Neutral Citation Number: [2005] EWCA Civ 595

Case No: A3/2004/0147,A3/2004/0148 & A3/2004/0330 PTA

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
(Mr Justice Lindsay)
HC0100644

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 May 2005

Before :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LORD JUSTICE CLARKE
and
LORD JUSTICE NEUBERGER

- -

Between :

MICHAEL DOUGLAS	**1st Respondent**
CATHERINE ZETA-JONES	**2nd Respondent**
NOTHERN & SHELL Plc	**3rd Respondent**
- and -	
HELLO LIMITED	**1st Appellant**
HOLA S.A.	**2nd Appellant**
EDUARDO SANCHEZ JUNCO	**3rd Appellant**

- -
- -

James Price QC & Giles Fernando (instructed by **Messrs M Law**) for the Appellants
Desmond Browne QC & David Sherborne (instructed by **Messrs Addleshaw Goddard**) for the Respondents

Hearing dates : 13, 14, 15, 16 & 20 December 2004

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Approved Judgment

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Lord Phillips, MR :

This is the judgment of the court, to which all members have contributed.

The Background

The basic facts

1. Hello! Ltd ("Hello!"), the publishers of Hello! magazine, appeal against awards of damages made by Lindsay J in favour of Mr Michael Douglas and his wife Ms Catherine Zeta-Jones ("the Douglases"), and Northern & Shell Plc ("OK!"), the publishers of OK! magazine. The appeal against the award of £14,600 in favour of the Douglases is in respect of liability only; the appeal against the award of £1,033,156 in favour of OK! is in respect of liability and quantum. The Douglases and OK! contingently cross-appeal; the issues raised on the cross-appeals concern the liability of Hello! Ltd to OK!, and the damages awarded to the Douglases.

2. The complex factual and procedural history of this matter is fully and clearly set out in paragraphs 1 to 179 of Lindsay J's judgment on liability, which is reported as *Douglas v Hello! Ltd (No3)* at [2003] 3 All ER 996. We shall limit ourselves to the essential facts necessary to determine the issues raised before us.

3. On 18th November 2000, Mr Douglas and Ms Zeta-Jones, who were and are very well-known film stars, were married at the Plaza Hotel, New York. As soon as the couple's engagement was announced in early 2000, there was intense interest in this event from certain sections of the media; in particular, from the publishers of OK! and Hello! magazines. As the judge said, in paragraph 12 of his judgment, both those magazines "provide a regular diet of photographs and text about royal, but, more usually, entertainment, sporting, and social celebrities, with photographs taking precedence over text." Most of those photographs are posed, and many of those that are not will have been taken with the consent of their subjects. As the judge said (at paragraph 15), the two magazines are "plainly keen rivals in the same market", and they each had an average weekly circulation in the UK of just over 450,000 copies.

4. Both publishers approached the Douglases with a view to obtaining the exclusive right to publish photographs of the wedding reception. The Douglases decided, with a view to reducing what Ms Zeta-Jones called "the media frenzy", that they would grant that right to one publisher. According to Mr Douglas, they regarded this course as "the best way to control the media and to protect our privacy". After some negotiations, they entered into a contract with OK! ("the OK! contract") on 10th November, eight days before the wedding.

5. In its preamble, the OK! contract referred to "the publication of an article, including story and photographs (collectively "the Article") relating to the Wedding". By clause 1, OK! agreed to pay £500,000 each to Mr Douglas (therein "MKD"), and to Ms Zeta-Jones (therein "CZJ"). By clause 2, it was agreed that:

> "MKD and CZJ hereby transfer to OK! the exclusive right to publish…the Photographs (as defined in paragraph 6 below)

> and the text referred to herein from the date of the Wedding and for nine months thereafter."

6. By clause 3, OK! were permitted to publish "the approved Article" in OK! magazine. By clauses 4 and 5, Mr Douglas and Ms Zeta-Jones respectively agreed that OK! would have, for the nine month period referred to, "the exclusive right...to consent to use" all photographs and other likenesses of the Douglases in relation to the wedding. By clause 6, the Douglases were to hire a photographer at their own expense "to take colour photographs of the Wedding ('the Photographs')." They also agreed to:

> "use their best endeavours to ensure that no other media…shall be permitted access to the Wedding, and that no guests or anyone present at the Wedding… shall be allowed to take photographs."

The Douglases also undertook to "use their best efforts" to ensure that their guests did not publish any details of the wedding.

7. By clause 7, the Douglases agreed that they would procure "joint ownership of all copyright in the Photographs", and that their selection of the approved photographs would be provided to OK! by 22nd November 2000. OK! agreed that they would only publish photographs approved by the Douglases. Clause 8 was concerned with the rights and obligations of the parties in relation to the text of an intended article and interview with the Douglases about the wedding, to be published in OK! magazine. Clause 9 entitled OK! to determine the contract if "the Photographs…are not of sufficient quality or quantity for a feature of this significance".

8. By clause 12, the Douglases agreed not to authorise the publication of any photographs of the wedding for the period of nine months, without the prior consent of OK!. Under clause 13, if any unlicensed third party used any photograph (or other likeness of the Douglases) in connection with the wedding, OK! agreed, if so requested by the Douglases, to "pursue all necessary legal action to cause such third party to cease such infringement". Clauses 14 and 15 provided for a sharing between OK! and the Douglases of any sum over £1m received by OK! "from all sources from the exploitation of the Article".

9. By clause 16, the Douglases undertook to:

> "take all reasonable means to provide such security (approved by OK! magazine) during the entirety of the Wedding proceedings…as is necessary to ensure that third party media…and/or members of the public …are unable to obtain access…in order to minimise photographs… of the Wedding…being made available to third party media."

Clause 17 contained a confidentiality provision, and clause 18 stated that the contract was governed by Californian law.

10. The Douglases had sent out invitations to the reception to around 120 family members, a large number of personal friends, and many celebrities. The invitations included a politely worded statement which made it clear that no photographs were to

be taken. The Douglases also hired appropriate photographers for the event. They duly took steps to ensure that there were tight security arrangements at the hotel on 18th November. Indeed, well before 18th November, there were security staff in place. On 17th November, the day before the wedding, entry cards were delivered to each of the 350 wedding guests, with a view to ensuring, by means of a coded marking on each card, that, so far as possible, no unauthorised person got in.

11. The guests began arriving at the hotel at about 7.30 in the evening of 18th November. There were speeches, entertainers, music, and dancing. The cake was cut at midnight, and the reception ended around 5.30 on the morning of the 19th. Although the event appeared to have been an unqualified success, it transpired that a paparazzo, Mr Rupert Thorpe, had infiltrated the reception, and surreptitiously taken photographs, including some of the bride and groom (together and separately). How this happened has still not been explained, at least in these proceedings.

12. Mr Thorpe then contacted another paparazzo, Mr Philip Ramey, who was based in California, with a view to selling the 15 photographs that he had surreptitiously taken. They included six ("the unauthorised photographs"), which were, in due course, thought to be of sufficient interest and quality to publish. These six photographs were described by the judge in these terms, in paragraph 76 of his judgment:

> "The photograph of the bride going down the aisle towards the wedding ceremony on the arm of her father cuts off all of him but his arm. Two show the bride eating, one of which has the groom holding the fork down into her mouth. In one she playfully holds up a cake knife at her husband. In one taken from a very low level she dances, but not with the groom. Another, hopelessly out of focus, shows the bride and groom kissing. The bride's dress is shown to a greater or lesser extent in all six, and parts of the very elaborate wedding cake are visible in three."

13. Mr Ramey immediately approached potential purchasers, including Hello!. Negotiations between Mr Ramey, in California, and Ms Sue Neal, then employed by Hello! as a picture editor in London, were quickly concluded. At some point during 19th November, with the authority of her superiors in Madrid, Ms Neal agreed to pay £125,000 for the exclusive right to publish the unauthorised photographs in Hello! magazine in the UK, and in its sister publications in Spain and in France. The judge had little difficulty in concluding that both Mr Ramey and Hello! would, or at least ought to, have known of the OK! contract, and of the sort of terms it would have included (in particular, with regard to exclusivity), as well as of the elaborate security procedures to prevent intrusion and unauthorised photography at the reception.

14. The staff of Hello! magazine then started to prepare for the next edition on the basis that it would include the unauthorised photographs. Meanwhile, OK! learnt that unauthorised photographs had been taken and were on the market. The Douglases were informed, and were, according to their evidence, not surprisingly "shocked". On learning that Hello! had bought, and were intending to publish, the unauthorised photographs, the Douglases and OK! ("the claimants") applied for, without notice to Hello!, and obtained from Buckley J, an interlocutory injunction on 20th November. This injunction, which restrained Hello! from publishing photographs of the wedding,

was continued by Hunt J the following day, after a hearing, at which Hello!, as well as the claimants, were represented.

15. Hello! appealed, and, after a hearing over two days, the Court of Appeal (Brooke, Sedley and Keene LJJ) announced, a little before 5.00pm on 23rd November, that the appeal would be allowed, and the interlocutory injunction lifted. Reasoned judgments were given later, on 21st December 2000, and are reported at [2001] QB 967.

16. It subsequently transpired that some of the evidence put before the Court of Appeal on behalf of Hello! was seriously inaccurate. First, the draft statement of their publishing director, which was put before the court even though she had declined to sign it, stated that Hello! were unaware that unauthorised photographs were intended to be taken. In fact, they were aware that an attempt would be made to take clandestine photographs, although they had not in any way commissioned, or even agreed to purchase, any such photographs. Secondly, the Marquesa de Varela, who frequently supplied features to Hello! magazine, signed a manufactured letter to support the story in which she said that it was her company, Neneta Overseas Ltd, which had sold the unauthorised photographs to Hello!. This was an invention, whose iniquity is reinforced by the fact that it was persisted in at trial even to the extent of the production of false apparently supportive invoices. Thirdly, the third defendant, Senor Sanchez Junco, the editor in chief of Hello! magazine (and controlling shareholder in Hello!'s parent company), stated that he had no previous contact with the providers of unauthorised photographs. As Lindsay J subsequently found, Senor Sanchez would have known this would have been understood to be a reference to the Marquesa, and, as so understood, this was untrue.

17. In anticipation of the possibility that they would be able to publish the unauthorised photographs, Hello! had finalised the 639th issue of their magazine to include them (including one on the front cover). That issue of Hello! magazine was distributed to newsagents on 23rd November, and was available to be purchased by the public throughout the UK on and after 24th November.

18. OK! had originally intended to publish the authorised photographs over two issues, its 242nd and 243rd, which were respectively due to come out on 30th November and 6th December in London, and a day later in the rest of the United Kingdom. However, on discovering the existence of the unauthorised photographs, they decided to bring the publication forward. This meant that the selection of photographs was an exercise carried out by the Douglases "in some haste", rather than being "a leisurely, unhurried and pleasant process" to quote from paragraph 89 of the judgment. As the judge found, the need for expedition resulted in expense, which would not otherwise have been incurred.

19. As a consequence, a large number of the authorised photographs were included in the 241st edition of OK! magazine, with one of those photographs, a full family wedding group, on the front cover. Although this edition bore the date of 1st December, it "went on public sale on the very same day as Hello!'s issue 639", to quote from paragraph 133 of the judgment. The balance of the authorised photographs was published in the next edition of OK! magazine, with a close-up of the bride and groom on the cover, which came out on 2nd December.

20. On the same day that OK! magazine published many of the authorised photographs and Hello! magazine published the six unauthorised ones, 24th November 2000, the Sun newspaper published five of the unauthorised photographs, and the Daily Mail newspaper published a reproduction of the front cover of Hello! magazine (i.e. one of the unauthorised photographs). The following day, the Daily Mail published four of the unauthorised photographs.

21. The judge accepted the evidence of Hello! magazine's London editor, Ms Koumi, that "it was totally untrue that permission had been given to the Sun", or indeed to the Daily Mail, to republish the Douglas wedding pictures" (paragraph 138 of the judgment). In answer to requests made on behalf of those two newspapers, just after the injunction had been lifted, Ms Koumi had said that they could reproduce the front cover of issue 639, but no other photographs in the magazine. The editor of the Sun had been told earlier by Ms Koumi that he might be able to use the other unauthorised photographs, but she made it clear that he could not do so on 23rd November, when, according to the judge, "it was ...not too late for the Sun to have withdrawn from its print run any pictures from the inside of Hello! which the Sun had proposed to use" (paragraph 134 of the judgment).

22. Meanwhile, the proceedings developed. The claimants had initially wanted only injunctive relief, but, in light of the discharge of the interlocutory injunction, they also sought damages. Further defendants, including Senor Sanchez Junco, were joined in addition to Hello!, and this entailed a further visit to the Court of Appeal. The pleadings on each side were amended on a number of occasions, disclosure was given, and witness statements exchanged.

23. There was then an application by the claimants to debar the defendants, including Hello!, from defending the claim, on the grounds of their deceit (including the lies to the Court of Appeal), their failure to give proper disclosure (which included allegations of destruction of documents), and the unreliability of some of their evidence. That application came before Sir Andrew Morritt V-C, who, on 27th January 2003, dismissed it, although he strongly criticised the way in which Hello! and many of its employees had conducted the litigation- see at [2003] 1 All ER 1087. (It is right to add that some of those criticisms were expressly disclaimed by Lindsay J in paragraphs 103 and 127-8 of his judgment, after having heard and seen fuller evidence than was available to the Vice-Chancellor).

24. Very shortly thereafter, on 3rd February 2003, the case came on for hearing, on liability only, before Lindsay J. The hearing lasted 25 days, and the judge gave an impressive and full judgment on 11th April 2003. Although other points were dealt with in his judgment, it is enough for present purposes to summarise the judge's conclusions as follows:

- He found that the Douglases were entitled to damages and a perpetual injunction against Hello!, on the grounds that the publication of the unauthorised photographs in this jurisdiction by Hello! constituted a breach of confidence, effectively because the reception was a private event.

- He found that OK! were entitled to damages from Hello! on substantially similar grounds, albeit that the breach of confidence was, so far as they were concerned, more in the nature of a trade secret.

- He rejected OK!'s case against Hello! in so far as it was based on what we shall call economic torts, namely deliberate interference with the business of OK!, or conspiracy to injure either by lawful, or by unlawful, means.

25. There was a subsequent hearing on the issue of quantum, resulting in a further judgment on 7th November 2003. In that judgment ("the quantum judgment"), Lindsay J rejected the argument that the Douglases were entitled to damages calculated on the basis of a notional licence fee, but he indicated that, if that had been the proper basis, he would have assessed the notional fee at £125,000. He awarded the Douglases damages on a different basis, namely, (a) £3,750 each for the distress occasioned by the publication of the unauthorised photographs, (b) £7,000 between them for the cost and inconvenience of having to deal hurriedly with the selection of the authorised photographs to enable them to be published in OK! magazine no later than the publication of the unauthorised photographs in Hello! magazine, and (c) nominal damages of £50 each for breach of the Data Protection Act 1998. The judge awarded OK! £1,026,706, representing his assessment of their loss of profit from the exploitation of the authorised photographs (essentially as a result of a much more modest increase in circulation than would otherwise have been enjoyed by the 241st and 242nd issues of OK! magazine) attributable to the publication of the unauthorised photographs on 24th November 2000. He also awarded OK! £6,450 in respect of wasted costs.

The issues raised on this appeal

26. First, Hello! contend that the judge was wrong to conclude that the Douglases were entitled to any relief. This contention is premised on the proposition that, whether one puts their case in terms of confidence or privacy, the Douglases had no cause of action against Hello! as a result of the publication of the unauthorised photographs. Secondly, Hello! argue that the judge was also wrong when he decided that OK! had a cause of action, based on confidence, as a result of the publication of the unauthorised photographs.

27. Thirdly, if Hello! succeed in establishing that they are not liable to OK! in confidence, OK! argue that, contrary to the judge's conclusion, Hello! are nonetheless liable to them on the basis of one or more of the economic torts. For reasons which will be explained when dealing with this part of the appeal, this argument depends on the Douglases maintaining their judgment against Hello!.

28. The fourth and fifth issues relate to damages. Hello! argue that, if they are liable to OK!, the judge erred, when assessing the effect on OK!'s profits, in taking into account the effect, not merely of the publication of the unauthorised photographs in Hello! magazine, but also of the publication of some of these in the Sun and the Daily Mail. Finally, if Hello! are liable to the Douglases, but not to OK!, the claimants contend that the damages awarded to the Douglases should be equivalent to the licence fee which they would have negotiated with Hello! for the publication of the

unauthorised photographs in Hello! magazine, and that the judge's assessment of that fee at £125,000 was too low.

The judgment on liability

29. The judgment on liability was 90 pages in length, the first 50 of which were devoted to the facts. The judge then identified the different kinds of claim advanced on the basis of these facts. For present purposes the following are relevant:

- On the basis that the wedding was private, the Douglases claim for breach of confidence, a duty, in that circumstance, owed only to them.
- Further, or alternatively, on the basis that the wedding was an event which was exploited for gain, all three claimants claim for breach of confidence, their case being that photographic representation of the events was, in effect, a commercial or trade secret.
- In the further alternative, the Douglases claim for breach of their right to privacy.
- All claimants claim that there was deliberate interference by the defendants with their trade or businesses, by unlawful means.
- All claimants claim that there was a conspiracy by the defendants to injure them by unlawful means.
- All claimants claim there was a conspiracy by the defendants with the predominant purpose of injuring them.

30. The judge dealt first with the two claims based on the law of confidence. He considered the recent development of this area of the law that has been stimulated by the Human Rights Act 1998. He set out the principles that he drew from the authorities in relation to what he described as 'personal or individual confidence'. He then went on to give consideration to what he described as 'commercial confidence'. He concluded that the authorities suggested that the benefit of a commercial confidence can be shared with and enforced by the original confider and another or others, where the facts require that such others should be protected.

