—at any rate in advance of the court having seen what they contain—the court should not prevent by permanent injunction the possible future use of information contained in the other seven journals when, for all the court knows, circumstances may arise which may make the disclosure an entirely appropriate exercise of the defendant's right of freedom of expression, so also should the defendant be free, as part and parcel of the exercise of that B right, to quote verbatim extracts from the journals and that, in the meantime, it would be an illegitimate curtailment of its article 10 rights to have to return the copies it has of those seven journals. I regard this as a difficult question. It brings into play the impact of the 1998 Act on the protection afforded to copyright by the Copyright, Designs and Patents Act 1988. This particular aspect of the dispute was not debated at any great C length before me. I am left in sufficient doubt about the correct answer to think that it would not be right to come to any final conclusion on the point on an application of this kind.

Result

193 The application succeeds in respect of the claims in confidence and D copyright concerning the Hong Kong journal. The claims in respect of the other journals must go forward to trial.

Order accordingly.

Solicitors: Harbottle & Lewis; Reynolds Porter Chamberlain.

S E R

E

The defendant appealed.

Mark Warby QC and *Pushpinder Saini* for the defendant. The nature of the legal and factual issues raised in these proceedings was such that the judge should not have granted judgment under CPR Pt 24 but should have directed a trial of the issues. In particular, the judge erred in summarily F disposing of this part of the case in circumstances where a unique factual matrix raised issues of general public importance concerning the developing law of privacy and confidence, as well as the relationship between that law and the law of copyright.

[Lord Phillips of Worth Matravers CJ. If the judge erred in concluding that there was no relevant issue of fact that requires a trial his order must be G set aside and a trial ordered. If, however, there is no issue of fact that requires trial, should not we treat this as an appeal on the merits that we can determine either by upholding the judge's order in favour of the claimant or by setting aside his order and giving judgment in favour of the defendant?]

[Counsel for each of the parties indicated that they agreed with that course.]

H The general legal principles applicable in the area of informational privacy post-Human Rights Act 1998 are authoritatively identified in *Campbell v MGN Ltd* [2004] 2 AC 457. However, the task of applying those principles to the facts of a particular dispute raises difficult issues of proportionality: see paras 140 and 20. The law in this area is rapidly developing: see *Douglas v Hello! Ltd (No 3)* [2006] QB 125, para 46. This

case presents several unique features which clearly distinguish it from the relatively few privacy cases which have hitherto come before the courts. A

The judge erred in holding (a) that the claimant had a reasonable expectation of privacy in respect of the contents of the Hong Kong journal and (b) that it could be said on a summary judgment application that the claimant's rights under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms trumped the newspaper's and the public's rights under article 10 to impart and receive the information at issue. B

The question whether, in respect of the specific facts, the claimant had a reasonable expectation of privacy is a threshold issue which is distinct from the question which may arise subsequently as to whether the specific privacy right invoked is such as to override article 10: see *Campbell's* case [2004] 2 AC 457, paras 20–21, 137 and *Maccaba v Lichtenstein* [2005] EMLR 109, para 4. The threshold test requires that attention be paid to the content of C the particular information at stake, the identity of the particular claimant, and his behaviour. The burden is on a claimant to establish that the threshold test is satisfied: see *A v B* [2005] EMLR 851, paras 12, 21.

The judge wrongly treated his conclusion that the journal was a private and confidential document as determinative of the separate, critical issue of the privacy of the information within the journal and, therefore, he failed D adequately to examine the latter issue. Further, the judge erred in summarily resolving or treating as immaterial certain disputed issues of fact and in proceeding on the assumption that no additional evidence in support of the defendant's case could be obtained. The judge wrongly disregarded or gave no weight to the principle that a person may deprive himself of a reasonable expectation of privacy in relation to certain information by making voluntary disclosures of information in the same zone of his life: see *A v B plc* E [2003] QB 195, 208; *Campbell v Frisbee* [2003] ICR 141, para 34 and *A v B* [2005] EMLR 851, paras 21–31. The judge failed to have regard to the principle that a public figure must tolerate a greater level of intrusion in his private life than other persons: see *A v B plc* [2003] QB 195, para 11. The judge wrongly treated the claimant's status as a public figure as a factor in favour of upholding his privacy claim. The judge failed to give any weight to F the absence of any evidence or assertion of harm.

Even if the claimant's article 8 rights were engaged by the publication, the judge was wrong to proceed to determine summarily that the balance between those rights and the article 10 rights of the defendant and the public came down in favour of the claimant. The judge failed to assess accurately or at all the weight of the privacy right relied on and failed to attribute proper weight to the freedom of expression right relied on by the defendant. G The claimant's status, the political nature of his comments and the political nature of the articles in which they were featured made this a particularly strong case in favour of freedom of expression. When it came to the balancing process, the scales were therefore out of kilter from the start and the judge's proportionality assessment was skewed. The judge should have held that the case for free expression was overwhelming or at least H sufficiently strong for the balance to require examination at trial.

Where a claimant seeks to restrain publication by reason of rights guaranteed under article 8, neither article 8 nor article 10 has precedence over the other article. Where conflict arises between the articles, an intense focus is necessary upon the comparative importance of the specific rights

A being claimed in the individual case. The court must take into account the justification for interfering with or restricting each right and the proportionality test must be applied to each: see *McKennitt v Ash* [2006] EMLR 178, para 48; *Campbell v MGN Ltd* [2004] 2 AC 457 and *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17. An assessment of the comparative importance of the specific rights
B being claimed requires consideration of the weight of the form of private information relied upon under article 8(1), in all the circumstances, as compared with the weight of the form of expression undertaken by the defendant for article 10(1) purposes. In the present case, the competition is between information which is of low importance in the range of protected article 8(1) information as compared to the highest form of protected speech for article 10(1) purposes, namely, political speech: see *Malisiewicz-Gąsior v*
C *Poland* (Application No 43797/98) (unreported) 6 April 2006, para 56. [Reference was also made to *Bladet Tromsø v Norway* (1999) 29 EHRR 125 and *Goodwin v United Kingdom* (1996) 22 EHRR 123.]