31. In an important step in his reasoning the judge said this at paragraph 196 of his judgment:

> "I see it as appropriate to examine the applicability of the law of confidence on the basis that the Claimants had here a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by Miss Zeta-Jones and Mr Douglas for the benefit of them and of the 3rd Claimant. I quite see that such an approach may lead to a distinction between the circumstances in which equity affords protection to those who seek to manage their publicity as part of their trade or profession and whose private life is a valuable

> commodity and those whose is not but I am untroubled by that; the law which protects individual confidences and a law of privacy may protect the latter class and provide no reason to diminish protection for the former. So far as concerns OK!, the right to exclusivity of photographic coverage of the wedding was, in contrast with the nature of the confidence as to the 1st and 2nd Claimants, even more plainly a right in the nature of a trade secret."

32. The judge considered a number of defences raised to the claims and rejected them. These included the contention that the question of whether what took place at the wedding was confidential was governed by the law of New York and the contention that any rights of confidentiality were lost as a result of the publication of the authorised photographs by OK!

33. The judge's conclusion in relation to confidence appears in paragraph 228:

> "In my judgment, and first regarding the Claimants' case as one of either commercial confidence or of a hybrid kind in which, by reason of it having become a commodity, elements that would otherwise have been merely private became commercial, I find the Hello! Defendants to have acted unconscionably and that, by reason of breach of confidence, they are liable to all three Claimants to the extent of the detriment which was thereby caused to the Claimants respectively. "

34. The description of the confidence identified by the judge as 'hybrid' was appropriate. The Douglases had claimed damages under two heads: (1) for invasion of their privacy and (2) for damage to their commercial interest in information about their wedding. Their contention was that they were commercially exploiting information about their wedding in such a way as to preserve residual confidentiality, or privacy, in relation to it. Selected photographs would be made public, disclosing that part of the private information that the Douglases were content should be conveyed to the public. No other images would be made available to the public.

35. The judge appears to have accepted that this was a legitimate approach. He held at paragraph 52:

> " the notion of an exclusive contract as a means of reducing the risk of intrusion by unauthorised members of the media and hence of preserving the privacy of a celebrity occasion is a notion that can reasonably be believed in as a potentially workable strategy to achieve such ends."

36. When the judge came to assess damages, he made an award under each head. He awarded Mr Douglas and Ms Zeta-Jones £3,750 each, for distress at the publication of the unauthorised photographs. This can only have been on the basis that those photographs had invaded their privacy. He awarded them a further £7,000 jointly for the labour and expense of expediting the selection of photographs that were to be provided under their contract with OK!. This can only have reflected damage, or the

cost of mitigating damage, to their commercial interest in the information about their wedding.

37. The judge dealt shortly with the question of whether the Douglases could bring a separate claim under the law of privacy. He held that in this case the law of confidence provided them with an adequate remedy. Were that not the case it would have been for Parliament, not the court, to fill the gap.

38. So far as the claims for interference with business and conspiracy to injure, the judge held that the necessary elements in these causes of action were not all made out. We shall consider his reasoning in greater detail later in this judgment.

The issues in relation to confidence and privacy: the principles

Introductory

39. Mr Price QC, on behalf of Hello, submitted that it was not possible to approach this case, as the judge had done, on the premise that the rights involved were of a hybrid kind, being both personal and commercial. Different principles applied to the two different types of right.

40. So far as the Douglases' claim was concerned, the right that they invoked was a personal right in the nature of a privacy right. It was a right which would be infringed by publication of photos of the wedding if, but only if, such publication would be highly offensive to a reasonable person. The right was not transferable. In so far as the Douglases had such a right it was lost once they entered into an agreement with OK! under which that which they could have kept private was to be made public. Furthermore, any damages for infringement of this right could only reflect the values protected by the legal principle, that is privacy values.

41. So far as OK!'s claim was concerned, they claimed to have enjoyed a right of commercial confidence, transferred to them under their contract with the Douglases. The law recognised no such right in respect of what went on at the wedding and no such right could be transferred to OK!. Alternatively, if such a right did exist, it ceased on publication by OK! of the authorised photographs, which placed the information alleged to be confidential in the public domain.

42. Mr Price advanced separate defences based upon New York law. The unauthorised photographs were taken by Mr Thorpe in New York. Any duty of confidence on the part of Hello! could only be based on knowledge that Mr Thorpe owed a duty of confidence in relation to the photographs. Under the law of New York Mr Thorpe owed no such duty. It followed that Hello! owed no duty of confidence either to the Douglases or to OK!.

43. It is convenient to consider the issues in relation to the Douglases' claim separately from those in relation to OK!'s claim. The issues in relation to the Douglases' claim are as follows:

- (Disregarding the effect of the OK! contract) did the law of confidence protect information about the wedding as being private information? If so,

- Did the OK! contract destroy that protection?
- Did the law of confidence protect the Douglases' commercial interest in the information about their wedding?

44. The issues in relation to OK!'s claim are as follows:

- Did the OK! contract have the effect of extending to OK! the protection of the law of confidence in respect of the information about the wedding? If so
- Was that protection lost when OK! published the authorised photographs?

45. There is one issue common to both claims. Is this area of the law so uncertain that it cannot be invoked to justify interference with Hello!'s freedom of expression?

46. These issues fall to be considered in a context in which English law is rapidly developing. The enactment of the Human Rights Act provoked a lively discussion of the impact that it would have on the development of a law protecting privacy. The Government has made it clear that it does not intend to introduce legislation in relation to this area of the law, but anticipates that the judges will develop the law appropriately, having regard to the requirements of the Convention – see the comment of Lord Irvine LC in the course of the debate on the Human Rights Bill HL Debs Vol 583 Col 771 (24 November 1997) and the submissions of the United Kingdom in *Spencer v UK* (1998) 25 EHRR CD 105. The courts have not accepted this role with whole-hearted enthusiasm. Before turning to consider recent developments in this area of the law, we propose to consider two seminal questions: (1) What obligation does the Convention impose on the United Kingdom in relation to the protection of privacy? (2) What obligation is placed on the courts in respect of the protection of privacy?

The United Kingdom's Convention obligation in respect of privacy

47. We are not the first to acknowledge the assistance to be derived from Gavin Phillipson's lucid article, *Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act* (2003) 66 MLR 726. At p 729 he observes that the Strasbourg jurisprudence provides no definite answer to the question of whether the Convention *requires* states to provide a privacy remedy against private actors. That is no longer the case. In *von Hannover v Germany* (24 June 2004) the ECtHR gave judgment in respect of a series of complaints by Princess Caroline of Monaco. They all related to press photographs of her that had been taken in public places. She contended that these infringed her privacy and had sought a remedy in a series of actions in the German courts, which had been unsuccessful. She alleged that these decisions of the German courts infringed her Article 8 right to respect for her private and family life. The ECtHR agreed:

> "The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this

> primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *mutatis mutandis, X and Y v the Netherlands*, judgment of 26 March 1985, Series A no. 91, p 11, ss 23; *Stjerna v Finland*, judgment of 25 November 1994, Series A no. 299-B, p61, ss38; and *Verliere v Switzerland* (dec.), no. 41953/98, ECHR 2001-VII). That also applies to the protection of a person's picture against abuse by others " .

48. The ECtHR went on at paragraph 72 to state that the relevant German statute should have been interpreted narrowly by the German courts:

> "to ensure that the State complies with its positive obligation under the Convention to protect private life and the right to control the use of one's own image"

49. It follows that the ECtHR has recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way which will achieve that result.

What obligation is placed on the courts in respect of the protection of privacy?

50. Some, such as the late Professor Sir William Wade, in Wade & Forsyth *Administrative Law* (8th Ed.) p 983, and Jonathan Morgan, in *Privacy, Confidence and Horizontal Effect:" Hello" Trouble* (2003) CLJ 443, contend that the Human Rights Act should be given 'full, direct, horizontal effect'. The courts have not been prepared to go this far. In *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 AC 406 Lord Hoffmann observed at paragraph 30 that whether the law of confidence should be extended so as to protect privacy was a question which "must wait for another day", but he went on to hold that there could be no question of the courts adopting "some high level principle of privacy". In *Campbell v MGN* [2004] 2 WLR 1232 Lord Nicholls of Birkenhead observed at paragraph 11 that:

> "In this country, unlike the United States of America, there is no over-arching, all-embracing, cause of action for "invasion of privacy"…But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions."

51. Lord Nicholls went on to describe the way in which the law of breach of confidence has been adapted to embrace one aspect of invasion of privacy, the wrongful disclosure of private information, commenting at paragraph 14:

> "The essence of the tort is better encapsulated now as misuse of private information."

A little later in his speech he said this:

> "17.The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: *A v B plc* [2003] QB 195, 202, paragraph 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.
>
> 18. In reaching this conclusion it is not necessary to pursue the controversial question whether the European Convention itself has this wider effect. Nor is it necessary to decide whether the duty imposed on courts by section 6 of the Human Rights Act 1998 extends to questions of substantive law as distinct from questions of practice and procedures. It is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion."

52. Baroness Hale said that the Human Rights Act did not create any new cause of action between private persons. Nor could the courts invent a new cause of action to cover types of activity not previously covered. But where there is a cause of action the court, as a public authority, must act compatibly with both parties' Convention rights.

53. We conclude that, in so far as private information is concerned, we are required to adopt, as the vehicle for performing such duty as falls on the courts in relation to Convention rights, the cause of action formerly described as breach of confidence. As to the nature of that duty, it seems to us that sections 2, 3, 6 and 12 of the Human Rights Act all point in the same direction. The court should, insofar as it can, develop the action for breach of confidence in such a manner as will give effect to both Article 8 and Article 10 rights. In considering the nature of those rights, account should be taken of the Strasbourg jurisprudence. In particular, when considering what information should be protected as private pursuant to Article 8, it is right to have regard to the decisions of the ECtHR. We cannot pretend that we find it satisfactory to be required to shoe-horn within the cause of action of breach of confidence claims for publication of unauthorised photographs of a private occasion.

The law of confidence

54. We now turn to consider the law of confidence as it has developed up to this point. We start with *Prince Albert v Strange* (1849) 1 Mac & G 25. Prince Albert obtained an injunction restraining the defendant from publishing a catalogue of etchings made by himself and Queen Victoria. One ground for the grant of this equitable remedy was that the information in the catalogue must have been obtained by breach of trust, confidence or contract. The information in question was personal, not commercial,

although the defendant intended to make money out of it, and Lord Cottenham LC remarked that "privacy is the right invaded".

55. We can advance well over a century to *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, a case in which Megarry J analysed three elements of breach of confidence as established by the authorities up to that point in time. First the information had to be 'of a confidential nature'. In explaining this phrase Megarry J first cited the statement of Lord Greene MR in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 at p 215 that it must not be "something which is public property and public knowledge". This is not the clearest of definitions. 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. Megarry J went on to hold that "whether it is described as originality or novelty or ingenuity or otherwise, I think that there must be some product of the human brain which suffices to confer a confidential nature upon the information". While this may have been an appropriate statement on the facts before him, it is plainly not of general application, as the *Spycatcher* litigation demonstrates.

56. The second requirement was that the information must have been communicated by the confider to the confidant in circumstances of confidence. As to this requirement, Megarry J advanced the following test at p 48:

> "…if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose on him the equitable obligation of confidence."

The third requirement was that there had to be an unauthorised use of the information to the detriment of the confider. We would observe that the essential feature creating the duty of confidence was the circumstances in which the information was communicated from the confider to the confidant.

57. The information that was the subject matter of *Coco v A N Clark* was technical information of value for commercial purposes. It was held not to be of a confidential nature as it was already in the public domain.

58. In *Attorney-General v Guardian Newspapers Limited (No 2)* [1990] 1 AC 109 Lord Goff of Chieveley observed that an obligation of confidence could arise even where the information in question had not been confided by a confider to a confidant. He said at p 281:

> "I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties – often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such

> cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers – where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by."

59. Lord Goff went on to say that he had deliberately avoided the fundamental question whether, contract apart, the duty lay simply "in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained". We would observe that the reference to an *obviously confidential document* might be said to have begged the question of what made the document confidential. We would also observe that in Lord Goff's examples the nature of the information, together possibly with the form in which it was recorded, coupled with the circumstances in which it came to the notice of the person fixed with the duty of confidence, were such as to lead a reasonable person to conclude that the information in question was private.

60. Lord Goff also deliberately avoided the question of whether confidential information might be regarded as property, a question of particular importance in the context of the appeal before us.

61. The potential that Lord Goff's analysis had for protecting private information that was not recorded in a document was not immediately appreciated. In *Kaye v Robertson* (1991) 19 IPR 147 journalists had gained unauthorised access to the hospital bedside of a celebrity recovering from a brain injury and taken photographs of his appearance to which he was in no condition to consent. The Court of Appeal held that the law provided no protection for the photographic information so obtained. It was not even argued that the law of confidence could provide a remedy.

62. The significance of Lord Goff's approach was, however, appreciated by Laws J who, in *Hellewell v Chief Constable* [1995] 1 WLR 804 at p 807, made the following *obiter* observation:

> "If someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence. It is, of course, elementary that, in all such cases, a defence based on the public interest would be available."

63. The first detailed analysis of the impact of the Human Rights Act on the protection of privacy afforded by English law and, in particular, the law of confidence, was that carried out by the Court of Appeal when discharging the interlocutory injunction which had been granted in this case – reported at [2001] QB 967. Brooke LJ concluded, on the facts as they then appeared, that the unauthorised photographs had been taken by someone at the wedding, that is on a private occasion, who was under a duty of confidence, so that they constituted 'confidential information' under established principles. He went on to consider the possibility that the photographs had been taken by an intruder with whom no relationship of trust or confidence had been established, remarking that in that eventuality the court would have to explore the law relating to privacy when it was "not bolstered by considerations of confidence".

64. Brooke LJ went on to consider authorities involving invasion of privacy in England, in the Commonwealth and at Strasbourg, and concluded that it was a difficult question whether the Human Rights Act required the English courts to develop a law of privacy, but one that he was not obliged to solve.

65. Sedley LJ posed the same question, but gave it a more affirmative answer. He concluded (paragraph 110):

> "We have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy."

He went on (paragraph 125) to conclude that there was a powerfully arguable case on the existing authorities that the Douglases had a right of privacy that English law would recognise and, where appropriate, protect. Furthermore, section 12 of the Human Rights Act expressly required the court to have regard to Article 10 of the Convention and this, necessarily, brought 'into the frame' Article 8.

66. Keene LJ considered that developments in the law of breach of confidence gave the claimants at least an arguable claim. He remarked (paragraph 166):

> "The nature of the subject matter or the circumstances of the defendant's activities may suffice in some instances to give rise to liability for breach of confidence. That approach must now be informed by the jurisprudence of the Convention in respect of article 8. Whether the resulting liability is described as being for breach of confidence or for breach of a right to privacy may be little more that deciding what label is to be attached to the cause of action, but there would seem to be merit in recognising that the original concept of breach of confidence has in this particular category of cases now developed into something different from the commercial and employment relationships with which confidentiality is mainly concerned."

67. The Court discharged the injunction on the basis that the OK! contract had substantially weakened The Douglases' claim to relief based on invasion of privacy and that damages or an account of profits was likely to provide an adequate remedy should breach of duty be established at the trial.

68. Perhaps the most dramatic use of the law of confidence to protect privacy occurred within weeks of the interlocutory decision in this case. In *Venables and Thompson v New Group Newspapers Ltd and others* [2001] Fam 430 Dame Elizabeth Butler-Sloss P granted injunctions against the whole world restraining the disclosure of any information that might lead to the identification of the murderers of James Bulger after their release from prison. The President held that, taking into account the Convention, the law of confidence could extend to cover the injunctions sought. Disclosure of the information in question might lead to grave, and possibly fatal, consequences for the claimants. This factor not merely rendered the information confidential, but outweighed the freedom of expression that would otherwise have underpinned the right of the press to publish the information.

69. A remarkable feature of this decision was that the nature of the information alone gave rise to the duty of confidence regardless of the circumstances in which the information might come to the knowledge of a person who might wish to publish it.

70. In *A v B* [2003] QB 195 the Court of Appeal had to consider an application to set aside an interim injunction preventing the first defendant newspaper from publishing details of the claimant's sexual relationships with the second defendant and a woman to whom he was not married. The injunction had been granted on the ground that the information was confidential and subject to the protection of Article 8 of the Convention and there was no public interest in publication that enabled the defendant's rights of freedom of expression to prevail.

71. In introducing the judgment of the court, Lord Woolf CJ said this at paragraph 4:

> "The application for interim injunctions have now to be considered in the context of articles 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. These articles have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the application raise has been modified because, under section 6 of the 1998 Act, the court, as a public authority, is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles."

72. Lord Woolf then laid down guidelines which a court should follow when considering a similar application. These include the proposition that in the great majority of, if not all, situations where the protection of privacy is justified in relation to events after the Human Rights Act came into force, an action for breach of confidence will provide the necessary protection. As to interests capable of being subject to a claim for privacy, these will usually be obvious. 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. If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to an action for breach of confidence unless the intrusion can be justified.

73. Lord Woolf went on to deal with the circumstances where a person can and cannot reasonably expect details of his sexual activities to be treated as confidential. This was a matter that later fell for consideration by Ouseley J in *Theakston v MGN* [2002] EWHC 137 and, in the nature of things, is likely to call for consideration not infrequently in the future. Having regard to the facts of the present case this is not an area that we need explore. We would simply observe that to date the English courts appear to have taken a less generous view of the protection that the individual can reasonably expect in respect of his or her sexual activities than has the Strasbourg court.

74. The most recent and authoritative consideration that has been given to this area of the law is to be found in the speeches of the House of Lords in *Campbell v MGN.* Naomi Campbell brought proceedings for breach of confidence in respect of an article in the Mirror newspaper which disclosed that she was a drug addict, and was attending meetings of Narcotics Anonymous. Details were given as to the frequency of these meetings and the article was illustrated by photographs of her on the doorstep of a building where such a meeting had just taken place. The photographs had been taken covertly from a car by a freelance photographer who had been employed by the newspaper for this purpose.

75. Miss Campbell did not complain of the publication of the fact that she was a drug addict. She accepted that, because she had gone on record as saying that she did not take drugs, the press served a legitimate public interest in putting the record straight. She complained, however, that the information about her attendance at Narcotics Anonymous was private information that the Mirror had disclosed in breach of confidence. As to the photographs, Miss Campbell expressly did not complain that it was a breach of confidence to publish these on the ground that they had been taken covertly. Her complaint was that the information depicted by the photographs formed part of the private information which the Mirror had no justification for publishing.

76. Miss Campbell succeeded at first instance. She lost in the Court of Appeal on the ground that the information that she alleged was private was information that it was legitimate for the Mirror to publish, being peripheral to the central story that she was a drug addict and published in order to portray her in a favourable light. The House of Lords, by a majority or 3 to 2, took a different view. The details of Miss Campbell's treatment with Narcotics Anonymous, together with the photographs, constituted private information the publication of which amounted to what used to be called a breach of confidence. While the House divided on the application of the law to the facts, there was no significant disagreement as to the relevant principles of law.

77. We have already referred to Lord Nicholls's statement that the essence of the tort was better encapsulated as a misuse of private information. That statement was preceded by the following passage:

> "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 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"

78. Later at paragraph 21 Lord Nicholls commented:

> "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 drew attention to the distinction between identifying whether information is private and identifying whether it is proportionate to prevent disclosure of such information, having regard to the competing Convention right of freedom of expression. He suggested that the test of whether disclosure would be "highly offensive to a reasonable person" , advanced by Gleeson CJ when considering the test of what is private in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, paragraph 42, was more relevant to the latter issue.

79. Lord Hoffmann identified two developments of the law of confidence. The first was the recognition of the artificiality of distinguishing between confidential information obtained through a violation of a confidential relationship and similar information obtained in some other way. The second was the acceptance, under human rights instruments such as Article 8 of the Convention, of the privacy of personal information as something worthy of protection in its own right. As to the latter there was no logical ground for affording a person less protection against a private individual than against the state. In the result (paragraph 51):

> "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."

80. Lord Hope of Craighead (paragraph 85) approved Lord Woolf CJ's statement in *A v B* that 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. He considered that Gleeson CJ's test was useful where there was room for doubt, but:

> "If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published." (paragraph 96)

81. Baroness Hale held that the cause of action of breach of confidence had within its scope what has been termed "the protection of the individual's informational autonomy". Where 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 the threshold is reached where the court will have to balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it (paragraph 137). Lord Carswell at paragraph 166 observed that it was not necessary to apply Gleeson CJ's test. It was sufficiently established by the nature of the material that it was private information which attracted the duty of observing the confidence in which it was imparted to the respondents.

82. Some of the comments that we have cited underline the validity of Lord Nicholls's observation that the use of the phrase "duty of confidence" and the description of private information as "confidential" are not altogether comfortable. What the House was agreed upon was that the knowledge, actual or imputed, that information is private will normally impose on anyone publishing that information the duty to justify what, in the absence of justification, will be a wrongful invasion of privacy. The House was also agreed that, when Article 8 and Article 10 are both engaged, one does not start with the balance tilted in favour of Article 10.

'Private information'

83. Megarry J in *Coco v A N Clark* identified two requirements for the creation of a duty of confidence. The first was that the information should be confidential in nature and the second was that it should have been imparted in circumstances importing a duty of confidence. As we have seen, it is now recognised that the second requirement is not necessary if it is plain that the information is confidential, and for the adjective 'confidential' one can substitute the word 'private'. 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 that the information satisfies these criteria.

Photographic information

84. This action is about photographs. Special considerations attach to photographs in the field of privacy. They are not merely a method of conveying information that is an alternative to verbal description. They enable the person viewing the photograph to act as a spectator, in some circumstances voyeur would be the more appropriate noun, of whatever it is that the photograph depicts. As a means of invading privacy, a photograph is particularly intrusive. This is quite apart from the fact that the camera, and the telephoto lens, can give access to the viewer of the photograph to scenes where those photographed could reasonably expect that their appearances or actions would not be brought to the notice of the public.

85. The intrusive nature of photography is reflected by the various media codes of practice. It is also recognised by the authorities. In *Theakston v MGN* Ousley J refused an injunction restraining publication of a verbal depiction of the claimant's activities in a brothel. He granted, however, an injunction restraining the publication of photographs taken of these activities. He held, at paragraph 78:

> "The authorities cited to me showed that the Courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish. This protection extended to photographs, taken without their consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in pubic or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars. I concluded that this part of the injunction involved no particular extension of the law of confidentiality and that the publication of such photographs would be particularly intrusive into the Claimant's own individual personality. I considered that even though the fact that the Claimant went to the brothel and the details as to what he did there were not to be restrained from publication, the publication of photographs taken there without his consent could still constitute an intrusion into his private and personal life and would do so in a peculiarly humiliating and damaging way. It did not seem to be remotely inherent in going to a brothel that what was done inside would be photographed, let alone that any photographs would be published."

86. In *D v L* [2004] EMLR 1 at p 10 Waller LJ remarked:

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

87. In *von Hannover v Germany* the ECtHR remarked at paragraph 59:

> "Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life of even of persecution."

88. In *Campbell v MGN*, although Naomi Campbell made no complaint that the publication of her photographs itself constituted a breach of confidence, both Lord Hope and Baroness Hale placed particular weight on the intrusive nature of photographs. Lord Hope said at paragraph 123:

> "Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken deliberately, in secret, and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixelated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded."

89. Lord Hope had earlier held applicable the reasoning of the Supreme Court of Canada in *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. The court had held that publication in a magazine of an unauthorised photograph of a 17 year old girl sitting on the steps of a public building had violated her right to respect for private life conferred under Article 5 of the 'Quebec Charter' of Human Rights and Freedoms.

90. Baroness Hale was not prepared to go this far. She said that by themselves the photographs would not have been objectionable, contrasting the law of England with that applied in the *Vice-Versa* case. She held the photographs objectionable because (paragraph 155):

> "A picture is "worth a thousand words" because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like."

91. With this summary of English law, we turn to the issues raised by the facts of this case.

The Douglases' Claim

Disregarding the OK! contract, did the law of confidence protect information about the wedding as private information?

92. We should make clear at the outset that the only issue on liability was whether the photographs published by Hello! infringed rights of confidence or privacy enjoyed by the Douglases. As the judge recorded, Hello! did not seek to argue that it was in the public interest that they should publish the unauthorised photographs or that their Article 10 rights of freedom of expression outweighed any rights of confidence or privacy that the Douglases enjoyed.

93. The judge found (paragraph 66):

> "To the extent that privacy consists of the inclusion only of the invited and the exclusion of all others, the wedding was as private as was possible consistent with it being a socially pleasant event."

He further found that Mr Thorpe took the unauthorised photographs surreptitiously in circumstances where he was well aware that his presence at the wedding was forbidden. Finally the judge found that those responsible for purchasing the unauthorised photographs on behalf of Hello! were aware that the taking of the photographs would have involved at least a trespass or some deceit or misrepresentation on the photographer's part.

94. Had the wedding taken place in England, and putting on one side the effect of the OK! contract, only an affirmative answer could be given to the question of whether those acting for Hello! knew that the information depicted by the unauthorised photographs was fairly and reasonably to be regarded as confidential or private.

95. Applying the test propounded by the House of Lords in *Campbell v MGN,* photographs of the wedding plainly portrayed aspects of the Douglases' private life and fell within the protection of the law of confidentiality, as extended to cover private or personal information. Does it make any difference that the wedding took place in New York?

The effect of the law of New York

96. It was not suggested that section 9(1) of the Private International Law (Miscellaneous Provisions) Act 1995 is applicable to this case, but we have none the less considered that question. That section governs the choice of law for determining issues relating to tort. The Douglases' claim in relation to invasion of their privacy might seem most appropriately to fall within the ambit of the law of delict. We have concluded, however, albeit not without hesitation, that the effect of shoe-horning this type of claim into the cause of action of breach of confidence means that it does not fall to be treated as a tort under English law, see *Kitechnology BV v Unicor GmbH* [1995] IL Pr 568; [1995] FSR 795 at paragraph 40, and more generally *Clerk & Lindsell on Torts,* (18th edition, 2000) at footnotes 2 and 3 to paragraph 27-001. Nor has anyone suggested that the facts of this case give rise to a cause of action in tort under the law of New York (see below). Accordingly we have concluded that the parties were correct to have no regard to section 9(1) of the 1995 Act.

97. *Dicey & Morris on The Conflict of Laws* (13th edition, 2000) Vol II suggest somewhat tentatively, at paragraph 34-029 and following, that a claim for breach of confidence falls to be categorised as a restitutionary claim for unjust enrichment and that the proper law is the law of the country where the enrichment occurred. While we find this reasoning persuasive, it does not solve the problem on the facts of this case. Even if the Douglases' claim for invasion of their privacy falls to be determined according to principles of English law, these may themselves require consideration of the law of New York. That indeed is the case advanced on behalf of Hello!

98. The judge held that the conscience of Hello! was tainted, so far as the use of the unauthorised photographs were concerned, by a number of matters. They knew of the security precautions taken by the Douglases to prevent unauthorised photography.

They knew of OK!'s exclusive contract. They knew that the unauthorised photographs must have been taken surreptitiously and have involved at least a trespass by the photographer. In these circumstances he brushed aside arguments advanced by Hello! based on the law of New York in half of a single paragraph (211):

> "Then these Defendants say there was no wrong done by the law of the place, New York, but, firstly, I cannot see how Mr Thorpe can fail to be regarded as other than having been at least a trespasser by the law of New York and it has certainly not been demonstrated to me that he was not. Secondly, so long as the conscience of the publishers of Hello! is tainted, as I have held it to be, I fail to see how Thorpe's innocence of any breach of local law, even had that been proved to me, should assist them."

99. The judge's finding that Mr Thorpe must at least have been a trespasser under the law of New York was not challenged. Hello!'s argument, as advanced before us, was as follows. The information in the unauthorised photographs can only have attracted the protection of the law of confidence (1) as a consequence of the subject matter of the photographs or (2) as a result of the circumstances in which they were taken. So far as the subject matter was concerned, this could only attract protection if it was, itself, of a nature that would be highly offensive to a reasonable person of ordinary sensibilities. That was not this case. It followed that to establish that the information was protected, the Douglases had to rely upon the circumstances in which the information was published. As to these, the relevant circumstances were events in New York, and the implication of those events had to be considered according to the law of New York. Under the law of New York there would have been no inhibition upon Mr Thorpe publishing the photographs which he had taken. Hello!, having derived the photographs from Mr Thorpe, could be no worse off. Although the judge made no express finding on the point, we understand that it was common ground that, had the unauthorised photographs been published by Mr Thorpe in New York, or sold by Mr Thorpe to Hello! and published by Hello! in New York, no actionable wrong would have been committed.

100. We do not consider that the law of New York has any direct application on the facts of this case. The cause of action is based on the publication in this jurisdiction and the complaint is that private information was conveyed to readers in this jurisdiction. The test of whether the information was private so as to attract the protection of English law must be governed by English law. That test, as established by *Campbell v MGN*, is whether Hello! knew or ought to have known that the Douglases had a reasonable expectation that the information would remain private. Where the events to which the information relates take place outside England – in this instance in New York – the law of the place where they take place may nonetheless be relevant to the question of whether there is a reasonable expectation that the events will remain private.

101. If, in the present case, the law of New York had provided that any member of the public had a right to be present at a wedding taking place in a hotel and to take and publish photographs of that wedding, then photographs of the wedding would be unlikely to have satisfied the test of privacy. That was not the case, however. The law of New York clearly entitled the Douglases to arrange for their wedding to take place in circumstances designed to ensure that events at the wedding remained private, at

least so far as photographic detail was concerned. The fact that photographs taken in violation of that privacy might have been published with impunity in New York has no direct bearing on whether the information fell to be treated as private and confidential in England. The question of whether, if unauthorised photographs of the wedding had actually been published in New York, privacy and confidentiality in England would have been destroyed is a different question, and one relevant to the next question that we have to address.

102. To summarise our conclusion at this stage: disregarding the effect of the OK! contract, we are satisfied that the Douglases' claim for invasion of their privacy falls to be determined according to the English law of confidence. That law, as extended to cover private and personal information, protected information about the Douglases' wedding.

The effect of the OK! contract

103. Hello!'s argument, as advanced by Mr Price, is that, once the Douglases had committed themselves by the OK! contract to putting before the public photographs of their wedding, it was no longer possible for them to advance a claim that events at their wedding were private or confidential. Thereafter, publication of other photographs of that event could not possibly infringe Article 8 of the Convention or give rise to a claim for breach of confidence.

104. We have seen that the first element of breach of confidence identified by Megarry J in *Coco v A N Clark* was that the information had to be 'of a confidential nature', as opposed to being public property and public knowledge. The *Spycatcher* litigation concerned republication in English newspapers of extracts from a book, published without legal restraint in Australia and elsewhere, which had been written by a former member of the British secret service in breach of contract and confidence applicable under English law. In that litigation, which culminated in the decision of the House of Lords in *Attorney-General v Guardian Newspapers Limited (No 2)* [1990] 1 AC 109, it was held, after much discussion, that the protection of the law of confidence had been lost as a result of the information coming into the public domain. Care must be exercised in applying that decision generally, for there is a special principle of law which precludes the State from asserting breach of confidence where it cannot be shown that this is in the public interest.

105. In general, however, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, though this may not always be true: see *Gilbert v Star Newspaper Company Limited* (1894) 51 TLR 4 and *Creation Records Limited v News Group Newspapers Ltd* [1997] EMLR 444 at p 456. The same may generally be true of private information of a personal nature. Once intimate personal information about a celebrity's private life has been widely published it may serve no useful purpose to prohibit further publication. The same will not necessarily be true of photographs. Insofar as a photograph does more than convey information and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph and even when one who has seen a previous publication of the photograph, is confronted by a fresh publication of it. To take an example, if a film star were photographed, with the aid of a telephoto lens, lying naked by her private swimming pool, we question whether widespread publication of

the photograph by a popular newspaper would provide a defence to a legal challenge to repeated publication on the ground that the information was in the public domain. There is thus a further important potential distinction between the law relating to private information and that relating to other types of confidential information.

106. Nor is it right to treat a photograph simply as a means of conveying factual information. A photograph can certainly capture every detail of a momentary event in a way which words cannot, but a photograph can do more than that. A personal photograph can portray, not necessarily accurately, the personality and the mood of the subject of the photograph. It is quite wrong to suppose that a person who authorises publication of selected personal photographs taken on a private occasion, will not reasonably feel distress at the publication of unauthorised photographs taken on the same occasion.

107. There is a further point. The objection to the publication of unauthorised photographs taken on a private occasion is not simply that the images that they disclose convey secret information, or impressions that are unflattering. It is that they disclose information that is private. The offence is caused because what the claimant could reasonably expect would remain private has been made public. The intrusion into the private domain is, of itself, objectionable. To the extent that an individual authorises photographs taken on a private occasion to be made public, the potential for distress at the publication of other, unauthorised, photographs, taken on the same occasion, will be reduced. This will be very relevant when considering the amount of any damages. The agreement that authorised photographs can be published will not, however, provide a defence to a claim, brought under the law of confidence, for the publication of unauthorised photographs. It follows that we do not accept Mr Price's submission that the effect of the OK! contract precluded the Douglases' right to contend that their wedding was a private occasion and, as such, protected by the law of confidence.

108. This conclusion endorses that reached by Sedley LJ, who held at the interlocutory stage that the Douglases:

> "were careful by their contract to retain a right of veto over publication of OK !'s photographs in order to maintain the kind of image which is professionally and no doubt also personally important to them. This element of privacy remained theirs and Hello!'s photographs violated it."

109. Keene LJ was less positive about this point. He concluded that it was arguable that a limited degree of privacy remained vested in the Douglases so that they could validly complain of the loss of control over the photographs to be published, leading to damage to their image because of unflattering photographs. We agree that the Douglases were entitled to complain about the unauthorised photographs as infringing their privacy on the ground that these detracted from the favourable picture presented by the authorised photographs and caused consequent distress.

110. The judge awarded £3,750 to each of the Douglases in respect of the distress caused by the unauthorised photographs, a very modest sum in the context of this litigation. No challenge is made to the amount of damages awarded and so we see no ground for interfering with this head of damage.

Did the law of confidence protect the Douglases' commercial interest in information about their wedding?

111. The other head of damages awarded to the Douglases related to the labour and expense of editing the selection of photographs that were to be provided under the contract with OK!. This head of damage could only be justified in so far as it represented compensation for interference with the Douglases' commercial exploitation of their wedding. We agree with Mr Price that this head of claim had nothing to do with interference with private life. It was based on an assertion that the Douglases had a commercial interest in making public information about their wedding, which they were entitled to protect. The judge accepted that the information of what took place at the wedding was similar to a trade secret which the Douglases were entitled to exploit and to keep confidential until exploited. Hello! contend that no such right is known to English law. Whether the law recognises such a right is of importance not merely in relation to the £7,000 damages awarded to the Douglases for interference with their right, but because OK!'s much greater award of damages was premised on a finding that this right was shared with them.

112. The judge, at paragraph 196, held that the law of confidence protects "those who seek to manage their publicity as part of their trade or profession and whose private life is a valuable commodity". If this statement is correct the law treats information about a celebrity's private life as a trade secret and grants an injunction against publication of such information, or damages in respect of it, not because of the distress which the invasion of privacy causes but because of the commercial damage caused by infringing the celebrity's monopoly right to make such information public. Two questions arise. Was the judge correct to recognise that English law affords protection to private information on this basis? If so, is the protection afforded in respect of events which take place in another jurisdiction?