If the defendant has a defence to the privacy claim fit to go to trial it has an equally realistic prospect of defending the copyright infringement claim. The judge wrongly failed to recognise that the copyright claim, which has
D no commercial element, is merely another form of privacy claim, with each claim involving a contest between privacy and freedom of expression and a need to strike a balance. The law should focus on the substance not the form of the claim, as it does in other situations. Where a claimant's true purpose is to protect reputation the court will disregard the particular cause of action relied on and refuse relief if it would not have been granted in defamation: see *Service Corpn International plc v Channel Four Television*
E *Corpn* [1999] EMLR 83, 89–90. Equally, if article 10(1) justifies disclosure of private information here, it also justifies the use of short verbatim extracts from the journal where defensible journalistic judgment is that these should be published. Sections 30 and 171(3) of the Copyright, Designs and Patents Act 1988 should be interpreted and applied in a manner which does not chill political speech which the law of privacy and
F confidence will not restrain. The case raises novel issues as to the scope of these statutory defences which should only have been resolved at trial. [Reference was made to *Hubbard v Vosper* [1972] 2 QB 84 and *Fressoz and Roire v France* (1999) 31 EHRR 28.]

Hugh Tomlinson QC and *Lindsay Lane* for the claimant. The appeal raises no novel or difficult issues of principle. The judge was right to hold
G that the defences advanced had no realistic prospect of success for the reasons that he gave.

The breach of confidence claim can be resolved by application of the legal principles relating to the misuse of private information sub-species of the broader equitable wrong of breach of confidence: see *Campbell v MGN Ltd* [2004] 2 AC 457. The claimant had a reasonable expectation of privacy in respect of the disclosed information. The question as to whether there is a
H reasonable expectation of privacy in a particular item of information or information of a particular type is an objective one. The defendant is wrongly attempting to import into this test a number of considerations relating to the claimant's status, conduct and the degree of harm suffered. These are relevant at the second, justification stage.

Whilst a claimant has the burden of establishing that he has a reasonable expectation of privacy in the published information, it is sometimes impossible to divorce the nature of the information from the type of document in which it is recorded: see *Douglas v Hello! Ltd* [2006] QB 125, para 83. There is a reasonable expectation that all the information contained in personal letters, diaries and journals will remain private. The fact that the author has recorded a particular event is itself a piece of information which is confidential. Even if the fact that a person holds an opinion has been made public, the fact that he has chosen to record it in a particular form on a particular date in his private journal is not in the public domain. The judge was, therefore, right to consider whether the claimant intended the whole Hong Kong journal to be and remain confidential and, having decided that he did, to find that he had a reasonable expectation of privacy in its contents.

The judge correctly held that there were no material issues of fact which required resolution at a trial. There were issues of fact which could not be resolved on the summary judgment hearing but the judge was right to hold that those issues had no relevance to the legal issues before the court at that hearing.

A doctrine of zonal forfeiture of privacy rights does not form part of English law and would run contrary to clearly established principles. Equitable rights can be lost by release, laches or acquiescence in well defined circumstances but there is no general doctrine of forfeiture of such rights. As for waiver, English law requires full knowledge of the rights being waived and is binding only if consideration is given or there has been detrimental reliance on the waiver by the defendant. A waiver of a right guaranteed by the Convention must not run counter to any important public interest, must be established in an unequivocal manner, and requires minimum guarantees commensurate to the waiver's importance. No binding waiver of privacy rights in a particular zone of a claimant's life can be established simply by publishing material from the same zone on some earlier date.

The extent of a person's Convention rights is not dependent on that person's status and a public figure has the same expectations of privacy as anyone else: see *Von Hannover v Germany* (2004) 40 EHRR 1. A person who is involved in public life must accept that his actions will be closely scrutinised by the media in so far as they are relevant to his official functions. However, the fact that a publication relates to a subject of general interest will not be sufficient if, in the light of its contents, the published information makes no contribution to a debate of public interest but merely satisfies public curiosity: see *Leempoel v Belgium* (Application No 64772/01) (unreported) 9 November 2006. [Reference was also made to *Editions Plon v France* (2004) 42 EHRR 705; *Halford v United Kingdom* (1997) 24 EHRR 523 and *Gourguénidzé v Georgia* (Application No 71678/01) (unreported) 17 October 2006, paras 39, 57, 59.]

Accordingly, the claimant's article 8 rights are engaged and the court must consider the balance between those rights and the article 10 rights of the defendant. The court must consider the justification under each article separately, in parallel, and does not start with the balance tilted in favour of article 10: see *Douglas v Hello! Ltd (No 3)* [2006] QB 125, para 82. Automatic priority is accorded to neither right: see *McKennitt v Ash* [2006] EMLR 178; [2008] QB 73. The judge carried out that exercise. The

A defendant does not contend that the judge adopted the wrong approach at this stage of the analysis or that he made any error of law but rather complains that he failed to give proper weight to some of the factors in issue so that the balance which was struck was adverse to the defendant. That is not a proper area for intervention by the Court of Appeal: see *Galloway v Telegraph Group Ltd* [2006] EMLR 221, para 68.

B The question of the nature and importance of the article 8 right must be considered on the individual facts. The publication of private information which has been obtained as a result of the disloyal actions of a person who owes express duties of confidentiality to the claimant is particularly intrusive as there is a continuing threat of the publication of further information from sources of this type. [Reference was made to *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.]

C The article 10 right to freedom of expression does not assist the defendant. A newspaper is in no better position than anyone else who misuses private information and a copyright work. Article 10(2) makes clear that freedom of expression can properly be restricted for preventing the disclosure of information received in confidence and for the protection of the rights of others. The defendant's public interest arguments do not bear D serious examination since it is not suggested that the published material reveals any important new information about the claimant's ability to perform his public functions. Public interest is being used as a cloak to cover the defendant's misappropriation of the claimant's private rights. The only interest served by the publication of the information was the defendant's commercial interest. The interference with the defendant's article 10 rights resulting from it being obliged to pay damages to the claimant and from E being restrained from further infringement of copyright is a limited one which is fully justified in the circumstances. In the circumstances, the judge correctly held that the ultimate balance was in favour of protecting the claimant's article 8 rights by awarding him damages for the publication of the journal. [Reference was made to *Lion Laboratories Ltd v Evans* [1985] QB 526.]

F The claim for copyright infringement can also be readily resolved by the application of established principles relating to the defences of fair dealing and public interest. The defendant's contention that the copyright claim is merely another form of privacy claim is misconceived and provides no basis for a defence to copyright infringement. The defendant's invocation of article 10(1) does not assist its case. The Copyright, Designs and Patents Act 1988 generally reflects a satisfactory balancing of the interests involved: see G *Ashdown v Telegraph Group Ltd* [2002] Ch 149. In any event, interference with the defendant's right to freedom of expression was justified. Accordingly, the judge was right to hold that the defendant had no arguable defence of fair dealing or public interest to copyright infringement. An appellate court should not reverse a judge's decision in a copyright infringement case unless he has erred in principle: see *Designers Guild Ltd v* H *Russell Williams (Textiles) Ltd (trading as Washington DC)* [2000] 1 WLR 2416, 2423–2424.

Warby QC replied.

Cur adv vult

21 December. **LORD PHILLIPS OF WORTH MATRAVERS CJ** handed down the following judgment of the court.

Introduction

1 In this appeal the defendant ("the newspaper") appeals against that part of the order of Blackburne J dated 17 March 2006 which granted summary judgment in respect of part of the claim of the claimant ("Prince Charles") for breach of confidence and infringement of copyright. The claim brought by Prince Charles related to eight hand written journals kept by Prince Charles to record his impressions and views in the course of overseas tours made by him between 1993 and 1999. Copies of these were provided to the newspaper, via an intermediary, by an employee of Prince Charles in breach of her contract of employment. Summary judgment was given in respect of one of these, the journal that related to the Prince's visit to Hong Kong between 23 June and 3 July 1993 ("the journal"), when the colony was handed over to the Republic of China. The newspaper had published substantial extracts from the journal in the "Mail on Sunday" on 13 November 2005.

2 The newspaper admits that Prince Charles owns the copyright in the journal, but relies on defences under the Copyright, Designs and Patents Act 1988 to the allegation of infringement of that copyright. The newspaper denies that the content of the journal was confidential. Each of the parties has relied upon the impact of the Human Rights Act 1998 and the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on the issues raised in this action. Prince Charles alleges that the publication of the extracts from the journal interfered with his right to respect for his private life and his correspondence under article 8 of the Convention, so that it constituted in modern parlance a breach of privacy. The newspaper denies this but alleges, in the alternative, that any interference with this right was justified under article 8(2) as necessary to protect the rights of the newspaper and the public under article 10. Prince Charles accepts that the relief that he has claimed amounts to a restriction on the newspaper's right of freedom of expression under article 10, but alleges that this restriction is justified under article 10(2) as necessary to protect his right to privacy, his copyright and to prevent the disclosure of information received in confidence.

3 Blackburne J's order was made in proceedings for summary judgment brought by Prince Charles under CPR Pt 24. Blackburne J concluded that, so far as the journal was concerned, there was little relevant issue of fact and, in so far as there was any such issue, the newspaper had no real prospect of succeeding on it. There were, however, substantial issues as to the application of the principles of the developing law of breach of privacy to the facts of this case. These issues were explored before the judge in a depth which was not typical of the ordinary proceeding under Part 24. Thus the skeleton argument submitted on behalf of Prince Charles extended to 44 pages and that submitted on behalf of the newspaper to 30 pages. The hearing lasted three days and the judgment was 44 pages in length.

4 It seems to us that what the judge did, in effect, was to hold that there was no issue of fact in relation to the journal that called for trial, so that disclosure and oral evidence were unnecessary, and to proceed to try the

A remaining issues. The judge resolved those issues in favour of Prince Charles. He entertained, however, full argument as to why those issues should be resolved in favour of the newspaper and, had he been persuaded by that argument, would have been in a position to give final judgment against Prince Charles.

5 The preparations made for this appeal were appropriate for
B determination by this court of the substantive merits of the case, in so far as it relates to the journal. The skeleton submitted on behalf of the newspaper is 33 pages in length and that submitted on behalf of Prince Charles is 44 pages in length. Three files containing copies of 42 authorities were prepared for the hearing. In these circumstances we have been in no doubt as to how to give effect to the overriding objective as set out in CPR Pt 1. Our first task must be to consider whether the judge was correct to conclude
C that there was no relevant issue of fact that required a trial. If he was not, then his order must be set aside and a trial ordered. If, however, there is no issue of fact that requires trial, we should treat this as an appeal on the merits that we can determine either by upholding the judge's order in favour of Prince Charles, or by setting aside his order and giving judgment in favour of the newspaper. Counsel for each of the parties very sensibly agreed with this
D course.

6 Blackburne J's judgment has not been reported. The convenient course is to annex it to our own judgment, and we do so*.

The facts

7 In order to facilitate the conduct of this litigation Prince Charles
E agreed to the full disclosure of the contents of the journal. These are summarised by the judge at paras 28 to 38 of his judgment and we shall not repeat that exercise. Suffice it to say they are a personal description of Prince Charles's participation in the events that marked the handing over of Hong Kong. These include a banquet which the Chinese President attended and which Prince Charles describes in a manner that is disparaging of the formalities and of the behaviour of the Chinese participants.

F 8 The publication of and comments on extracts from the journal in the "Mail on Sunday" came shortly after a state visit to London by the Chinese President in the course of which he held a banquet at the Chinese Embassy. Prince Charles declined an invitation to that banquet. The judge summarises the articles in that newspaper and sets out the editorial comment at paras 54 to 61 of his judgment. The front page headline was "Appalling Waxworks",
G the phrase used by Prince Charles to describe the Chinese entourage, and the article to which it related started by stating that "Scathingly candid remarks Prince Charles has made about the Beijing leadership can be revealed today—just days after the Chinese President completed his controversial state visit to Britain". Reference should be made to the judgment for details of the publication.

H 9 There were two areas where there was a degree of conflict in the evidence placed before the judge. Mr Warby for the newspaper submitted that these conflicts required to be resolved at a trial. The first area covers the practice followed by Prince Charles in relation to causing or permitting

* *Reporter's note*. Blackburne J's judgment is reported, ante, pp 60 105.

others to see his journals and, in particular, the course that he followed in relation to the journal. There are issues of fact in relation to this area. The second area relates to the general conduct of Prince Charles in making public his views and seeking to influence executive action and, in particular, to his conduct in declining invitations to two banquets given in London by the President of China, each one on the occasion of a state visit to this country. There is a degree of conflict of evidence as to his reasons for not attending the banquets.

10 The evidence in relation to the journals is set out in paras 13 to 26 of Blackburne J's judgment. Evidence in statement form on behalf of Prince Charles was given by Sir Stephen Lamport, who was Prince Charles's Principal Private Secretary from 1996 to 2002 and by his successor, Sir Michael Peat. Evidence on behalf of the newspaper was given by Mr Mark Bolland, who served as Assistant Secretary to Prince Charles from 1996 to 1997 and Deputy Private Secretary from 1997 to 2002. We shall start by setting out evidence which is not disputed.

11 Over the last 30 years it has been Prince Charles's practice to make a handwritten journal recording his views and impressions on completing a foreign visit. Sir Stephen described these as "candid and very personal, and intended as a private historical record". Mr Bolland said that "he viewed the journals both as a historical record and as a bit of fun. He would try to make them amusing . . ."

12 On his return to this country the completed handwritten journal is photocopied by a member of staff in Prince Charles's private office. At the time of the journals which are the subject of this action this was Ms Sarah Goodall. Prince Charles handed her a list of those to whom the journal should be circulated. Each of these received with the journal a letter signed by Prince Charles. The envelope in which these were sent was marked "private and confidential". The journal was circulated in this way.