113. Recognition of the right of a celebrity to make money out of publicising private information about himself, including his photographs on a private occasion, breaks new ground. It has echoes of the *droit à l'image* reflected in Article 9 of the French *Code Civil* and the German cause of action that Professor Markesinis describes as the 'tort of publicity claim' – see volume 52 of the American Journal of Comparative Law (2004) at p 176. Despite the comment of Rozenberg in *Privacy and the Press* (2004) at p 228, we do not see this as any reason to draw back. We can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret. It is helpful at this point to consider how far English law has gone in this direction.

114. There is cogent authority that supports the proposition that equity will protect trade secrets that have been divulged in breach of a confidential relationship. See for example *Saltman Engineering v Campbell Engineering* and *O Mustad & Son v S Allcock & Co Ltd* [1963] 3 All ER 416. The question raised by this appeal is the extent to which similar protection will be afforded to other types of valuable information which is acquired, not by breach of a confidential relationship, but by some form of unauthorised intrusion into a situation of privacy.

115. In *Prince Albert v Strange* the Lord Chancellor relied both on Prince Albert's property in the etchings and in the fact that they were private when holding that he

was entitled to prevent the publication of information about them in the form of a catalogue. Had Prince Albert himself been intending to publish such information for profit, we doubt if the Lord Chancellor would have been any the less inclined to afford him a remedy.

116. In *Gilbert v The Star*, W S Gilbert obtained an injunction restraining publication of confidential information about the plot of his new comic opera, asserting that such publication was calculated to cause him economic injury. In *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134 the High Court granted an interlocutory injunction restraining publication of photographs conveying information about details of a forthcoming film, which those making it had taken reasonable steps to keep secret for obvious commercial reasons. In granting the injunction on the grounds, among others, of an arguable case in confidence, Mr Martin Mann QC, the deputy high court judge, accurately observed:

> "… whether or not equity imposes an obligation to keep information confidential depends upon a great many factors often unique to the case in which it is said to do so. However, most cases will have certain common constituents, namely, the existence of a body of information which a plaintiff wishes to keep confidential for the protection of some lawful interest of his, a defendant coming into possession of such information in circumstances in which he actually knows (or is fixed by operation of law with knowledge of) or ought as a reasonable person to know the plaintiff intends to be kept confidential, a detriment actual or potential to the plaintiff from publication, the non-availability of such information to the public and the absence of any public interest in disclosure."

117. *Creation Records v News Group* was another interlocutory decision in which the issue was whether the facts disclosed an arguable breach of confidence. Those facts were that a pop group had posed at a specially devised scene, consisting of a white Rolls Royce in the swimming pool of a hotel and incorporating various other props. The object of the exercise was to take a photograph to be used as a record cover. The defendants commissioned a freelance photographer to take photographs of the scene. Lloyd J granted an injunction restraining the publication of these photographs on the ground that it was well arguable that the nature of the operation together with the imposition of security measures made the occasion one of confidentiality, at any rate as regards photography.

118. These decisions are of no more than persuasive authority and some of them have not been without critics. We consider, however, that they reflect the following principles. Where an individual ('the owner') has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner. We have used the term 'the owner' loosely.

119. We have concluded that confidential or private information, which is capable of commercial exploitation but which is only protected by the law of confidence, does not fall to be treated as property that can be owned and transferred. We shall explain our reasons for this conclusion when we deal with OK!'s claim.

120. It remains to consider whether, in so far as the Douglases' claim is in respect of damage to their commercial interest in the information about their wedding, the law of New York has any greater relevance than it has in relation to their claim for invasion of their privacy. We have concluded that it does not. The Douglases' claim is for damage done to their commercial interests in this country by publication of the unauthorised photographs in this country. Our reasoning in relation to the claim for invasion of privacy applies equally in respect of this head of claim. The Douglases had taken steps, permitted under the law of New York, which were intended to ensure that their wedding was a private occasion and that no unauthorised photographs were taken or published. Hello! knew this. Hello! also knew that the Douglases expected commercially to exploit their private wedding by the publication of authorised photographs. Hello! deliberately obtained photographs that they knew were unauthorised and published them to the detriment of the Douglases. This renders them liable for breach of confidence under English law.

121. For these reasons the appeal against the judgment in favour of the Douglases is dismissed.

OK!'s Claim in confidence

Did the OK! contract extend to OK! the protection of the law of confidence in respect of the information about the wedding?

122. Lindsay J recorded at paragraph 187:

> "The Hello! Defendants accept, of course, that trade secrets can be sold and it is common enough in commercial confidence cases for the benefit of the confidentiality to be shared with others. The confidentiality of a trade secret, for example, may be shared between, and enforceable by, the inventor and the manufacturer to whom he had granted licence for the secret to be turned to account."

123. The judge cited in support of these propositions *Gilbert v The Star* and *Mustad v Allcock.* He continued, referring to the latter decision:

> "The report is not entirely clear as it sometimes speaks of Dosen having acquired information whilst in "their service", i.e. that of Mustad, yet speaks also of what Dosen had learned in the service of his "former master", a reference to Thoring & Co.. The better view, as it seems to me, is that Dosen was never in Mustad's employ and never acquired the relevant knowledge whilst in Mustad's employ. On that footing the case shows that the benefit of a confidence can pass, in that case by purchase from the liquidator of Thoring, and, if that is so, then it is hard to see why it should not be shared between and be enforceable

> by co-owners or by a successor in title, at any rate where the defendant knew or could be taken to have known of the co-ownership or sharing before acting in breach and where all entitled to the confidence assert it. ”

124. Mr Price challenged this part of the judge’s reasoning. He drew an analogy between the wedding and a dramatic performance, in which the Douglases were the performers. He submitted that the rights of the performers in respect of unauthorised photographic or sound reproduction of their live performances were accorded limited statutory protection under Part II of the Copyright, Designs and Patents Act 1988. Under the 1988 Act these performers’ rights were ‘non-property rights’ and could not be assigned or transmitted to third parties – see section 192A. It would be very strange if, by expressly prohibiting filming, recording or photography, performers could place themselves in a position to create rights to prohibit reproductions of their live performances, assignable to and enforceable by third parties. It would be equally strange if those taking part in a wedding were in such a position.

125. We observe that under sections 185 and 186 of the 1988 Act a person to whom a performer has granted the exclusive right to photograph his performance receives a right which he *can* enforce against third parties. It seems to us that the nature of the contractual rights conferred on OK! by the Douglases requires careful analysis before any analogies are drawn with the position of performers.

126. The starting point is to consider the nature of the rights enjoyed by the Douglases. As we have already indicated, their interest in the private information about events at the wedding did not amount to a right of intellectual property. Their right to protection of that interest does not arise because they have some form of proprietary interest in it. If that were the nature of the right, it would be one that could be exercised against a third party regardless of whether he ought to have been aware that the information was private or confidential. In fact the right depends upon the effect on the third party’s conscience of the third party’s knowledge of the nature of the information and the circumstances in which it was obtained.

127. Lord Upjohn accurately summarised the position in *Boardman v Phipps* [1967] 2 AC 46 at pp 127-8, when he said:

> “The true test is to determine in what circumstances the information has been acquired. If it has been acquired in such circumstances that it would be a breach of confidence to disclose it to another then courts of equity will restrain the recipient from communicating it to another. In such cases such confidential information is often and for many years has been described as the property of the donor, the books of authority are full of such references: knowledge of secret processes, “know-how”, confidential information as to the prospects of a company or of someone’s intention or the expected results of some horse race based on stable or other confidential information. But in the end the real truth is that it is not property in any normal sense but equity will restrain its transmission to another if in breach of some confidential relationship.”

128. The judge treated the information about the wedding rather as if it were property when he referred to its benefit being “shared between and…enforceable by co-owners or by a successor in title”. We shall consider the two decisions upon which the judge relied as showing that the benefit of confidential information could be transferred.

129. In *Gilbert v The Star* the claim for an injunction restraining disclosure of the plot of Mr Gilbert’s libretto was initially brought by Mr Gilbert alone. The basis of the claim was that the plot must have been disclosed to the Star in breach of confidence and of an implied contractual term by an actor or employee at the theatre. The judge required the manager of the theatre to be joined as a plaintiff on the ground that the contracts of employment were with him, rather than with Mr Gilbert. This decision supports the proposition that, where the benefit of confidential information is shared between A and B, B can claim that disclosure of that information will constitute a breach of a duty of confidence owed to B. However, the significance of the case is complicated by the fact that the existence of a contract imposing a duty of confidentiality between B and the supplier of the information to the Star was considered by the judge to be of critical importance. Further, it was a first instance case merely concerned with the grant of an interlocutory injunction.

130. The facts of *Mustad v Allcock* were complex, but can for present purposes be simplified. Mr Dosen worked for a company T under a contract of employment that included an undertaking to keep confidential information acquired at work. T went into liquidation and Mustad bought T’s business, including the benefit of trade secrets and pledges of secrecy. Dosen then went to work for Allcock. Mustad obtained an injunction restraining Dosen from communicating to Allcock information acquired when working for T. This decision supports the proposition that a purchaser of confidential information can restrain disclosure of that information in breach of confidence, but again the picture is complicated by the fact that the benefit of Dosen’s contractual obligation not to disclose the information was purchased by Mustad.

131. The facts of the present case are very different from those of the two cases relied upon by Lindsay J. The material provisions of the OK! contract ,which we have set out in detail at paragraphs 5 to 9 above, had the following effect:

- The Douglases would procure the taking of colour photographs of the wedding wherever and whenever they chose (‘the official photographs’) (clause 6).

- The Douglases would procure that they became joint owners of all copyright and any other rights in the official photographs (clause 7).

- The Douglases would provide OK! with approved, and where necessary retouched, photographs, selected from the official photographs (“the approved photographs”) (clause 7).

- The Douglases would transfer to OK! the exclusive rights to publish the approved photographs or to authorise others to do so, world wide, for a period of 9 months (clause 2).

- The Douglases would transfer to OK! the exclusive right for a period of 9 months to consent to use their names, voices, signatures,

photographs or likenesses in connection with the wedding for advertising purposes (clauses 4 and 5).

- The Douglases would use their best efforts to ensure that neither the media nor anyone else should take wedding photographs (clauses 6 and 16).

- The Douglases would not, for a period of 9 months, authorise publication of any other of the official photographs without prior approval from OK! (clause 12).

- If any third party not licensed by OK! should use one of the Douglases' name, voice, signature, photograph or likeness in connection with the wedding, OK! would, at the written request the Douglases, where possible, pursue all necessary legal action to cause such third party to cease such infringement (clause 13).

132. It can thus be seen that the OK! contract did not purport to transfer to or share with OK! the right to use, or even know of, any photographic information about the wedding other than the approved photographs released to OK! by the Douglases for publication pursuant to clause 7, the copyright of which was vested in the Douglases. OK! were given an exclusive licence to publish, and to authorise others to publish, these photographs for a period of 9 months.

133. The Douglases retained to themselves those of the official photographs which they did not choose to have published. They undertook not to authorise the publication of these. They also undertook to use their best endeavours to see that no other photographs of the wedding were taken.

134. The grant to OK! of the right to use the approved photographs was no more than a licence, albeit an exclusive licence, to exploit commercially those photographs for a nine month period. This licence did not carry with it any right to claim, through assignment or otherwise, the benefit of any other confidential information vested in the Douglases. In *Allen & Hanbury Ltd v Generics Ltd* [1986] RPC 203 at p 246 Lord Diplock said that a licence:

> "passes no proprietary interest in anything; it only makes an action lawful which would otherwise have been unlawful."

135. As Jacob J pointed out in *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785 at paragraph 28, some statutes expressly give an exclusive licensee of intellectual property the right to sue an infringer. The Copyright, Designs and Patents Act 1988 is an example (see paragraphs 124 and 125 above). In the absence of such a statutory provision a mere exclusive licence to use authorised photographs of an event does not carry with it the right to sue a third party for infringement of a right vested in the licensor to object to the publishing of other photographs of that event.

136. We have recognised that the Douglases retained a residual right of privacy, or confidentiality, in those details of their wedding which were not portrayed by those of the official photographs which they released. It was in the interests of OK! that the Douglases should protect that right, so that OK! would be in a position to publish, or

to authorise the publication of, the only photographs that the public would be able to see of the wedding. On analysis, OK!'s complaint is not that Hello! published images which they had been given the exclusive right to publish, but that Hello! published other images, which no one with knowledge of their confidentiality had any right to publish. The claimants themselves argued that "the unauthorised photographs were taken at different moments to the authorised ones, showed different and informal incidents at the reception, and were naturally much less posed". These photographs invaded the area of privacy which the Douglases had chosen to retain. It was the Douglases, not OK!, who had the right to protect this area of privacy or confidentiality. Clause 10 of the OK! contract expressly provided that any rights not expressly granted to OK! were retained by the Douglases. The claim successfully advanced by the Douglases in this litigation is at odds with OK!'s claim.

137. For these reasons we conclude that the judge was wrong to hold that OK! was in a position to invoke against Hello! any right to commercial confidence in relation to the details of the wedding or the photographic images portraying these.

The effect of the publication of the photographs in OK! magazine

138. If we are wrong in our conclusions that OK! had no right of commercial confidence in the information portrayed by Hello!'s photographs, this can only be on the basis that the photographs published by Hello! fell within a generic class of commercially confidential information to which OK! were party and which OK! were entitled to protect. On that premise we propose to consider the effect of the fact that, as a result of OK! advancing the publication date of the first edition of OK! magazine to carry photographs of the wedding, these photographs were published on the same day as the unauthorised photographs were published in Hello! magazine. Mr Price argued that the publication of the photographs in OK! magazine brought the confidential information that they portrayed into the public domain, so that this was no longer capable of giving rise to a duty of confidence.

139. Mr Desmond Browne QC advanced more than one answer to Mr Price's argument. He relied upon the fact that the unauthorised photographs were "quite different in nature to the authorised ones", which simply underlined his difficulty in showing that his clients, OK!, had any rights in respect of the subject matter of the unauthorised photographs. More pertinently he questioned the application to photographs of the proposition that information loses protection of the law of confidence once it is in the public domain. His most cogent submission was that, when Hello! published the unauthorised photographs, the photographs in OK! magazine were not truly in the public domain. They were not widely available to the public. OK! could properly have expected to be able to control when to publish the authorised photographs and they could not lose the protection of the law of confidentiality until they were so widely available to the public that they no longer retained any commercial value capable of exploitation.

140. We have already questioned the application of the 'public domain' test to photographs in the context of invasion of privacy. Where the claimant's interest is a commercial interest in the exploitation of information by the publication of photographs, the legal effect of prior publication of similar information is particularly difficult to analyse. We do not, however, consider that the facts of this case raise a problem. If, contrary to the conclusion we have reached, OK! were entitled to enjoy the exclusive benefit of

publishing photographs of the wedding until their photographs had been put into the public domain, we are in no doubt that Hello! jumped the gun in publishing the unauthorised photographs when they did. This was also the view of the judge. Hello! did not wait until OK!'s photographs were in the public domain before publishing their own. They took steps which, but for the reaction of OK!, would have resulted in their publishing their photographs first in breach of OK!'s rights. In an attempt to mitigate the damage that this would do, OK! rushed forward the publication of their own photographs, but did no more than achieve approximately simultaneous publication with Hello!. We agree with the judge that OK!'s action had not, by the time of Hello!'s publication, had the effect of destroying such rights of confidentiality as OK! had.

Legal certainty

141. This point remains alive in relation to that part of the judgment that awarded damages to the Douglases which we have upheld.

142. Mr Price's arguments in relation to legal certainty were as follows. The Claimants' claims involved a restriction on Hello!'s freedom of expression. Article 10(2) of the Convention required that any such restriction should be 'prescribed by law'. When Hello! took the decision to publish the unauthorised photographs the relevant law was so uncertain that it was not possible to predict that publication would be held to be unlawful. The four cases from which the judge chiefly drew his exposition of the modern law in relation to personal confidence all post dated publication of the relevant issue of Hello! magazine. It followed that there was, at that time, no relevant restriction on publication 'prescribed by law'. In these circumstances, for the court to hold that by publishing the unauthorised photographs Hello! committed a breach of duty owed to the Claimants would be in conflict with Article 10.

143. In support of this submission Mr Price relied upon well established principles of Strasbourg jurisprudence, founded on this passage of the judgment of the ECtHR in *Sunday Times v UK* (1979) 2 EHRR 245 at paragraph 49:

> "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Second, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. These consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law mush be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

144. Lindsay J dealt with this argument in a single sentence at paragraph 212: "I am not conscious of having extended but merely of having applied the law". That is not an answer to the point if the law which he applied had only been established by decisions which pre-dated his judgment but post-dated the publication of the relevant edition of Hello! magazine.

145. Mr Browne submitted that the Strasbourg jurisprudence did not preclude developments of English common law that were reasonably foreseeable. He relied, in particular, on observations of the ECtHR in *SW v UK* (1995) 21 EHRR 363. That case involved two applicants, each of whom had been convicted of raping his wife. Theirs had been the first cases in which the English courts had recognised that there was no general immunity available to a husband against a charge of raping his wife. They contended that their convictions involved a retroactive change in the law which violated Article 7(1) of the Convention.

146. The Court held at paragraph 43/41:

> "However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial lawmaking is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen."

The Court went on to conclude at paragraph 43/41 that the decision of the House of Lords withdrawing the husband's immunity was no more than continuing "a perceptible line of case law development" which had "reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.

147. Had the Claimants' application for an interlocutory judgment in this case succeeded, it would have been possible for Hello! to have prevented the publication of the edition containing the unauthorised photographs. When the injunction was refused, they decided to proceed with the publication. At that moment, it is not clear whether the Court of Appeal gave any indication as to their reasons for refusing the injunction. We do not believe, however, that the court's reaction to the arguments advanced on behalf of the Claimants can have left Hello! confident that the Claimants would not establish a valid claim in law. Applying the reasoning of the ECtHR in *SW v UK,* we conclude that it was reasonably foreseeable to Hello!, when they decided to proceed with the publication, that this developing area of English law might result in their being held to have infringed the Douglases' rights of privacy or confidence.