13 The employment contracts of each of those in Prince Charles's service provided that any information in relation to him that was acquired during the course of his or her employment was subject to an undertaking of confidence and was not to be disclosed to any unauthorised person.

14 There is an issue as to the number of people to whom the journal was sent. Sir Michael said that 14 copies were sent to close friends, some of whom were married so that the recipients totalled 21. These included Mr Nicholas Soames MP, who was the only politician to receive a copy. Sir Michael said that he had contacted each of the recipients, who had confirmed that the copy had been kept safely. Mr Bolland was not in a position to give evidence that related specifically to the journal. He said, however, that he estimated that 50 to 75 people would have received each of the journals, including politicians, media people, journalists and actors.

15 There is also an issue as to the care that was taken of the journals and copies of them that were not circulated. Sir Stephen said that the journals were locked in an archive at Highgrove and that photocopies were kept under lock and key at St James's Palace. Thereafter access was limited to four authorised members of staff. Mr Bolland said that all the private secretaries got copies of the journals. They were not regarded as being especially secret; there was a very relaxed attitude to their contents. The newspaper also sought to rely on hearsay evidence from an undisclosed

A source spoken to by Mr Peter Wright, the editor of the "Mail on Sunday". The judge discounted this evidence. Mr Warby did not suggest that he was wrong to do so.

16 The judge did not consider that these issues were significant. He assumed in favour of the newspaper that its case on these issues of fact was made out. Mr Warby submitted that this was not an appropriate approach. We disagree. At least for the purpose of considering whether the claimant B was entitled to judgment, it was both appropriate and sensible to assume that issues of fact would be decided against him.

17 There was an issue before the judge as to how the journals came into the possession of the newspaper. The judge's findings in relation to that issue are not challenged. Those findings add to the picture in relation to the care taken of the journals. They have, however, much greater significance C than that. We shall set them out at this stage.

18 Ms Goodall was employed in Prince Charles's private office between May 1988 and December 2000. She had given the usual undertakings as to confidentiality. She had been dismissed following a disciplinary hearing in relation to matters irrelevant to this action. She had not been authorised to make typed copies of the journals or to remove photocopies of them from the private office. Despite this Ms Goodall, via a friend who did not disclose D her identity, supplied the newspaper in May 2005 with typed copies of the eight journals in the hope that the newspaper would purchase them.

19 On 14 October 2005 Ms Goodall disclosed to Prince Charles's communications secretary, Mr Haverson, what she had done. She said that she had asked her friend to recover the copy journals, but he had not succeeded in doing so. On the same day she met Mr Wellington, the E managing editor of the "Mail on Sunday", told him that she was the source of the copy journals and asked for them back. He handed her a set of copies and she returned these to Mr Haverson. The newspaper had, however, retained a set of copies.

20 Meanwhile Prince Charles's solicitors contacted the newspaper and made it plain that the copy journals were confidential, contained private information, and were protected by copyright. They had been removed F from Prince Charles's office without permission and should be returned. On 10 November, after the newspaper had given notice that it intended to publish extracts from the journal, Sir Michael Peat telephoned the editor and subsequently wrote protesting that the journals were private and confidential and had been removed from the private office in breach of trust. The solicitors also wrote, threatening proceedings if the contents of the G journal were published. The newspaper none the less proceeded with the publication that has led to this action.

21 We turn to the second area where Mr Warby submits that there is factual dispute. In 1994 Mr Jonathan Dimbleby published an authorised biography of Prince Charles. This included a number of extracts from the journals then in existence. In the preface Mr Dimbleby stated that he had had unprecedented and unfettered access to original sources, from which he H had been free to quote extensively. His contract stated that he should have "the final decision in his own discretion about the contents" of the work. None the less, Sir Michael Peat stated that Mr Dimbleby had been given access to material "subject to strict conditions of confidentiality" and that "no material could be used from the journals without the express permission

of Prince Charles". We do not accept that this conflict of evidence required to be resolved at a trial. In para 66 of his judgment the judge records that Mr Tomlinson for Prince Charles conceded that Prince Charles had allowed Mr Dimbleby free access to the journals and disclosure of their contents at his sole discretion.

22 Finally Mr Warby draws attention to evidence that Prince Charles made use of the media to make it plain that he had deliberately boycotted the Chinese banquet at the time of the state visit in 1999, which conflicts with evidence provided by Prince Charles through Sir Michael Peat that this was not the case. The judge recorded the existence of this issue at para 66 of his judgment, as he did Mr Tomlinson's invitation to proceed as if the evidence advanced by the newspaper was true. The judge acceded to this invitation and we consider that this course was appropriate and sensible.

23 For these reasons we reject Mr Warby's submission that there are issues of fact unresolved that call for a trial. The issue on this appeal is whether the judge's application of law to the facts that were either undisputed or assumed to be those advanced by the newspaper produced the correct result.

The approach to the law

24 At para 85 of his judgment the judge commenced his analysis of the claim for breach of confidence with the statement: "The modern starting point in a claim of this kind is the decision of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457." Counsel for each of the parties proceeded on the premise that this statement was correct. This led them to approach the case as though there were only two significant issues. (1) Was the subject matter of the journal "private" so that the newspaper's publication of it interfered with Prince Charles's rights under article 8(1) of the Convention? If so (2) was the newspaper's publication none the less justifiable under article 8(2) as being necessary for the protection of the article 10 rights of the newspaper and of the public? In short the essential issue in this case was a conflict between the rights under article 8 and article 10 of the Convention.

25 We consider that this approach to this action was an over-simplification. Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to the Convention. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see *Von Hannover v Germany* (2004) 40 EHRR 1, paras 74 and 78.

26 The English court has been concerned to develop a law of privacy that provides protection of the rights to "private and family life, his home and his correspondence" recognised by article 8 of the Convention. To this end the courts have extended the law of confidentiality so as to protect article 8 rights in circumstances which do not involve a breach of a confidential relationship. Although their Lordships differed as to the result in *Campbell v MGN Ltd* [2004] 2 AC 457, there was little between them as

A to the applicable legal principles. Lord Nicholls of Birkenhead described the position as follows, at para 14:

> "Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description
B of the information as 'confidential' is not altogether comfortable. Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information."

27 Many of the recent decisions in this area of the law involve situations
C where information has been published that has not involved the breach of a relationship of confidence. In such circumstances the issue has been whether the information was of a private nature, so that its disclosure interfered with article 8 rights and, if so, how the tension between article 8 and article 10 should be resolved.