148. There is a further point. This case involves a conflict between the Article 8 right of respect for private and family life and the Article 10 right of freedom of expression.

The Convention only permits restrictions of either right where “prescribed by law”. In *Spencer v UK* the applicants complained that United Kingdom law had failed to protect the Article 8 rights of Countess Spencer after a newspaper had published a photograph of her, taken with a telephoto lens, in the grounds of a clinic. The Commission ruled the application inadmissible on the ground that the courts, through the common law system in the United Kingdom, should be permitted to develop existing rights in respect of breach of confidence by way of interpretation so as to cover the breach of privacy that had taken place.

149. In *Peck v United Kingdom* [2003] 36 EHRR 719 the applicant complained, among other things, of the lack of a domestic remedy against infringement of his right to respect for private life in relation to facts that occurred before the Human Rights Act came into effect. He had been photographed in a public place by closed circuit television with a knife in his hands after attempting to commit suicide and the film had been released to the media and widely published. The Government argued that the facts involved an area of the law which had been, and would continue to be developed by the courts and that the Strasbourg jurisprudence, which had had an important impact on these developments, would have an even more important impact with the coming into effect of the Human Rights Act. The ECtHR was not persuaded. It found that it was unlikely that the domestic courts would have afforded the applicant a remedy at the relevant time had an action been brought for breach of confidence.

150. If one postulates that, at the time of the publication by Hello! of the unauthorised photographs, English law was insufficiently clear to satisfy the requirements of providing protection to privacy in a manner “prescribed by law”, the court was on the horns of a dilemma. If it gave a decision which developed the law so as to provide a protection to respect for privacy “prescribed by law”, it risked infringing Hello!’s Article 10 rights. If, however, it ruled that the law was insufficiently clear to provide a remedy, it perpetuated the infringement of the Douglases’ Article 8 rights. It seems to us that in this situation the proper course was for the court to attempt to bring English law into compliance with the Convention, even if this was at the cost of a restriction, in the instant case, of Hello!’s Article 10 rights by findings which, up to that moment, could not be said to have been “prescribed by law”.

151. For all these reasons, we dismiss Hello!’s attack on the judgment below on the ground that it imposed a restriction on Hello!’s right to freedom of expression that was not prescribed by law of sufficient certainty.

OK!’s claim based on economic torts: unlawful interference with business

Introduction

152. Having held that OK! were entitled to damages from Hello! for breach of confidence, it was not strictly necessary for the judge to decide whether there was any other tortious basis of liability. However, in the light of the conclusion set out above that OK! are not entitled to damages for breach of confidence, it becomes necessary to consider whether there is any other basis of liability. Before the judge OK! put their case in a number of ways, although it is only necessary for us to refer to three, which the judge identified in paragraph 180(vi), (viii) and (ix) of his judgment. They were

(so far as relevant) unlawful interference with the business of OK!, conspiracy to injure OK! by unlawful means and conspiracy to injure OK! with the predominant purpose of doing so.

153. There are two types of conspiracy to injure, namely conspiracy to injure by lawful means and conspiracy to injure by unlawful means. In *Kuwait Oil Tanker SAK v Al Bader* [2000] 2 All ER Comm 271 at paragraph 108, this court defined them as follows:

> "A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose is to injure the claimant.
>
> A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

154. In formulating those principles, the court had particular regard to *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC and *Lonrho Plc v Fayed* [1992] 1 AC 448: see paragraph 109. The distinction between the two types of conspiracy was put thus by Lord Bridge in *Lonrho Plc v Fayed* at pp465-6:

> "Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful."

155. It is no longer alleged that the predominant purpose of Hello! was at any stage to injure OK!. That is scarcely surprising in the light of the judge's conclusion of fact that Hello!'s purpose was to protect its own interests (see below). As to their case that Hello! are liable for damages for conspiracy to injure them by unlawful means, OK! accept that the allegation of conspiracy adds nothing to their case that Hello! are liable for a tort which the editors of *Clerk & Lindsell on Torts* (cited above) describe in paragraph 24-88 as 'unlawful interference with economic and other interests' and which we will call 'unlawful interference' for short. The argument before us has proceeded on the premise that the test of intention is the same in the two torts and we have concluded that this common ground is correct.

156. We propose therefore to focus primarily on the ingredients of the tort of unlawful interference and their application to the facts of this case. In paragraph 24-88 of *Clerk & Lindsell* the editors say:

> "There exists a tort of uncertain ambit which consists in one person using unlawful means with the object and effect of causing damage to another."

It is not in dispute that the tort of unlawful interference exists but the parties are not agreed as to its precise ingredients. In particular they do not agree as to the nature of the 'unlawful means' required or as to the requirement of '*object* and effect' in this context. In this latter regard there is an issue as to whether it is necessary to show that the defendant acted with the object or purpose of injuring the claimant and/or that the defendant's acts were in some sense aimed or directed at the claimant. It is, however, common ground (1) that some *mens rea* or *intention to injure* is required and (2) that it is not necessary to show that the predominant purpose or intention of the defendant was to injure the claimant.

157. Before focusing on those questions it is convenient to set out the case for OK! as it has been put in this appeal, in the light of our conclusions on privacy and confidentiality and of the findings of fact made by the judge as to the state of Hello!'s knowledge. OK!'s case is that in all the circumstances the judge should have held that the tort of unlawful interference with OK!'s business was made out on the basis that the publication of the unauthorised photographs was an unlawful act, that, in publishing them, Hello! intended to injure OK! and that OK! suffered loss and damage as a result.

158. The judge accepted that the publication was indeed an unlawful act and that it amounted to unlawful means. He said in paragraph 249 of his judgment that, if he had found the intent to injure made out, he would have held the intent to be to injure by the unlawful means of publishing the unauthorised photographs in breach of obligations of confidence owed to all the claimants and by way of contravention of the Data Protection Act 1998. It is not necessary for us to consider the Data Protection Act for, in the light of our conclusions as to privacy and confidence, the part of paragraph 249 principally relied upon by OK! is the judge's conclusion that the publication was in breach of obligations of confidence owed to the Douglases. Mr Browne submits that the publication of the unauthorised photographs in breach of the Douglases' rights of privacy amounts to a sufficient unlawful act or unlawful means for the purposes of the tort of unlawful interference. We will return to this point below in the light of submissions made by Mr Price on behalf of Hello! but will first consider OK!'s case on intention.

Intention: OK!'s case

159. There are a number of contenders for the test of the state of mind that amounts to an 'intention to injure' in the context of the tort that we have described as 'unlawful interference'. These include the following:

> a) an intention to cause economic harm to the claimant as an end in itself;

b) an intention to cause economic harm to the claimant because it is a necessary means of achieving some ulterior motive;

c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm;

d) knowledge that the course of conduct will probably cause the claimant economic harm;

e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does or not.

A course of conduct undertaken with an intention that satisfies test a) or b) can be said to be 'aimed', 'directed', or 'targeted' at the claimant. Causing the claimant economic harm will be a specific object of the conduct in question. A course of conduct which only satisfies test c) cannot of itself be said to be so aimed, directed or targeted, because the economic harm, although inevitable, will be no more than an incidental consequence, at least from the defendant's perspective. Nonetheless, the fact that the economic harm is inevitable (or even probable) may well be evidence to support a contention that test b), or even test a), is satisfied.

160. Whatever test is adopted, it is not sufficient for the claimant to show that it was reasonably foreseeable that the claimant would or might suffer damage as a result of his act. As much of the discussion in *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 shows, albeit in the context of the tort of misfeasance in public office, there is an important conceptual and factual difference between a tort, like negligence or breach of duty, which requires merely that the loss or damage should be reasonably foreseeable and a tort, which requires actual knowledge (or subjective recklessness) as to the consequences.

161. OK!'s case, as advanced by Mr Browne, can be summarised as follows:

- The judge should have found that Hello! had the deliberate object of causing economic harm to OK! (i.e. that test a) or b) was satisfied) and that this amounted in law to the necessary intention to injure. Alternatively:

- The judge found, or should have found, that Hello! knew that their conduct would inevitably, or alternatively probably, cause economic harm to OK! (i.e. that test c) or d) was satisfied) and that this amounted in law to the necessary intention to injure. Alternatively:

- The judge found, or should have found, that Hello! knew that their conduct might cause OK! economic harm, acted with reckless indifference as to whether they did or not (i.e. that test e) was satisfied) and that this amounted in law to the necessary intention to injure.

162. In support of these submissions Mr Browne relies upon the judge's findings as to Hello!'s state of mind and we propose to set these out before turning to the express findings that the judge made in respect of Hello!'s intention.

Intention: the judge's findings

163. The state of mind of Hello! depends largely, if not entirely, upon the state of mind of Senor Sanchez Junco, who is also the third Defendant. He is a director and controlling shareholder of the second Defendant, Hola SA, which publishes Hello! magazine in the United Kingdom. The judge made these findings as to the state of knowledge of Senor Sanchez Junco in paragraphs 79, 80 and 81 of his judgment:

> "79. As he set about arranging the unauthorised photographs into a lay-out for an issue of Hello!, Senor Sanchez Junco well knew that OK! had obtained an exclusive contract for coverage of the Douglas wedding. He knew of Ramey's reputation and the kind of work that Ramey handled and the intrusive systems which paparazzi such as Ramey employed. It was a kind of journalism he and Hello! did not like, he said, and usually tried to avoid. At least a part of the reasons for Senor Sanchez Junco's insistence that Ramey should not be commissioned in advance, was in my judgment, that he, as a cautious man, was uncomfortable in being seen, as a commission would involve, to be procuring the sort of unpredictable and possibly unlawful activity that a paparazzo of Ramey's reputation might get up to. Whilst he would not have known of the specific language used, Sr Sanchez Junco knew that a feature of OK!'s "exclusive" would have been that security arrangements were required by contract so far as was reasonable to ensure that only those invited or duly employed would be present at the wedding and that no photographs were to be taken other than the authorised ones. For example, Hello!'s own pleaded exclusive contract for coverage of the wedding of Gloria Hunniford required reasonable security to be enforced. Such arrangements had to be contemplated by those in the trade as an inevitable concomitant of an "exclusive", certainly where as much as £1m was at stake.
>
> 80. It was obvious to him that the photographs were unauthorised. He said in cross-examination that he had no doubt but that the person who did the photographs was trying to hide himself. He was then asked:-
>
>> Mr Tugendhat: Did you ask Mr Ramey any questions about how the photographs were taken?
>>
>> Witness: No.

> Mr Tugendhat: Is that because you did not care whether they were taken legally or illegally?
>
> Witness: No, it was because I didn't want any information. I didn't want to know anything about it. I wasn't curious about it. I didn't want to know."

Similarly, to Mr Luke, co-ordinating Editor in Madrid, it was a matter of indifference how the photographs had been obtained.

Senor Sanchez Junco knew from his contacts with Mr Burry that the Douglases had been insisting on control over what photographs would be released and his own proposals to Mr Burry of May 2000 had accordingly offered the Douglases full picture approval rights.

81. In my judgment Senor Sanchez Junco *knew and ought to have known,* as he selected the unauthorised photographs for publication, that what he was doing would or might significantly diminish the benefits which OK! would otherwise derive from its exclusive contract with the Douglases, that it would deny the Douglases the picture approval which he knew they wanted and which he would have expected them to have procured in their contract with OK! and that the taking of the unauthorised photographs, which he had been careful not to commission, would have involved at least a trespass or some deceit or misrepresentation on the photographer's part in order for the photographer to overcome the security arrangements which, in outline, he knew or must be taken to have known to have been in place at a wedding which he had no reason to think was other than private. It was obvious, agreed Sue Neal, Hello!'s Picture Editor at the time, that the photographs had been taken by someone "who had no business to be there." Mrs Cartwright's evidence was that they had to have been taken surreptitiously" (emphasis added).

164. Set against the judge's findings of knowledge must be his express findings as to the intention of Senor Sanchez Junco and thus of Hello!. The judge set out Senor Sanchez Junco's evidence in some detail between paragraphs 245 and 248 of his judgment. Given the importance of the evidence to this part of case, especially to the submissions made by Mr Price, we set out paragraphs 245 to 248 of the judgment here:

"245. As for the relevant intent of the Hello! Defendants, in practical terms it is either to be found in Senor Sanchez

Junco or it does not exist. As to his intent, his written evidence said:-

> "I want to state categorically that there was never an intention to cause damage to any of the claimants – to the first two claimants because we have always treated them in Hello! with deference and sympathy, in accordance with the magazine style. In our 60-year history we have never tried to damage anyone. Therefore, we would not want to do it to people whom we have always treated fairly and objectively in our reports portraying them in the best possible light. With respect to OK! we took it for granted that, without a doubt, they would have a great editorial success, as they had a great exclusive and consequently, the magazine would be sold under excellent conditions as was the case. Our main purpose was to inform our readers about an event which had been publicised all over the media for weeks before the wedding, which shows that this wedding was of interest for the United Kingdom. We did not wish to disappoint our readers. It was never our aim or intention to damage the third claimant, our prime motivation was only to give our readers information on the wedding of two celebrities, about whom, without doubt, our readers expected to read in Hello!.
>
> Other consideration was to defend the interests of our magazine and keep our place in the market. There was little or no monetary incentive in publishing these photographs because the increase in sales was not likely to compensate the costs incurred in purchasing the photographs, changing the edition and airlifting a proportion of the copies from Spain into the UK. However, this is something that every publisher must be prepared to do from time to time and it is a matter of professional pride and an investment in the goodwill of the publication's readership.

246. In his oral evidence Senor Sanchez Junco disavowed having acted in revenge against the Douglases for his not getting the exclusive he so wished; rather he wanted, despite losing the exclusive, to publish an edition that would interest his readers, the event being one which had captured the imagination of the public. His act, he said, was not of revenge but of salvage.

He denied having the intention of spoiling OK!'s sales adding:

> "my motive was never to spoil the exclusive of OK!. I repeat, I wanted to defend as far as I could my publication …. ."

Mr Tugendhat put this to him:-

> "What I am suggesting to you is that in all of this you were driven by your anger and you were intending to do as much damage as you could both to the Douglases and to the publishers of OK!"

Senor Sanchez Junco:

> "No. My priority was to save my publication after having, in the light of a very important big loss, and that is that of the exclusive, and I didn't think of the possible damage that I could inflict on Hello! [sic] or the Douglases because the photographs, I never thought that these photographs could be considered to be damaging for the Douglases and that is because photographs published in that way were unlikely to damage the authorised exclusive."

247. Then, referring to an argument which I hold to be not unreasonable, namely that poor photographs in one of the rival magazines could in fact increase the sales of the other which covered the event in a better way, he added, of such a case:-

> "In some cases it encourages it. It has happened to me many times and I've never considered it to be that it was a damage which – certainly not a serious one. This supposed damage which I was supposed to have wanted to inflict on OK! wasn't even, in my opinion, clear damage. Maybe it could even help out its exclusive. In any event, I sold a few more, and I believe that OK! sold its exclusive very well."

Ms Koumi, too, gave evidence that poor photographs of an event in one of the rival magazines could increase the sales of the rival that has better ones (though I am not to be taken to be holding that was in fact the case here).

> 248. Mr Luke, in close contact with Senor Sanchez Junco in Madrid was asked the question:-
>
> > "How common, to your recollection, are spoilers by Hello! of OK! exclusives?"
>
> Mr Luke:
>
> > "It is a bit of a misnomer. I would not call it a spoiler because in the case of … . If we go back to the Zeta-Jones wedding, it was the event of the year. It is like one had to cover the outbreak of war because – or would not cover it because Churchill had given his exclusive interview to the Express. We had to cover it in some way. I think "spoiler" is a bit of a misnomer. It is something we have to cover, and if photographs become available you publish them. This is not an attack on your competition, this is because our readers want to know about these events so you go ahead and publish them. If those photographs are made available by an orang utan with a Polaroid, well you publish them."

165. That was the judge's summary of the evidence given on behalf of Hello! as to what their intentions were. The judge then expressed his conclusion thus:

> 249. I have not found Senor Sanchez Junco or Mr Luke to be reliable as witnesses but I do accept the evidence they gave on this subject. Whilst I recognise that for a defendant to act out of self-interest does not, of itself, disprove that he had no intent to injure another, here I find on the evidence that there was no intent to injure by unlawful means because there was no intent to injure at all. …."

The judge added in paragraph 260 that no intent of any of the defendants other than Senor Sanchez Junco was proved and that he did not hold Senor Sanchez Junco to have had "any intent to injure the Douglases". Although the judge was there referring specifically to the Douglases, it is plain that his conclusion was the same vis-à-vis OK!.

Intention: conclusions in relation to the judge's findings

166. Paragraphs 245 to 249 are fatal to Mr Browne's argument that test a) or b) set out in paragraph 159 above was satisfied. The judge plainly found that Hello! had not aimed, directed or targeted their conduct at OK! They had no specific object to cause economic harm to OK!. Mr Browne, on behalf of OK!, sought to challenge the judge's findings of fact in this appeal. He argued that the judge was wrong to hold that Hello! did not have the subjective intention, in the sense of object or purpose, of

causing injury to OK!. However, the judge heard and considered an enormous body of evidence including oral evidence and reached the clear conclusion set out in paragraph 249 of his judgment. This court will very rarely interfere with a judge's conclusions of fact in such circumstances. There was ample evidence upon which the judge could properly reach the conclusion which he did, and in our judgment there is no basis upon which we could properly interfere with that conclusion. It follows that the first way in which OK! put their case on intention is not made out.

167. We turn to the second way in which OK! put their case, namely that Hello! knew their conduct would inevitably, or alternatively probably, cause economic harm to OK! The key part of the judge's findings is in the opening words of paragraph 81, where the judge expressly held that Senor Sanchez Junco

> "knew and ought to have known, as he selected the unauthorised photographs for publication, that what he was doing would or might significantly diminish the benefits which OK! would otherwise derive from its exclusive contract with the Douglases …"

The judge was not there stating either what was reasonably foreseeable or what Senor Sanchez Junco 'knew *or* ought to have known', but what he 'knew *and* ought to have known' (our emphasis). The judge was setting out his conclusion as to Senor Sanchez Junco's actual state of mind, namely that he knew that publication would or might injure OK! because it would or might diminish the benefits which OK! would otherwise derive from the contract.

168. This finding has to be read, however, with the evidence which the judge accepted, which he set out in paragraphs 245-248 of his judgment. When this approach is adopted it becomes impossible to argue that the judge held, or should have held, that Hello! knew that their conduct would, either inevitably or even probably, cause economic harm to OK!. The judge's finding amounts to no more than Hello! knew that their conduct *might* cause economic harm to OK!. Once again this is a finding of primary fact with which we cannot properly interfere. It follows that the second way in which OK! put their case on intention is not made out.

169. We turn to the third way in which Mr Browne puts OK!'s case on intention. The judge's findings of fact were, we consider, sufficient to satisfy test e). Hello! knew that their conduct might cause economic harm, to OK! and their attitude to this risk can properly be described as reckless indifference. The critical question is whether this attitude of mind was, in law, sufficient to constitute 'intention to injure' in the context of the tort of unlawful interference. A crucial stepping stone in Mr Browne's argument in support of test e) is his contention that the authorities firmly establish the validity of test d). It is, indeed, a short step from knowledge that conduct will cause harm to knowledge that conduct may cause harm, coupled with reckless indifference as to whether it does. In advancing test d) as his starting point, Mr Browne relies particularly on three authorities: *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716; *Lohnro PLC v Fayed* [1992] 1 AC 448 and the *Kuwait Oil Tanker case*. The first of these is a case on misfeasance in public office, the second a case on unlawful interference and the third a case on conspiracy to injure by unlawful means.

170. One of the problems with this part of the case is that OK! have sought to expand the way in which their case is put before us, as compared with the way in which it was put before the judge. This can be seen both from the way in which the judge approached the relevant principles and from the way in which he approached the evidence in the passages we have quoted.

171. The judge considered the principles relevant to the tort of unlawful interference in paragraphs 242 to 244 of his judgment on liability, just before he set out his findings of fact as to Senor Sanchez Junco's intention. Before doing so he first considered briefly the tort of interference with contractual relations, quoted a passage from the judgment of Slade LJ in *RCA v Pollard* [1983] Ch 135 at p156, in which Slade LJ was referring only to that tort, and held (in our view correctly) that there was here no interference with the contractual relations between the Douglases and Hello!.

172. The judge observed in paragraph 243 that OK! must prove an intention to injure by unlawful means and said in paragraph 244 that, although the role of intent is not always described in the same terms in the authorities, it was appropriate to accept the *Clerk & Lindsell* formulation (quoted above) that the tort consists in one person using unlawful means with the object and effect of causing damage to another. He observed that that was the case being made by OK! and thus the formulation that Hello! were being required to answer. It was in that context that, having concluded in paragraph 249 that Hello! had no intent to injure at all, he held that OK!'s claim under this head failed. It is we think clear therefore that the judge was asking himself whether OK! satisfied the *Clerk & Lindsell* test, that is whether it was the object of Hello! to injure OK!. He held that it was not.

173. Mr Browne contended that the judge did not consider whether intention can be established without the necessity to prove object or purpose. This is correct but the judge is not to be criticised in any way for that because the case was not put before him in the way in which it has been put before us. The argument based upon *Bourgoin*, *Lohnro Plc v Fayed* and the *Kuwait Oil Tanker* case was advanced for the first time in detail before us and, although it is said in Hello!'s skeleton argument that it is not open to OK! to advance it, both sides made detailed submissions about it and we can see no injustice to Hello! in allowing the point to be taken now. It is less clear that the same is true of the development of that argument based upon the proposition that the relevant intention can be established by proof of subjective recklessness. We decided that we would consider Mr Browne's submissions on the basis that, should we be minded to accept them, we would first afford Mr Price the opportunity to advance further submissions in response to them.

Intention: our approach to the law

174. In considering this area of the law of tort, we have found much assistance in Hazel Carty's valuable book entitled *An Analysis of the Economic Torts* published in 2001. We also wish to pay tribute to the article entitled '*Intentional Infliction of Harm by Unlawful Means*' by Philip Sales and Daniel Stilitz in (1999) 115 LQR 411. They suggest that the tort would more aptly be called intentional infliction of harm by unlawful means. We agree.

175. As Hazel Carty shows, there are a number of disparate economic torts which have differing characteristics and do not all fall to be approached in the same way. Thus

care must be taken in concluding that because intention has a particular meaning in the context of one of the torts it necessarily has the same meaning in others. This can be seen, for example, by reference to the two torts of conspiracy to injure to which we have already referred. Both conspiracy to injure by lawful means and conspiracy to injure by unlawful means require intention to injure but it is common ground that the former requires proof that the defendant's predominant purpose is to injure the defendant, whereas the latter does not.

176. It does not follow from the fact that predominant purpose must be established in the former case that it is necessary or sufficient to establish that *a* purpose was to injure in the latter case. It may be necessary or sufficient to do so but whether it is or not cannot be deduced from cases of lawful means conspiracy. In paragraph 260 of his judgment, the judge said this in the context of unlawful means conspiracy:

> "This is not an area of the law where it can be *assumed* that a person intends the natural and probable consequences of his actions or omissions – *Crofter Hand Woven Harris Tweed Co. v Veitch* [1944] A.C. 435 at 444 per Viscount Simon L.C. - so that for this conspiracy to succeed an intent to harm the Douglases on the part of the Hello! Defendants is required to be proved."

If the judge was saying that Viscount Simon was expressing any view about intention in an unlawful means conspiracy, we respectfully disagree because the *Veitch* case involved a lawful means conspiracy where, by contrast with an unlawful means conspiracy, it is common ground that a predominant object or purpose to injure is required.

177. As we have explained, the argument before us proceeded on the reasonable premise that the test of intention in the tort of unlawful interference is the same as the test in relation to unlawful means conspiracy. There is no agreement that the same is true in relation to the torts of interference with contractual rights and misfeasance in public office. We intend to consider first cases on unlawful interference and unlawful means conspiracy, then cases on interference with contractual rights. Then, after turning to see what assistance, if any, is to be derived from cases on misfeasance in public office, we will express our conclusions.

Intention: cases on unlawful interference and unlawful means conspiracy

178. The line of authority starts with *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889) 23 QBD 598. The plaintiff shipowners claimed damages on the ground that they had been shut out from profitable China trade by the conspiracy of the defendants, who had formed a Conference from which the plaintiffs were excluded. The claim failed. Bowen LJ summarised the law as follows:

> "No man, whether trader or not, can however justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction and molestation are forbidden; so is the intentional procurement or violation of individual rights, contractual or other, assuming always that there is no just cause for it … but the defendants have been

> guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the context of their own trade. To the argument that a competition so pursued ceases to have a just cause or excuse when there is ill-will or a personal intention to harm it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other than such as was necessarily involved in the desire to attract to the defendant's ships the entire tea freights of the ports."

179. *Allen v Flood* [1898] AC 1 involved a demarcation dispute. The defendant, on behalf of a group of ironworkers, persuaded their employers to desist from employing the plaintiff shipwrights. This involved no breach of contract. The plaintiffs alleged that this conduct gave rise to liability in tort on the ground that the defendant had maliciously induced the employers to act as they did. The action failed. Lord Watson held at p 96:

> "There are in my opinion two grounds only upon which a person who procures the act of another can be made legally responsibly for its consequences. In the first place he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place when the act induced is within the right of the immediate actor and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment if a third party; and in that case according to the law laid down by the majority in *Lumley v Gye* the inducer may be held liable if he can be shown to have procured his object by the use of illegal means *directed against that third party*." (our emphasis)

180. *Allen v Flood* was distinguished in *Quinn v Leathem* [1901] AC 495. The House of Lords upheld a decision of the Irish Court of Appeal that a conspiracy 'wrongfully and maliciously' to induce customers and servants of the plaintiff not to deal with him was actionable on proof of damage. Lord Shand at p 514 explained the difference between the two cases as follows:

> "As to the vital distinction between *Allen v Flood* and the present case, it may be stated in a single sentence. In *Allen v Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was 'to injure the plaintiff in his trade as distinguish from the intention of legitimately advancing their own interest.'"

Other members of the House made the point that in *Allen v Flood* there was no question of conspiracy or of coercion.

181. The distinction between the two types of tortious conspiracy was drawn by the House of Lords in *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] AC 435 where a

trade embargo was held not to be tortious because the predominant purpose of the conspirators was to protect their own interests, not to damage the plaintiffs. The embargo had involved no illegality and Lord Wright at p 462 drew a distinction between such a conspiracy and one to do 'acts in themselves wrongful'. The mental element necessary to constitute the latter type of conspiracy tortious was not, however discussed. It was a matter to which Lord Denning MR gave specific consideration in *Lonrho v Shell* (unreported) 6 March 1981.

182. Lonrho had been a supplier of oil to Southern Rhodesia and had had to cease this profitable business when the UK imposed sanctions on that country. It alleged that Shell had conspired unlawfully to break the sanctions, thereby prolonging the illegal regime in Southern Rhodesia and causing economic damage to Lonrho. The Court of Appeal held that this gave rise to no cause of action. Lord Denning MR said:

> "So this point of law arises directly: Is an agreement to do an unlawful act actionable at the suit of anyone who suffers damage from it which is reasonably foreseeable? Even though the agreement is not directed at him, nor done with intent to injure him? In discussing this point of law I put aside the many modern cases on conspiracy – in which there is an agreement by two or more to do a *lawful* act. It is now settled by the House of Lords that such an agreement is actionable if it is done with the predominant motive of injuring the plaintiff and does in fact injure him: see *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch* [1942] AC 435, where Lord Simon LC said, at p 445: 'Liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortuous conspiracy'. Here we are concerned with a different problem altogether. It is an agreement by two or more to do an *unlawful* act. … I think there is a cause of action when it is remembered that the tort is a conspiracy *to injure*. I would suggest that a conspiracy to do an *unlawful* act – when there is no intent to injure the plaintiff and it is not aimed or directed at him – is not actionable, even though he is damaged thereby. But if there is an intent to injure him then it is actionable. The intent to injure may not be the predominant motive. It may be mixed with other motives. In this context, when the agreement is to do an *unlawful* act, we do not get into the 'quagmire of mixed motives', as Lord Simon LC described them in the *Crofters* case at p 445. It is sufficient if the conspiracy is aimed or directed at the plaintiff, and it can reasonably be foreseen that it may injure him, and does in fact injure him. That is what Parker J thought. I agree with him."

183. In the House of Lords [1982] AC 173 at p 179 counsel for Lonrho is reported at p180 as advancing the following argument in relation to the mental element of the tort:

> "The question of conspiracy assumes no breach of contract, no private rights arising out of breach of the sanctions Orders and no allegations of intention to injure. All that is alleged is actual knowledge that damage would be suffered. A conspiracy to do

> an unlawful act which is carried into effect and causes reasonably foreseeable damage is actionable as a conspiracy although the act may not have been tortuous in itself. There is conspiracy where an unlawful act is done pursuant to agreement. Here there was actually knowledge that the acts done would cause damage to the appellants. The appellants have pleaded that the historical development of the tort of conspiracy from the crime of conspiracy indicates that a combination or agreement to do an act unlawful in itself gives a cause of action if it results in foreseeable damage."

184. Lord Diplock at p189 first considered conspiracy to injure where no unlawful means were employed:

> "The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today."

He then considered the question of whether it was necessary to establish an intention to injure where the conspiracy involved action that contravened penal law. He held:

> "This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J and all three members of the Court of Appeal. I am against extending the scope of civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff. "

185. One of the cases upon which Mr Browne particularly relies involved a subsequent claim by Lonrho. The subject matter of the litigation was the battle to purchase the share capital of the House of Fraser which owned Harrods. In *Lonrho Plc v Fayed* [1990] 2 QB 479 Lonrho alleged that the Fayed brothers had perpetrated a fraud on the Secretary of State, thereby securing permission to buy the company without a reference to the Monopolies and Mergers Commission and preventing Lonrho from buying the company. In the Court of Appeal Lonrho did not pursue a claim for tortious conspiracy, accepting that this required a predominant intention to injure them. They did, however, pursue a claim for unlawful interference, appealing against an order striking out this claim. The appeal succeeded.

186. Dillon LJ said at pp 488-9:

> "It is submitted to us that, even with this tort, it must, as with the tort of conspiracy, have been the predominant purpose of the tortfeasor to injure the victim rather than to further the tortfeasor's own financial ends. I do not accept that. It would be inconsistent with the way Lord Diplock treated this tort and the tort of conspiracy differently in his speech in *Lonrho Ltd v Shell Petroleum Co. Ltd (No2)* and in *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191, 228-229. No predominant purpose to injure is required where the tortuous act relied on is injury by wrongful interference with a third party's contract with the victim or by intimidation of a third party to the detriment of the victim, nor should it in my view be required where the wrongful interference has been by the practice of fraud on a third party, aimed specifically at the plaintiff, as it was put by Oliver LJ in *RCA Corporation v Pollard* [1983] Ch 135, 151e-f."
>
> "It also has to be proved by a plaintiff who seeks to rely on this tort, as Mr Beveridge conceded for Lonrho, that the unlawful act was in some sense directed against the plaintiff or intended to harm the plaintiff. The origin of those phrases is the oft quoted passage in the speech of Lord Watson in *Allen v Flood* [1898] AC 1,96, which was applied by the majority of this court (Buckley and Kennedy LJJ) in *National Phonograph Co. Ltd v Edison-Bell Consolidated Phonograph Co. Ltd* [1908] 1 Ch 335. In that case the fraud was clearly directed against the plaintiff. "

Ralph Gibson LJ at p 492 also referred to 'the nature of the intention that is required to satisfy the requirement that the conduct be "directed against" the plaintiffs.

187. Woolf LJ at p 494 said:

> "So far as conspiracy is concerned, there is good reason for requiring that predominant intent should be an ingredient of the tort. Great difficulty would, in my view, arise if a requirement of predominant intent to injure were to be introduced into the tort with which we are concerned here. This tort is not based upon any agreement, but interference, and frequently it will be fully appreciated by a defendant that a course of conduct that he is embarking upon will have a particular consequence to a plaintiff and the defendant will have decided to pursue that course of conduct knowing what the consequence will be. Albeit that he may have no desire to bring about that consequence in order to achieve what he regards as his ultimate ends, from the point of view of the plaintiff, whatever the motive of the defendant, the damage which he suffers will be the same. If a defendant has deliberately embarked upon a course of conduct, the probable consequences of which to the

> plaintiff he appreciated, I do not see why the plaintiff should not be compensated."

188. In the House of Lords, Lonrho revived their claim for unlawful means conspiracy, arguing that there was no need to show that the predominant purpose of the conspiracy was to injure the plaintiff. It was enough to show that the defendants knew and intended that the plaintiff would be injured, albeit that their primary purpose was to benefit themselves. Lord Bridge of Harwich gave the only speech, with which the other members of the House agreed. He rejected the submission advanced by the Fayeds that Lord Diplock had held in *Lonrho v Shell* that, in an unlawful means conspiracy, there must be a predominant purpose to injure the plaintiff. After considering the authorities, he summarised the law as follows at pp 465-6:

> "Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortuous. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests; it is sufficient to make their action tortuous that the means used were unlawful. "

189. Lord Bridge added at p 468:

> "In the *Metall* case [1990] 1 QB 391 Slade LJ delivering the judgment of the court, whilst expressly disclaiming any intention to construe Lord Diplock's speech as if it were a statue, nevertheless subjected it to a detailed textual analysis leading to the conclusion that it laid down a rule of law that the tort of conspiracy to injure required proof in every case not merely of an intention to injure the plaintiff but also that injury to the plaintiff was the predominant purpose of the conspiracy.
>
> My Lords, I am quite unable to accept that Lord Diplock or the other members of the Appellate Committee concurring with him, of whom I was one, intended the decision in *Lonrho v Shell* [1982] AC 173 to effect, sub silentio, such a significant change in the law as it had been previously understood. The House as is clear from the parties' printed cases, which we have been shown, had never been invited to take such a step. Moreover, to do so would have been directly contrary to the view of Lord Denning MR expressed in the judgment which the House was affirming and inconsistent with the dicta in what Lord Diplock described, at p 188, as 'Viscount Simon LC's now classic speech in *Crofter Hand Woven Harris Tweed Co. Ltd v Veitch* [1942] AC 435, 439'. I would overrule the *Metall* case in this respect.

> It follows from this conclusion that Lonrho's acceptance that the pleaded intention on the part of the appellants to cause injury to Lonrho was not the predominant purpose of their alleged unlawful action is not necessarily fatal to the pleaded cause of action in conspiracy and therefore affords no separate ground for striking out that part of the pleading."

190. In neither *Lonrho v Shell* nor *Lonrho v Fayed* was the House of Lords considering what constitutes a sufficient intention for the purpose of establishing an unlawful means conspiracy claim. Nor indeed was this court in *Associated British Ports v TGWU* [1989] 1 WLR 939, but we note that, at p 966G-H, Stuart-Smith LJ said that the essence of the tort was "deliberate and intended damage". Moreover both he and, at p952G-H, Neill LJ quoted the passage in the judgment of Dillon LJ in *Lonrho v Fayed*, where he said that it must be proved that the unlawful act was in some way directed at the plaintiff, without expressing any doubt as to its correctness. Butler-Sloss LJ referred to *Daily Mirror Newspapers Ltd v Gardner* [1968] 2 QB 762, *Acrow (Automation) Ltd v Rex Chainbelt Inc* [1971] 1 WLR 1676 and *Brekkes v Cattel* [1972] Ch 105, and said, at p 960D-E, that in those three cases it could be shown that the defendant had the object and intention to injure the plaintiff.