28 This action is not concerned, however, with a claim for breach of
D privacy that involves an extension of the old law of breach of confidence. There is an issue in this case as to whether the information disclosed was private so as to engage article 8 and there is an obvious overlap between this question and the question of whether the information was capable of being the subject of a duty of confidence under the old law. Assuming that it was, there are in this action all the elements of a claim for breach of confidence under that law. The information was disclosed in breach of a well
E recognised relationship of confidence, that which exists between master and servant. Furthermore, the disclosure was in breach of an express contractual duty of confidentiality. The newspaper was aware that the journals were disclosed in breach of confidence.

29 Article 10(2) provides that the freedom to receive and impart information and ideas "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a
F democratic society . . . for preventing the disclosure of information received in confidence". Information received in confidence may not be of such a nature as to engage article 8. A trade secret will not necessarily do so. Thus the Convention recognises that it may be necessary in a democratic society to give effect to a duty of confidence in the old sense at the expense of freedom of expression.

G **30** It seems to us that a case such as this requires consideration of the weight that should be given to the fact that the information in this case had been received by Ms Goodall in confidence and, furthermore, under a contractual duty of confidence. This factor received little recognition in the submissions of counsel or, indeed, in Blackburne J's judgment. At para 135 the judge recorded Mr Tomlinson's submission that "there is a strong public (as well as the claimant's own private) interest in preserving the
H confidentiality of private journals and communications within private offices" but no express weight appears to have been given to the fact that the disclosure was in breach of a duty of confidentiality arising out of both the relationship and the contract between master and servant, and that the newspaper was aware of the breach of confidence.

31 The importance of private duties of confidence in the context of article 10 rights is not much explored in either the English or the Strasbourg authorities. Mr Tomlinson suggested that this was because the horizontal effect of the Convention consequent upon the recognition by the Strasbourg court that states are under a positive obligation to ensure that their laws protect the fundamental freedoms is a recent development. We suspect that this is correct.

32 Before the Human Rights Act 1998 came into force, the English law of confidence had recognised that there were circumstances where the public interest in disclosure overrode the duty of confidence, and that these circumstances could differ depending upon whether the duty was owed to a private individual or to a public authority. The present case raises the question whether the principles permitting publication of information disclosed in breach of an obligation of confidence require to be revised in order to give full effect to article 10 rights. Before addressing that question we propose to consider the overlapping questions of whether the content of the journals was confidential and private within the protection of article 8.

Were the journals confidential and was their content private?

33 In *Douglas v Hello! Ltd (No 3)* [2006] QB 125, para 55, this court said:

> "It seems to us that information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others."

Dealing at para 83 of the same case with the issue of privacy, the court said:

> "What is the nature of 'private information'? It seems to us that it must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public. The nature of the information, or the form in which it is kept, may suffice to make it plain that the information satisfies these criteria."

34 We consider that these observations remain sound. They are in no way discordant with the statement of Lord Nicholls of Birkenhead in *Campbell v MGN Ltd* [2004] 2 AC 457, para 21: "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy." Lord Hope of Craighead, at para 85, advanced a similar test: "a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected." Baroness Hale of Richmond, at para 134, advanced the same test and Lord Carswell, at para 165, endorsed this.

35 Lord Hope, at para 96, remarked that there is no need for a test where "the information is obviously private". In many cases it will be perfectly obvious that information is both confidential and of a private nature. This is such a case. The journal set out the personal views and impressions of Prince Charles. They were set out in a journal in his own hand. They were seen by his staff, who were under an express contractual obligation to treat their content as confidential. They were sent to selected

A recipients under cover of a letter signed by Prince Charles in an envelope marked "private and confidential". The journals were paradigm examples of confidential documents. They also satisfied each of the tests of confidential and private documents to which we have referred above.

36 It is not easy in this case, as in many others, when concluding that information is private to identify the extent to which this is because of the
B nature of the information, the form in which it is conveyed and the fact that the person disclosing it was in a confidential relationship with the person to whom it relates. Usually, as here, these factors form an interdependent amalgam of circumstances. If, however, one strips out the fact of breach of a confidential relationship, and assumes that a copy of the journal had been brought to the newspaper by someone who had found it dropped in the street, we consider that its form and content would clearly have constituted
C it private information entitled to the protection of article 8(1) as qualified by article 8(2).

37 The judge applied the test of reasonable expectation derived from *Campbell v MGN* and concluded that Prince Charles had a reasonable expectation that the content of the journal would remain private.

38 Mr Warby advanced the following arguments in an attempt to
D persuade the judge and to persuade us that the content of the journal was not confidential and private: (i) the subject of the journal consisted of events that were in the public domain; (ii) the relaxed way in which the journals were treated and the width of their circulation belied an expectation that they would remain private; (iii) having regard to the nature of the content of the journal any expectation of privacy on the part of Prince Charles was
E unreasonable.

39 While most of the events described in the journal were in the public domain, what were not in the public domain were Prince Charles's comments about them, and it was these that were the essence of the publication in the "Mail on Sunday". That newspaper's headline that it "*reveals* his extraordinary and historic journal" (our emphasis) gives the lie to the suggestion that what was being published was already in the public
F domain.

40 Mr Warby submitted that the manner in which Prince Charles dealt with his journals was so relaxed that he could not reasonably expect their contents to remain confidential. In support of this submission he relied on: (i) the evidence of Mr Bolland as to the practice of letting all the private secretaries have copies of the journals, (ii) the width of the circulation of the
G journals and (iii) the permission that was, on the facts agreed for the purpose of this litigation, given to Mr Dimbleby to have free access to the journals then in existence and to publish in the biography that he was writing such extracts from them as he chose.

41 There was no merit in any of these points. As to any laxity in allowing members of staff to have copies of the journals, they were all under express contractual duties not to disclose the contents of the journals and,
H over 30 years and until the breach of trust by Ms Goodall, there was no abuse of the duty of confidence that they were under. As to Ms Goodall's conduct, the judge remarked at para 70 of his judgment that the conduct of Ms Goodall was almost wholly antithetical to the notion that the journals were not treated by the staff as confidential. We agree.

42 The judge proceeded on the basis that Mr Bolland was correct to say that those to whom Prince Charles sent his journals totalled 50 to 75, including politicians, media people, journalists and actors. The judge commented that the number and occupations of the recipients of the journals were of no significance in the absence of any suggestion that they would have felt free to publish the contents of the journals without Prince Charles's permission. Again we agree and again the significant fact is that over a period of some 30 years there is no evidence that any recipient of the journals breached the confidence under which they had received them. If it be the fact that the circulation of the journals was as wide as Mr Bolland has suggested, this cannot, having regard to all the circumstances, lead to a conclusion that Prince Charles could not reasonably expect the contents of his journals, and in particular the journal, to have been kept confidential.

43 If, as has been conceded for the purposes of this litigation, Prince Charles in 1994 gave Mr Dimbleby free access to his journals and unconditional permission to reproduce those passages that he wished, we do not accept that this meant that Prince Charles could not reasonably expect that, in the absence of similar authorisation, the content of subsequent journals would remain confidential.

44 We turn to Mr Warby's suggestion that, having regard to the nature of the content of the journal, any expectation by Prince Charles that it would remain confidential was unreasonable. Mr Warby submitted that Prince Charles, as heir to the throne, was a public figure who had controversially courted public attention and used the media to publicise views, particularly in relation to the Chinese, of a similar kind to those expressed in the journal. The views expressed in the journal were political in nature. In these circumstances he could have no reasonable expectation that the journal would remain confidential.

45 The judge expressed the view that these matters did not go to the question of whether the content of the journal was confidential but rather to whether that confidentiality would have to give way when weighed against the rights of freedom of expression enjoyed by the newspaper and its readers. We agree with that view. There is a distinction, not always drawn, between the question of whether a claimant can reasonably expect those in a confidential relationship with him to keep information confidential and whether a claimant can reasonably expect the media not to publish such information if the duty of confidence is breached. As to the latter it may be argued that if the circumstances are such that article 8 rights of privacy in relation to particular information are likely to be trumped by article 10 rights of freedom of expression, then it cannot be reasonable to expect the information to remain confidential. Such an approach blurs the question of whether article 8 is engaged with the question of how the balance should be struck between article 8 and article 10 rights. We consider that the better approach is to consider the points made by Mr Warby in relation to the subject matter of the journal in the context of the competition between article 8 and article 10. It is to this that we now turn, which brings us back to the question posed in para 32 above.

46 After conclusion of the hearing we were referred by the parties to the discussion of the ambit of article 8 in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91. That case was not concerned with breach of privacy. Nothing said by their Lordships in relation to article 8 causes us to

A alter our view that the publication by the newspaper of extracts from the journal interfered with Prince Charles's right to respect for his private life. This is even clearer when one reflects that this right extended to protect Prince Charles's "correspondence".

The impact of article 10 on an action for breach of confidence

B **47** In *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 ("the Spycatcher case") Lord Griffiths referred, at p 273, to the provisions of article 10 of the Convention and commented that he saw no reason why our law should take a different approach. In *Campbell v MGN Ltd* [2004] 2 AC 457 Lord Hoffmann said, at paras 51–53:

"51. The result of these developments has been a shift in the centre of
C gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in *Douglas v Hello! Ltd* [2001] QB 967, 1001, the new
D approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.

"52. These changes have implications for the future development of
E the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified.

"53. In this case, however, it is unnecessary to consider these implications because the cause of action fits squarely within both the old
F and the new law."

48 We do not believe that Lord Hoffmann intended to suggest that the fact that information has been disclosed in breach of the duties of good faith that arise in a relationship of trust and confidence is irrelevant when considering the balance between the requirements of article 8 and article 10. In that case the press had been informed of Ms Campbell's treatment as a
G result of a breach of confidence, either on the part of a fellow participant at meetings of Narcotics Anonymous or on the part of one of her staff or entourage. But the House of Lords did not have to consider the extent to which this weighed in the balance to be struck between article 8 and article 10 rights. It was common ground that, had Ms Campbell not herself put her experience of drugs into the public domain, all the information published would have constituted an interference with her article 8 rights
H which was not justified by article 10 considerations.

49 Reference to decisions of the Strasbourg court identifies, as a common theme, the importance of the role of the press in a democratic society. A recent formulation of the relevant principles is to be found in *Fressoz and Roire v France* (1999) 31 EHRR 28, para 45:

"(i) Freedom of expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.

"(ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. In addition, the court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.

"(iii) As a matter of general principle, the 'necessity' for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of article 10, whether the restriction was proportionate to the legitimate aim pursued."

50 A number of decisions of the Strasbourg court provide examples of situations where the public interest in the receipt of information protected by article 10 has prevailed over restraints on publication that were lawful under domestic law. In general the Strasbourg court views with disfavour attempts to suppress publication of information which is of genuine public interest. Where it relates to a matter of major public concern, even medical confidentiality may not prevail: *Editions Plon v France* (2004) 42 EHRR 705.

51 Where the published information invades an individual's right of privacy, as protected by article 8, the court gives careful consideration to whether the information is truly of public interest rather than of interest to the public. Thus in *Von Hannover v Germany* 40 EHRR 1, para 63, the court observed:

"The court considers that a fundamental distinction needs to be made between reporting facts—even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest' it does not do so in the latter case."

52 In *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, para 17, Lord Steyn, in a speech with which the other members of the House concurred, deduced the following principles from the decision of the House in *Campbell v MGN Ltd*:

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

B **53** This passage does not assist with the weight to be given to the fact that the publication under consideration involves "the disclosure of information received in confidence". We have not been referred to any Strasbourg decision where this question receives express consideration, other than the consideration that was given to medical confidentiality in *Editions Plon v France* 42 EHRR 705.

C **54** Before the Human Rights Act 1998 came into force, the English court recognised that the public interest could justify the publication of information that was known to have been disclosed in breach of confidence. Initially this was limited to the so called "iniquity rule"; confidentiality could not be relied upon to conceal wrongdoing. In *Lion Laboratories Ltd v Evans* [1985] QB 526 a more general test of public interest was upheld. Employees, in breach of confidence and copyright provided the media with
D documents that cast doubt on the accuracy of "breathalisers". This court held that there was an arguable public interest defence to the action brought for breach of confidence and copyrights, so that an interlocutory injunction was not appropriate. Griffiths LJ held, at p 550, that he was quite satisfied that the defence of public interest was well established in actions for breach of confidence and referred to circumstances in which it might be "vital in the
E public interest" to publish confidential information.

55 In the Spycatcher case [1990] 1 AC 109, 282 Lord Goff of Chieveley identified three limiting principles to the protection that the law affords to confidence. The third is material:

> "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
F the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, 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."