191. Assistance is, we think, also to be found in the approach of the New Zealand Court of Appeal in *Van Camp Chocolates Ltd v Aulesbrooks Ltd* [1984] 1 NZLR 354, where the plaintiffs sued for interference with their business by unlawful means, namely breach of confidence. A preliminary point of law was argued as to the nature of the intent to injure the plaintiffs necessary to establish the tort. The court said this:

> "In principle, as we see it, an attempt to harm a plaintiff's economic interests should not transmute the defendant's conduct into a tort actionable by the plaintiff unless that intent is a cause of his conduct. If the defendant would have used the unlawful means in question without that intent, and if that intent would not have led him to act as he did, the mere existence of the purely collateral and extraneous malicious motive should not make all the difference. *The essence of the tort is deliberate interference with the plaintiff's interests by unlawful means.* If the reasons which actuate the defendant to use unlawful means are wholly independent of a wish to interfere with the plaintiff's business, such interference being no more than an incidental consequence foreseen by and gratifying to the defendant, we think that to impose liability would be to stretch the tort too far" (emphasis added).

192. Henry J cited those observations with approval in *Barretts & Baird (Wholesale) Ltd v IPCS* [1986] IRLR 331, at paragraph 28, although it should be noted that, in so far as he said that the defendant must have injury to the plaintiff as his predominant purpose, he went too far. Further, as Hazel Carty points out in her book at p 107, the Court of Appeal in Nova Scotia asserted that the harm "must be directed at the plaintiff" in *Cheticam Fisheries Co-operative v Canada* (1995) 123 DLR 121 at p 132.

193. We turn to the decision of this court in the *Kuwait Oil Tanker* case. The appeal related to huge awards of damages against defendants who had conspired fraudulently to divert into their own pockets income that should have accrued to the claimant company. Counsel for the defendants raised the question of whether the necessary

intention to injure had been established, leading to the following passage in the judgment:

> "120. Mr Brodie submitted that, in order to succeed, the claimant must prove that the particular defendant and the other conspirator or conspirators intended to injure the claimant and that such an intention could not be inferred from the acts themselves. For the reasons already given we accept the submission that such an intention must be proved, as held by the House of Lords in the two *Lonrho* cases. We cannot, however, accept the second part of the submission. In many contexts it will be necessary in order to prove intention to ask the court to infer the relevant intention from the primary facts. We can see no reason why there should be a special rule of evidence in this situation. On the contrary, in the case of most conspiracies to injure by tortious means it will be clear from the acts of the conspirators that they must have intended to injure the claimant. In the case of a conspiracy to defraud by wholesale misappropriation it would be absurd to argue that the conspirators did not intend just that.
>
> 121. Mr Brodie was not able to produce any authority in support of his proposition. We are not surprised. An example of such an inference being drawn in a similar field is in *Bourgoin SA v Minister of Agriculture* [1986] 1 QB 716 Oliver LJ said (at page 777), in a part of his judgment with which both Parker and Nourse LJJ agreed:
>
> > "If an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them."
>
> The facts of the instant case are good example. On the judge's findings of fact the defendants' principal purpose was no doubt to line their own pockets, but they cannot be heard to say that they did not intend to injure the claimants or that their acts were not aimed at the claimants. In all the circumstances we are unable to accept Mr Brodie's submissions under this head."

Intention: interference with contractual rights

194. The tort of interference with contractual rights overlaps with the torts of unlawful interference and unlawful means conspiracy. The classic form of this tort consists of directly inducing a third party to break his or her contract with the claimant, as in *Lumley v Gye*. In such a case there is no requirement for the inducement to involve unlawful means. Where, however, the inducement is achieved indirectly, unlawful means are an element of the tort. For present purposes the important questions are what the authorities indicate in relation to the mental element of the tort and whether those authorities should be applied to the tort of wrongful interference.

195. In *South Wales Miners' Federation v Glamorgan Coal Company* [1905] AC 239 the House of Lords made it plain that malice, in the form of ill-will, was not required for this tort. It sufficed that the defendants knowingly and intentionally procured a violation of the plaintiffs' legal rights. In *Thomson v Deakin* [1952] Ch 656 the defendant union was alleged to have indirectly prevented a supplier from performing its contract to supply paper to the plaintiffs by inducing its members to withdraw their services from the supplier. Lord Evershed MR first considered the tort of directly inducing a breach of contract and remarked at p 677 that it was conceded that the defendant must have acted with the intention of doing damage to the person damaged and that he must have succeeded in his efforts. So far as indirectly procuring a breach of contract was concerned, the same intention had to be proved, but the tort would only be committed if the acts indirectly inducing the breach of contract involved wrongful conduct.

196. These principles were confirmed by the Court of Appeal in *Torquay Hotel Ltd v Cousins* [1969] 2 Ch 106, although the tort was extended to procuring interference with the exercise of contractual rights that did not involve a breach of contract. At p 138 Lord Denning MR observed:

> "the interference must be deliberate. The person must know of the contract, or at any rate turn a blind eye to it, and intend to interfere with it."

197. *Mercur Island Shipping Corporation v Laughton* [1983] 2 AC 571 was another case of indirect interference. Union officials blacked a ship, with the result that the plaintiff shipowners were unable to perform a time charter. Lord Diplock confirmed that the tort required intention on the part of the defendants to procure the breach of contract. He held that the intention existed because the defendants must have known that the ship was about to sail pursuant to a contract of carriage and diminishing the earnings under the contract was the only way of putting pressure on the shipowners.

198. The defendants' conduct in *Mercur* was aimed or directed at the shipowners. Lord Evershed MR's comments in *Thomson v Deakin* suggest that this was a necessary element of the tort. If so, a claim by the charterers, or indeed by holders of bills of lading, would not have succeeded. In *Dimbleby v National Union of Journalists* [1984] 1 WLR 427, the defendant union caused its members to withdraw their labour from the plaintiff, thereby preventing the plaintiff from performing a contract with a firm of printers. The conduct was aimed, primarily, not at the plaintiff but at the printers, with whom the union was in dispute. The plaintiff's claim for an injunction was upheld by the House of Lords.

199. Thus far, judicial statements in relation to intention are wholly consistent with those in relation to the tort of unlawful interference. There is no requirement of a predominant intention to harm the claimant, but such harm must none the less be an object of the defendant's conduct, albeit aimed at achieving an ulterior purpose. *Dimbleby* was such a case. The ultimate object was to harm the printers, but there was a deliberate intention to prevent Dimbleby from performing the contract in order to achieve this end.

200. The decision that is somewhat out of step with the authorities is that of this court in *Millar v Bassey* [1994] EMLR 44. Shirley Bassey had contracted with Dreampace, a

record producer, to record an album of songs. Dreampace contracted with the plaintiffs to provide the backing. Miss Bassey then declined to make the recording, with the result that Dreampace could not perform its contract with the plaintiffs. They sued Miss Bassey for inducing breach of contract. Miss Bassey sought to have the claim struck out on the ground that the plaintiffs had not alleged that Miss Bassey had acted with the intention of causing them damage or that her actions were directed at them. The judge struck out the claim and the plaintiffs appealed.

201. Beldam LJ conducted a review of the authorities and was particularly impressed by the passage that we have already quoted in the judgment of Woolf LJ in *Lonrho v Shell.* He observed at p 51:

> "In the passage cited, Woolf LJ was in my opinion emphasising the distinction between an intention to bring about a consequence and the desire to do so and was pointing out that a person can intend a consequence if he knows that it will follow from a course of conduct on which he embarks deliberately. Nor I my view can a consequence properly be regarded as unintended or incidental if the deliberate action is taken knowing that it must inevitably bring about the consequence, desired or not. In truth in such a case the actor intends to bring about both the undesired and the desired consequence and is willing to bring about the one to achieve the other. "

202. Subsequently, at p 55, Beldam LJ expressed this view.

> "If there is no valid distinction between persuading a man to break his contract with another and making his performance of it impossible by depriving him in breach of their contracts of the services of his employees, I do not see a basis for distinguishing the deliberate refusal to perform irreplaceable services in breach of contract knowing that such refusal will inevitably make the performance of another's contract impossible. If it is actionable to cause loss to the plaintiff by enticing or persuading another to break his contract with the plaintiff, can it be said to be unarguable that it is actionable to cause such loss by voluntarily and deliberately refusing to perform a contract knowing that such refusal will make it impossible for the other party to fulfil his obligations to the plaintiff? I do not think so."

His conclusion appears in the following passage at p 58:

> "In the present case, on the facts taken to be proved, the appellants establish that the respondent voluntarily broke her agreement with Dreampace knowing of the appellants' contracts and that the performance of those contracts would be impossible if she refused to perform the obligations under her agreement with Dreampace. Since she must have realised that her talents were essential and irreplaceable, she must have intended that Dreampace would be unable to fulfil its

> obligations to the appellants. In such circumstances it seems to me unnecessary to assert a specific intention to interfere with the performance of the appellants' contracts which must necessarily follow from her own refusal to perform her obligations to Dreampace. In the absence of any explanation advanced by the respondent for her actions, the only reasonable inference is that in refusing to perform she must have had a purpose of her own to serve which she pursued at the expense of the plaintiffs' right to contractual performance by Dreampace of its obligations."

203. Peter Gibson LJ did not agree. The authorities led him to conclude that:

> "… it is a requirement of the tort that it should be established that the defendant by his conduct intended to break or otherwise interfere with and, with that intention, did break or otherwise interfere with a contract to which the plaintiff was a party."

He also said that he would answer the following question in the former, rather than the latter, sense:

> " Must the conduct of the defendant … be aimed directly at the plaintiff, the contracting party who suffers the damage, in the sense that the defendant intends that the plaintiff's contract should be broken, or is it sufficient that the conduct should have the natural and probable consequence that the plaintiff's contract should be broken?"

204. Ralph Gibson LJ inclined to the view expressed by Peter Gibson LJ, but concluded that the authorities were insufficiently clear to justify striking out the claim so the appeal was allowed.

205. Since the decision in *Millar v Bassey*, it is the approach of Peter Gibson LJ, rather than that of Beldam LJ, that has found judicial favour. In *Isaac Oren v Red Box Toy Factory Ltd* [1999] FSR 785, Jacob J considered the tort of interfering with contractual relations, which requires an intention to interfere, and expressly followed the approach of Peter Gibson LJ, saying at p 799 that the unlawful conduct must "in some real sense be 'aimed at' the contract." In *OBG Ltd v Allen* [2005] EWCA Civ 106, at paragraphs 43 and 82-3 respectively, Peter Gibson LJ himself (with whom Carnwath LJ agreed) and Mance LJ (who dissented in the result) adopted the approach of Peter Gibson LJ, in preference to that of Beldam LJ, in *Millar v Bassey*. Indeed, they expressed the view that Peter Gibson LJ's approach was that of the majority in *Millar v Bassey*.

Intention: misfeasance in public office

206. The tort of misfeasance in public office occurs when an official acts beyond his powers provided that the necessary mental element is present. What do the authorities

say about that mental element and can what they say be applied to the tort of unlawful interference?

207. We turn first to *Bourgoin v Ministry of Agriculture*, which, as we have seen, was referred to in the *Kuwait Oil Tanker* case. The plaintiffs were French producers of turkeys. They alleged that the Minister revoked their licence to import turkeys into this country by a decision that was *ultra vires* and motivated by a desire to assist the British turkey producers. The Minister sought to have the plea struck out on the ground that it lacked the essential averment that the Minister acted with the purpose of inflicting harm on the plaintiffs, in other words that he had 'targeted malice'. At p 777 Oliver LJ quoted the view of the judge on this point and then added his own comments:

> " "I do not read any of the decisions to which I have been referred as precluding the commission of the tort of misfeasance in public office where the officer actually knew that he had no power to do that which he did, and that his act would injure the plaintiff as subsequently it does. I read the judgment in *Dunlop v Woollahra Municipal Council* [1982] AC 158 in the sense that malice and knowledge are alternatives. There is no sensible reason why the common law should not afford a remedy to the injured party in circumstances such as are before me. There is no sensible distinction between the case where an officer performs an act which has no power to perform with the object of injuring A (which the defendant accepts is actionable at the instance of A) and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injury to A (which the defendant denies is actionable at the instance of A). In my judgment each case is actionable at the instance of A and, accordingly, I determine that paragraphs 23 and 36 of the amended statement of claim do disclose a cause of action.

For my part, I too can see no sensible distinction between the two cases which the judge mentions.

If it be shown that the minister's motive was to further the interests of English turkey producers by keeping out the produce of French turkey producers – an act which must necessarily injure them – it seems to me entirely immaterial that the one purpose was dominant and the second merely a subsidiary purpose for giving effect to the dominant purpose. If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not "intend" the consequences or that the act was not "aimed" at the person who, it is known, will suffer them. In my judgment, the judge was right in his conclusion also on this point."

208. On the facts alleged in *Bourgoin,* this statement of the law could be reconciled with the requirement of intention in the tort of unlawful interference. It was the intention of the Minister that harm should be caused to the French producers. This was because causing such harm would fulfil the ulterior object of benefiting the British producers. It was necessary to cause the harm in order to confer the benefit. Causing the harm was 'a subsidiary purpose for giving effect to the dominant purpose'. In other words, *Bourgoin* was a case where test b) was satisfied.

209. *Bourgoin* was a case where a positive action by the Minister was aimed or directed at the claimants, the French Turkey producers. *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1 was a very different case. The claim was brought by creditors of BCCI. The allegation was that the Bank of England had wrongly granted a licence to, or failed to revoke the licence of, BCCI when it knew, believed or suspected that BCCI would collapse if not rescued. There was no allegation that the Bank's conduct was aimed or directed at the claimants. Preliminary issues were tried that raised the question of whether the claimants had pleaded a viable case. These raised questions as to the ingredients of the tort of misfeasance in public office. One such question related to the state of mind that had to be demonstrated in respect of the damage that the claimants alleged that they had suffered. The claimants alleged that it sufficed if the damage that they sustained was reasonably foreseeable by the Bank.

210. All members of the House of Lords agreed that there were two forms of the tort. Common to each was that the defendant must have committed a deliberate and dishonest abuse of power. This, however, was not of itself enough to establish liability for consequent economic injury. A further mental element had to be established in relation to this. All were agreed on the first form. This was described as 'targeted malice', that is a deliberate intention to cause the injury to the defendant or to a class of which the defendant is one.

211. As to the other form, the majority (Lord Steyn, Lord Hope, Lord Hutton and Lord Hobhouse) agreed that this in its turn could be subdivided into two mental conditions. The first was knowledge that the abuse of power would probably cause injury to the claimant or to a class to which he was one. The second was subjective reckless indifference as to whether such injury was caused or not.

212. Lord Millett's reasoning differed from that of the majority. He expressed the view at p 235 that the element of knowledge was a means of establishing the relevant intention, but not a substitute for it. On the next page he stated that the fact that the defendant foresaw that his conduct would probably harm the claimant was not enough. The inference could not be drawn unless the defendant did foresee the consequences.

Intention: discussion and conclusion

213. The law has always shown a reluctance to impose liability in tort for causing purely pecuniary loss. In the case of conspiracy to injure that does not involve the use of unlawful means, the law overcomes that reluctance where the tortfeasors conspire and where the predominant object of the conspiracy is to cause the claimant economic harm. The fact that the predominant object, or (which, as far as we can see, is the same thing in this context) the predominant purpose, of the exercise is to cause harm is of the essence of the tort. Where conspirators resort, or indeed an individual resorts, to unlawful conduct with the object of causing the claimant economic harm, the law

holds the conduct tortious, even if causing the harm is not the predominant object or purpose of the exercise. The tort will be made out even though causing the harm may only be the means to some other end.

214. However, in all cases of alleged unlawful interference and unlawful means conspiracy where liability has been established, the necessary object or purpose of causing the claimant economic harm has not been made out unless the conduct can be shown to have been aimed or directed at the claimant. That seems to us to be the consistent theme in the two *Lonrho* cases in the House of Lords.

215. In *Lonrho v Shell* Lord Diplock referred to "acts done … for the purpose … of injuring the plaintiffs". In *Lonrho v Fayed*, Lord Bridge approved Lord Denning's formulation in *Lonrho v Shell* in the Court of Appeal, where it was said that "[i]t s sufficient if the conspiracy is aimed or directed at the plaintiff". This approach is to be found elsewhere. We note in particular the statement in *Clerk & Lindsell* that the tort consists of using unlawful means with the object of injuring the claimant, the dicta of Dillon and Ralph Gibson LJJ in *Lonrho v Fayed*, Stuart-Smith LJ's reference to deliberate and intended damage in the *Associated British Ports* case, and the observations in the *Van Camp Chocolates* and *Ceticam* cases.

216. Cases on other economic torts appear to us to have approached the question of intention in the same way. For example, in the context of inducement, in the passage quoted above from *Allen v Flood*, Lord Watson referred to " the use of illegal means directed against a third party". In her book, at p 101, Hazel Carty traces the tort of unlawful interference back to the assertion of Lord Lindley in *Quinn v Leathem* at p 495, by reference to *Lumley v Gye* (1853) 2 E & B 216, that the underlying principle was "wrongful acts done intentionally to damage a particular individual and actually damaging him".

217. The relevant conduct was as much directed at the claimant in the *Kuwait Oil Tanker* case as in all the others. Only by diverting income that should have gone to the claimants could the defendants have enriched themselves. In other words test b) was satisfied, because the very act of diverting the money to the defendants required and involved (as opposed to merely resulted in) diverting the money away from the claimant. Indeed, it may be said that the wrongful act of diverting the money from the claimant in a sense preceded the ulterior motive, namely the receipt of the money by the defendant. However, in some situations an unlawful act will have adverse financial consequences to third parties, which are foreseeable and foreseen, but which are not consequences that the defendant desires or has any interest in bringing about. The statement from *Bourgoin* cited in the *Kuwait Oil Tanker* case might suggest that foresight of consequences must always be equated with intention to cause them – i.e. that satisfying test c) will suffice to establish the necessary intention. However, as we have explained in a paragraph 208 above, looked at the context in which the statement was made, it does not carry that inference.