G

56 Shortly after the Human Rights Act 1998 came into force, this court had to consider the impact of article 10 of the Convention on an action for breach of confidence in *London Regional Transport v Mayor of London* [2003] EMLR 88. The claimants had sought an interlocutory injunction restraining the defendants from publishing a report in breach of a contractual duty of confidence. This had been granted initially but
H discharged by Sullivan J on the defendants undertaking only to publish a redacted version. On an application for permission to appeal, it was alleged that Sullivan J had wrongly conducted a balancing exercise that had regard to the requirements of article 10 of the Convention notwithstanding that the publication was in breach of contractual obligations of confidence. The

claimants had argued that because of a contractual confidentiality agreement the court had no option but to grant the injunction. The defendants had relied, successfully, on the argument that if, which was not admitted, publication of the redacted report would breach the confidentiality agreement, the injunction should none the less be set aside because of the strong public interest in the content of the report. Sullivan J had held that the public interest required the report to be published in its redacted form, even if an exceptional case had to be made for breaching the contractual duty of confidence. He held that the case was exceptional:

> "this is not a case where some employee is seeking to pass confidential information to someone else for commercial gain, or where someone is trying to use confidential material to steal a march on a commercial rival. What the defendants seek to do is to disclose matters which are of genuine public concern . . . this is a most exceptional case. It could not possibly be described as the normal, run-of-the-mill breach of confidence case, whether it is breach of an implied duty of confidence or an express duty of confidence contained in an agreement . . .": see para 40.

57 Giving the leading judgment in this court, at para 46, Robert Walker LJ rejected the submission that a duty of confidence carried greater weight if it was contractual:

> "No authority has been cited to the court establishing that an apparent breach of a contractual duty of confidence is more serious, and is to be approached differently (as regards injunctive relief) than other apparent breaches . . . the court adopts the same approach to both."

58 He went on to deal with an argument advanced by the defendants that the judge had applied too stringent a test in requiring them to demonstrate that there was an exceptional case for publication. He held that on the test applied by the judge his conclusions were amply justified.

59 In a short concurring judgment, Sedley LJ held that Convention rights introduced by the Human Rights Act 1998 lent force to Robert Walker LJ's conclusion. He held that applying a test of proportionality furnished a more certain guide to the exercise of the court's discretion than "the test of the reasonable recipient's conscience": para 58. He held in para 60 that the effect of section 3(1) of the Act was:

> "in the absence of any meaningful threatened breach of confidentiality, that it is unlawful by virtue of section 6(1) of the Human Rights Act 1998 for either claimant to seek, whether by contract or by lawsuit, to interfere with article 10 rights—whether those of the defendants or those of the public."

60 Aldous LJ added at para 63 that, although the hearing had been of an application for permission to appeal, as the court had heard full argument "we regard our judgments as making a modest extension of the law".

61 Finally we should refer to the lengthy discussion of the public interest defence to an action for breach of confidence in paras 94 to 105 of the judgment of Eady J in *McKennitt v Ash* [2006] EMLR 178. In issue in that action was information about the first claimant in a book written by the first defendant who had had a close friendship with her and worked for her under a contract which contained a confidentiality clause. The judge held

A that the case required him to perform a balancing exercise between article 8 and article 10 rights. One argument advanced against granting an injunction was that the book legitimately disclosed instances of misconduct by the first claimant. As to this, the judge held at para 97:

> "I am prepared to acknowledge that a court nowadays might not apply quite so strict a test to that laid down by Ungoed-Thomas J in *Beloff v*
B *Pressdram Ltd* [1973] 1 All ER 241, 260: 'the disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.' I would nevertheless accept that Mr Browne [counsel for
C the claimant] is broadly correct when he submits that for a claimant's conduct to 'trigger the public interest defence' a very high degree of misbehaviour must be demonstrated. Relatively trivial matters, even though falling short of the highest standards people might set for themselves, will not suffice."

62 The judgment in favour of the claimant was appealed and the Court
D of Appeal delivered judgment last week, upholding Eady J [2007] 3 WLR 194. In the the leading judgment Buxton LJ approved the approach adopted by Eady J to striking a balance between article 8 rights and article 10 rights. He also emphasised the significance of the fact that the information that was in issue had been revealed within a relationship of confidence. He observed, at para 15, that having regard to this fact the case:

E "reverts to a more elemental inquiry into breach of confidence in the traditional understanding of that expression. That does not of course exempt the court from considering whether the material obtained during such a relationship is indeed confidential; but to inquire into that latter question without paying any regard to the nature of the pre-existing relationship between the parties, as the argument for the [defendants] in
F this court largely did, is unlikely to produce anything but a distorted outcome."

63 Buxton LJ added, at para 18:

> "The judge accordingly approached, and correctly approached, his consideration of the passages complained of against the background of a pre-existing relationship of confidence, known to be such by the first
G defendant, while at the same time not assuming that that covered everything that happened between the two women with the cloak of confidence."

Later, at para 43, he remarks that the provision of the written contract did not add much to the obligations that the first defendant owed in equity by reason of the closeness of her personal relationship with the claimant.

H

Discussion

64 In *Hosking v Runting* [2005] 1 NZLR 1, para 42, the Court of Appeal of New Zealand suggested that there were now in English law two quite distinct versions of the tort of breach of confidence:

"One is the long-standing cause of action . . . under which remedies are available in respect of use or disclosure where the information has been communicated in confidence. Subject to a possible 'trivia' exception and to public interest (iniquity) defences, those remedies are available irrespective of the 'offensiveness' of the disclosure. The second gives a right of action in respect of the publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence . . ."

65 Time has moved on since that judgment, which was delivered in March 2004 and its summary of the position under English law can be seen to be inaccurate. Whether a publication, or threatened publication, involves a breach of a relationship of confidence, an interference with privacy or both, it is necessary to consider whether these matters justify the interference with article 10 rights that will be involved if the publication is made the subject of a judicial sanction. A balance has to be struck. Where no breach of a confidential relationship is involved, that balance will be between article 8 and article 10 rights and will usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information.

66 What is the position where the disclosure relates to "information received in confidence?" The authors of *The Law of Privacy and the Media*, edited by Sir Michael Tugendhat and Iain Christie, in their Second Cumulative Supplement (2006), para 6.111 express the view that it would be surprising if this consideration was ignored. We agree. It is a factor that article 10(2) recognises is, of itself, capable of justifying restrictions on freedom of expression.

67 There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.

68 For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the

A public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.

69 In applying the test of proportionality, the nature of the relationship B that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee* [2003] ICR 141, para 22, this court drew attention to this conflict of view, and commented:

> "We consider that it is arguable that a duty of confidentiality that C has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality that is not buttressed by express agreement . . ."

We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case.

D

Conclusions

70 The information at issue in this case is private information, public disclosure of which constituted an interference with Prince Charles's article 8 rights. As heir to the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information E about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The judge rightly had regard to this factor when he said, at para 133:

> "Not the least of the considerations that must be weighed in the scales is the claimant's countervailing claim to what was described in argument as 'his private space': the right to be able to commit his private thoughts F to writing and keep them private, the more so as he is inescapably a public figure who is subject to constant and intense media interest. The fact that the contents of the Hong Kong journal are not at the most intimate end of the privacy spectrum does not, to my mind, lessen the force of this countervailing claim. The claimant is as much entitled to enjoy confidentiality for his private thoughts as an aspect of his own 'human autonomy and dignity' as is any other."

G

71 The information in the journal was disclosed to the newspaper by Ms Goodall. She was employed in Prince Charles's private office in circumstances and under a contract that placed her under a duty to keep the contents of the journal confidential. Mr Tomlinson emphasised in his submissions to the judge the strong public interest in preserving the confidentiality of private journals and communications within private H offices. He was right to do so. There is an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they have assumed. Both the nature of the information and of the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles.

72 The judge set out his conclusions in relation to the matters that Mr Warby submitted weighed on the other side of the scales at paras 123 to 132 of his judgment. Mr Warby had identified as matters of public interest (1) the nature of lobbying by Prince Charles of this country's elected leaders; (2) the political conduct of the heir to the throne; (3) the conduct of Prince Charles in failing to attend the 1999 Chinese banquet; (4) Prince Charles's public statements about his non-attendance at that banquet. The judge's conclusions were that the contribution that the journal or the articles in the newspaper made to providing information on any of these matters was minimal. We agree, for the reasons given by the judge.

73 We consider, in agreement with the judge that the significance of the interference with article 8 rights effected by the newspaper's publication of information in the journal outweighed the significance of the interference with article 10 rights that would have been involved had the newspaper been prevented from publishing that information. We think that this is the correct way to view the contest between the two articles. Mr Tomlinson argued that, because Prince Charles had not sought a prior injunction restraining publication of the articles, the correct balance to be struck was between the interference with Prince Charles's article 8 rights caused by the publication and the interference with the newspaper's article 10 rights constituted by the damages, as yet unassessed, that the newspaper will have to pay. We were unable to follow this argument. Damages will only be payable if the publication was wrongful. To postulate that that question depends upon the effect of the damages is nonsensical.

74 Thus, even if one ignores the significance of the fact that the information published had been revealed to Ms Goodall in confidence, we consider that the judge was correct to hold that Prince Charles had an unanswerable claim for breach of privacy. When the breach of a confidential relationship is added to the balance, his case is overwhelming.

Copyright

75 It is now common ground that Prince Charles owns the copyright in the journal. The judge found that there were two infringements of this copyright. The first occurred when the newspaper copied the version of the journal that had been provided by Ms Goodall before returning this to her. He ordered that all copies retained by the newspaper should be delivered up. Mr Warby confirmed that there is no challenge to this conclusion or the order based upon it.

76 The other infringement found by the judge was the reproduction of parts of the journal in the 13 November edition of the "Mail on Sunday". It is now conceded that these constituted a "substantial part" of the journal so as to constitute an infringement of copyright, subject to any statutory defences.

77 Before the judge Mr Warby had relied on three statutory defences. First he relied upon the defence of fair dealing afforded by section 30(2) of the Copyright, Designs and Patents Act 1988. This provides that:

> "Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that . . . it is accompanied by a sufficient acknowledgment."

A 78 The judge dealt with this defence at paras 164 to 174 of his judgment. He held that this defence was not made out. He accepted that it was just arguable that part of the published articles related to current events, namely Prince Charles's failure to attend the banquet at Buckingham Palace for the Chinese state visit that had occurred just before the publication of the articles and his role as heir to the throne. Much of the article, however, had
B no bearing on current events. The quotations from the journal that infringed copyright had been chosen for the purpose of reporting on the revelation of the contents of the journal as itself an event of interest and not for the purpose of reporting on current events. In these circumstances, and having regard to other relevant matters, including the fact that the journal had been obtained in breach of confidence, it could not be argued that the publication of the articles constituted fair dealing for the purpose of reporting current
C events.

79 Mr Warby argued that the judge had erred in principle in having regard to the extent to which the articles concerned current events for the purpose of deciding whether a defence under section 30(2) was made out. Once he had decided that the articles were concerned, however broadly, with current events, he should have considered whether the dealing was fair
D without further reference to the question of the extent to which the articles related to current events. We do not agree. We can fault neither the judge's approach to section 30(2) nor his conclusion that the defence under this subsection was not made out.

80 Next Mr Warby argued before the judge that the newspaper had a defence under section 30(1) of the 1988 Act, as amended by regulations 3
E and 10(1) of the Copyright and Related Rights Regulations 2003. This provides:

> "(1) Fair dealing with a work for the purpose of criticism or review . . . does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.
>
> "(1A) For the purposes of subsection (1) a work has been made
F available to the public if it has been made available by any means, including—(a) the issue of copies to the public . . ."

The judge rejected this defence on the ground that the newspaper could not establish that the newspaper's publication related to a work that had been "made available to the public".

G 81 Before us Mr Warby argued that, if the newspaper had a defence to its publication under section 30(2), it could then rely upon its legitimate publication as making the work available to the public for the purpose of a defence under section 30(1). This amounted to arguing that the newspaper could haul itself up by its own bootstraps in order to add a belt to the braces that it already had in place. Mr Warby's point might have been arguable had the newspaper first made a publication of parts of the journal that it could
H justify under section 30(2) and then made a subsequent publication of the same material for the purpose of criticising or reviewing the matter in its earlier publication. As, however, there was but one publication and this publication did not enjoy the protection of a defence under section 30(2) Mr Warby's argument does not get off the ground.

82 Finally, Mr Warby argued that the newspaper could rely, as establishing a public interest defence under section 171(3) of the 1988 Act, on the same grounds as those relied upon in respect of the confidence claim. In respect of both this defence and the defence advanced under section 30(2), Mr Warby advanced an interesting and novel argument. He relied upon the evidence that Prince Charles had no intention of publishing the journal, so that no commercial interest was at stake. In these circumstances he submitted that Prince Charles's only purpose in invoking the 1988 Act was to protect his privacy. If he was not in a position to complain of publication by the assertion of his article 8 rights, because these gave way before the article 10 rights of the newspaper and the public, it could not be right that he should be able to rely upon his copyright in order to protect his privacy.

83 As we have held that Prince Charles has a valid claim based on breach of confidence and interference with his article 8 rights, Mr Warby's argument is bereft of the foundation that it requires and we need give it no further consideration.

84 For the reasons that we have given, this appeal is dismissed.

Appeal dismissed.

12 June 2007. The Appeal Committee of the House of Lords (Lord Hope of Craighead, Baroness Hale of Richmond and Lord Carswell) dismissed a petition by the defendant for leave to appeal.

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J B S