218. The authorities that we have considered indicate that it is of the essence of the torts of unlawful means conspiracy and unlawful interference that the conduct that causes the harm is aimed or directed at the claimant, and that in such cases the courts have inferred that the requisite intention, that is the purpose or object of causing the claimant economic loss, is present. The one discordant voice is that of Woolf LJ in *Lonhro v Fayed.* He postulated that foresight by a defendant of harm to a plaintiff

was sufficient to satisfy the mental element in the tort of unlawful interference even though there was no desire to bring about that consequence in order to achieve what he regarded as his ultimate end. If by this Woolf LJ meant that foresight of an incidental consequence of unlawful action sufficed to constitute the mental element of the tort, even though achieving that consequence was no part of the defendant's design, we consider that his statement was contrary to the weight of the authority that we have summarised.

219. As to the cases on interference with contractual rights, Tony Weir in his published lectures on Economic Torts (1997) reacted strongly against the decision in *Millar v Bassey*. At p 19 he said this:

> "Admittedly it was a striking-out action, but what nonsense that it should go to trial, that Miss Bassey should have to defend herself against five people she had never contracted with and did not aim to harm just because she changed her mind about making a recording. Must I perform my contract with you just because a third party may, to my knowledge, suffer if I don't? Suppose that I agree to buy goods from you knowing that if the sale goes through, your agent will received a hefty commission: am I liable to him for refusing to accept delivery? In such a case there is only one third party: in *Millar v Bassey* the defendant looked to be liable to a whole orchestra plus the electronic bank. Dear me! Privity come back! – almost all is forgiven. It is easy to see how wrong this decision is, and we shall see later how it came to be possible."

220. Other commentators have expressed similar, although more moderate, views. We consider that the conclusions of Peter Gibson LJ are to be preferred to those of Beldam LJ. It is often the case that failure to perform one contract will lead to a series of consequent breaches of contracts to which the original contract breaker is not party. To render him liable for these breaches simply because they are consequences which he foresaw would be to undermine the doctrine of privity of contract.

221. Professor Weir and most other writers, including Hazel Carty and Messrs Sales and Stilitz, are of the view that the gist of all the economic torts is the intentional infliction of economic harm. We consider that this is a fair and satisfactory conclusion to draw from the authorities, difficult as some of these are to reconcile. Intention to inflict harm on a claimant is not the same as a wish to harm him. It is, however, very different from knowledge that economic harm will follow as a result of incidental consequences of conduct, when those consequences are not necessary steps in achieving the object of the conduct and are unsought.

222. *Three Rivers* establishes that foresight of probable injury or subjective recklessness as to whether such injury is caused is the mental element required in relation to the consequences of abuse of power, if the cause of action of misfeasance in public office is to be made out. This is a developing tort, as is the tort of unlawful interference. Is there a case for equating the mental element in the two torts? The House of Lords did not so suggest in *Three Rivers,* and Clarke J, who sat at first instance in *Three Rivers*, did not consider that there was – see at [1996] 3 All ER 558 at p 583. We do not consider that there is. The gist of the tort of misfeasance in public office is the

deliberate abuse of power. The mental element in the first form of the tort, namely targeted malice, bears strong echoes of the mental element required for unlawful interference, particularly in the early days of the development of that tort. The same is not true of the alternative requirements of foresight of consequences or subjective recklessness. These are not the gist of the tort; they are closer to control mechanisms limiting the liability that flows from the wrongful conduct.

223. The gist of the tort of unlawful interference is the intentional infliction of economic harm. In other words, it must be shown that the object or purpose of the defendant is to inflict harm on the claimant, either as an end in itself, or as a means to another end. If foresight of probable consequences or subjective recklessness sufficed as the mental element of the tort, this would transform the nature of the tort. This, in effect, is what Mr Browne sought to persuade us to do when he advanced tests d) and e) as sufficient to satisfy the mental element in the tort of unlawful interference. Indeed, we take the view that satisfaction of test c) would not be sufficient to establish the requisite mental element. However, as mentioned in paragraph 159 above, establishing that the defendant knew that the claimant would suffer economic loss may well be evidence which can support a contention that test b) or even test a), is satisfied..

224. It might be possible to envisage a case in which an intention satisfying test a) or b) could be established even though the unlawful act was not aimed, targeted or directed at the claimant. Equally it might be possible to envisage a case in which the relevant intention was not established, even though the unlawful conduct was in some way directed at the claimant. These are, however, unlikely scenarios and the decided cases do not provide an example of either. In principle we agree with Hazel Carty, and what she describes as 'most commentators', that it is necessary to prove targeted or directed harm. The essence of the tort is that the conduct is done with the object or purpose (but not necessarily the predominant object or purpose) of injuring the claimant or, which seems to us to be the same thing, that the conduct is in some sense aimed or directed at the claimant.

225. For the reasons that we have given, we reject this part of OK!'s case and hold that the claims founded on the economic torts are not made out.

Unlawful means

226. In the light of the above conclusions it is strictly unnecessary to consider what amount to unlawful means for the purposes of the tort with which we are concerned. We therefore refer to it relatively shortly.

227. There is scope for argument as to what can and cannot amount to unlawful means for the purposes of the tort of interference with business by unlawful means or of the tort of conspiracy to injure by unlawful means. It is not suggested that any distinction is to be drawn between the two torts for this purpose. It appears possible that not every unlawful act amounts to unlawful means – see for instance *RCA v Pollard*. But, if that is so, it is not always easy to know which acts qualify and which do not. However, it appears to us that the exceptions should be few and identified on some clear and principled basis.

228. The economic torts may be regarded as somewhat anomalous, in the sense that they give rise to a claim by a party who, ex hypothesi, is not within the class of persons who could claim for damage suffered simply as a result of the act embodied in the "unlawful means". However, once one accepts the existence of the economic torts, it seems to us that it would add to any anomalies if only certain types of unlawful acts could, as a matter of principle, qualify as "unlawful means", at any rate unless the principles of exclusions were clearly identified and justified. It would be more consistent and more likely to lead to just results if any unlawful act could be "unlawful means", while requiring a sufficient nexus between the act and its unlawfulness and the harm complained of. The need for a claimant to establish an intention on the part of the defendant to harm him, sufficient to satisfy test a) or b), would, at least normally, serve to incorporate this rather ill-defined reference to a sufficient nexus, although it is right to add that it also goes further than that.

229. Fortunately, it is not necessary for us to try to identify or formulate any exclusionary principle of general application in order to determine this appeal. In the light of the decided cases, it would not be easy to do so. The question here is whether publication by Hello! of unauthorised photographs which amounts to an infringement of the Douglases' rights of privacy and a breach of a duty of confidence owed to them is sufficient unlawful means to entitle OK! to maintain a claim in tort for loss intentionally caused to it by the publication.

230. In *Clerk & Lindsell*, at paragraphs 24-97 to 24-98, the editors consider whether breach of confidence can amount to "unlawful means", albeit for the purpose of the tort of interference with economic interests, and conclude that it can. As they suggest in the text and the footnotes, this view seems to be supported by the majority of this court (Otton LJ and Owen J) in *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248. The facts were these, essentially as summarised by *Clerk & Lindsell*. A broker arranged through a finance house the leasing of cars and computers for clients. In one transaction he gave confidential information about the client and his own trade terms, including his profit margin, to the defendant which used it without authorisation to offer more attractive terms, aiming to cut out the broker from deals with the client. It was held that there was no fiduciary duty or relationship between the broker and the finance house; they were at arm's length. However, it was held that the broker's profit margin and to a lesser degree the invoice price between the defendant and the broker were items of confidential information which had been misused by the defendant to enable it to put forward another deal to the client.

231. In these circumstances the claim succeeded in breach of confidence so that the views of the majority of this court on the tort of unlawful interference with business or, as Otton LJ put it, economic or other interests, were *obiter*. Simon Brown LJ preferred to express no view on the point. Otton LJ said at p 260 that in the particular circumstances of the case, the breach of contract coupled with the ruthless conduct of the defendant would amount to unlawful means. Owen J agreed that the defendant had used unlawful means.

232. That was a stronger case than this on the facts, and each case depends upon its own facts. However, the position here was that Hello! published photographs which it knew to be unauthorised by the Douglases in circumstances in which it also knew that OK! had acquired the rights to publish authorised photographs of the wedding and that it was OK!'s case that the publication would be in breach of duties of confidence

owed both to OK! and to the Douglases. Indeed, two judges had granted an injunction to restrain Hello! from publishing the photographs and, although the Court of Appeal had allowed Hello!'s appeal against the interlocutory injunction (but had not yet given its reasons for doing so), Hello! must have appreciated that the court may well conclude that OK!'s case was well-founded, although damages would be an adequate remedy.

233. To publish unauthorised photographs in those circumstances with the intention of injuring OK! (in the sense discussed above) and in fact injuring OK! was in our opinion to do so by unlawful means, namely the infringement of the rights of the Douglases. Moreover there would have been, in our view, a sufficient nexus between the publication, the fact that it was unlawful and the injury to OK! to justify the conclusion that there was here an interference with the business of OK! committed with the intention of injuring OK!.

234. We recognise that, having regard to the conclusions reached earlier as to OK!'s claim for breach of confidence, there was no breach of a duty of confidence owed to OK!, but it cannot be necessary for the unlawful means to amount to an actionable infringement of the claimant's own rights. Otherwise the tort would be largely ineffective: see *Associated British Ports v Transport and General Workers' Union* [1989] 1 WLR 939, especially per Stuart-Smith LJ at p 965.

235. Accordingly, if we had held that OK! had satisfied the high test of intention, bearing in mind the principle suggested by Sales and Stilitz that it is not appropriate to determine whether the means used were in a relevant sense unlawful by the seriousness of the civil wrong, we would have held that the test of unlawful means was satisfied.

Conclusion on OK!'s cross-appeal

236. For the reasons given above, OK! has failed to establish that Hello! had the requisite intention to establish the tort of unlawful interference with business or conspiracy to injury by unlawful means with the result that OK!'s cross-appeal fails.

The two issues on damages

237. As mentioned above, two issues were raised before us on the judge's assessment of damages. Because we have allowed Hello!'s appeal against the judgment in favour of OK!, the first of those issues, which only bears on the level of damages awarded to OK!, has become moot. We nonetheless propose to deal with it, and we will then turn to the Douglases' appeal in relation to damages. That appeal is in point because we have concluded that OK! have no cause of action against Hello!; accordingly, the Douglases maintain their contention that the damages they were awarded were far too low, and, in particular, were assessed on a wrong basis.

Liability for losses from publication in the newspapers

238. After the judgment on the issues of liability, there was, as we have mentioned, a subsequent hearing to determine the measure of damages. OK!'s damages were assessed on the basis of the profit they lost as a result of the reduction in sales of the two issues of OK! magazine containing the authorised photographs caused by the

publication of the unauthorised photographs. The judge decided, when assessing the effect on the circulation of Issues 241 and 242 of OK! magazine, that he should take into account not only the effect of the publication of the unauthorised photographs in Hello! magazine, but also that of the publication of copies of some of those photographs in the Sun and in the Daily Mail on (or shortly after) 24th November 2000. For Hello! it is said that this was wrong in principle, in light of the facts found by the judge. The relevant facts relied on to support that contention are as follows.

239. First, no consent was ever given by Hello! to the publication of any photographs in the two newspapers. Secondly, following the discharge of the interlocutory injunction, the two newspapers had been expressly forbidden by Hello! from publishing the photographs. Thirdly, at the time they were forbidden from publishing any of the photographs, it was not too late for the Sun to have withdrawn from publishing them, even though preparatory steps had been taken to do so. Fourthly, the judge said, in paragraph 40 of his main judgment, that, albeit after "a hesitant start", Hello! had "acted with reasonable speed to stop publication by others". In these circumstances, it is said that the judge's conclusion, whose basis was only briefly explained in the damages judgment, that the damages flowing from the publication of the unauthorised photographs were not "so remote a consequence of Hello!'s publication as not to be laid at Hello!'s door", cannot stand.

240. In our judgment, although it might have been better if the judge had given fuller reasons for his decision on this point, his determination on remoteness was one that he was entitled to reach. While the resolution of the question of remoteness will often involve issues of law, it is normally a fact-sensitive determination, which must carry with it a degree of inference and value judgment. As Laws LJ said in *McManus v Beckham* [2002] 1WLR 2982, at paragraph 39, in connection with a slander action, "The reality is that the court has to decide whether, on the facts before it, it is just to hold [the defendant] responsible for the loss in question". The judge held that the "but for" test was satisfied, but that that was clearly not enough (although it was necessary) to justify his conclusion. However, there were a number of other findings, or items of uncontroversial evidence, which, when taken together, in our view, justify his conclusion.

241. First, Hello! knew well before 24th November 2000 that some newspapers were wishing to publish copies of some of the unauthorised photographs. Secondly, it had been indicated on behalf of Hello! that the newspapers might be able to do so. Thirdly, there was evidence that it was not uncommon for newspapers to copy at least the front cover of Hello! (as well as OK!) magazine. Fourthly, it was foreseeable, especially to those in this business, that these photographs would provide particularly attractive copy for the newspapers, bearing in mind their subject matter and controversial history. Fifthly, there was Hello!'s "hesitant start" referred to by the judge. Sixthly, there was the judge's finding in his quantum judgment that, after the newspapers learnt of the discharge of the interlocutory injunction, "they not unnaturally thought that they were free to use the pictures". Seventhly, given that Hello! were publishing photographs which they well knew had been taken in an underhand way, it could scarcely have come as any surprise that others in the same line of business were prepared to run risks by publishing copies of those photographs. Indeed, having agreed to the circumstances in which the photographs had been taken,

it is questionable whether Hello! could successfully have brought proceedings for breach of copyright. *Ex turpi causa non oritur actio*.

242. In all these circumstances, we have reached the conclusion that the judge was entitled to decide, as he did, that the losses suffered by OK! from the publication of the unauthorised photographs in the two newspapers were "sufficiently consequential upon the breach and sufficiently foreseeable to make Hello! Ltd liable for them in the normal way".

The Douglases' claim for a notional licence fee

243. When it came to the assessment of damages, the Douglases were awarded £3,750 each as general damages for mental distress, plus a further £7000 between them for additional expenses and disruption in respect of selecting photographs for publication. Given that they are entitled to damages and that OK! are not entitled to damages, it is contended on behalf of the Douglases that they should be entitled to more substantial damages, namely a sum equal to the notional licence they would have charged Hello! to permit them to publish the unauthorised photographs. The Douglases also contend that the judge's assessment of that fee at £125,000 was significantly too low. We observe at the outset that it is not easy to understand why the Douglases' appeal in this connection should be contingent upon Hello!'s appeal succeeding against OK!. This anomaly raises an immediate question mark over the validity of this claim.

244. It is well established that damages in a case involving unauthorised use of, or unauthorised benefiting from, intellectual property and similar rights can be assessed in a number of different ways. In *General Tire & Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 1 WLR 819 at pp 824 to 827, Lord Wilberforce identified the normal categories at least in patent cases. They are the profit, or the royalty, which was or would have been achieved (e.g. where the defendant manufactures, or licences the manufacture of, goods covered by the patent), and the licence fee which would reasonably have been charged (e.g. where it is not possible to assess the level of profit). The present case is far from normal, and in our view none of these normal methods of assessment would be appropriate.

245. This is not a case where a profit was made by the defendant: bearing in mind the payment they made, £125,000, for the unauthorised photographs, Hello! actually made a loss on the whole exercise. This is not a case where a royalty, or its equivalent, would be appropriate, partly for the same reason, and partly because Hello! effected no licensing, or its equivalent, in relation to the use of the unauthorised photographs.

246. There are obvious problems with assessing the Douglases' damages on a notional licence fee basis. First, the whole basis of their (as opposed to OK!'s) complaint about Hello!'s publication of the unauthorised photographs is upset and affront at invasion of privacy, not loss of the opportunity to earn money. Indeed, they have already claimed and been paid, damages assessed on that former basis. That factor alone would not prevent an assessment on a notional licence fee basis, but it is not a good start. Secondly, the Douglases would never have agreed to any of the unauthorised photographs being published. The licence fee approach will normally involve a fictional negotiation, but the unreality of the fictional negotiation in this case is palpable.

247. Thirdly, and most importantly, having sold the exclusive right to publish photographs of the reception to OK!, the Douglases would not have been in a position to grant a licence to Hello!. In this connection, we do not consider that, in light of the terms of the OK! contract, especially clause 10, the Douglases could claim to be required to account for the notional licence fee to OK!. Accordingly, an award of a notional licence fee would involve the Douglases being unjustly enriched: they have already been paid £1m for the exclusive right to publish photographs of the reception. As was said in argument, they have thereby exhausted their relevant commercial interest.

248. Quite apart from these factors, while it is not a sufficient reason for rejecting the notional licence fee approach, there is the difficulty of assessing a fee. The Douglases would have been very unwilling to agree to publication of the unauthorised photographs in light of the terms of the OK! contract, the quality of the photographs, and the circumstances in which they were taken. Hello! would presumably have been prepared to pay at least £125,000, as that is what they actually paid for them, but Mr Browne made it clear that the Douglases would have wanted a lot more. The worse the quality of the photographs, the less they would have been worth to Hello! and the more the Douglases would have wanted for their publication.

249. In all these circumstances, we are of the view that a notional licence fee would not be the right basis on which to assess the Douglases' damages, even given that they, but not OK!, are entitled to claim against Hello!. If, however, Hello! had made a profit on the publication, we would have had no hesitation in accepting that the Douglases would have been entitled to seek an account of that profit. Such an approach would not run into the difficulties of principle which their notional licence fee argument faces. Such an approach may also serve to discourage any wrongful publication, at least where it is motivated by money.

250. Finally, if it had been right to award damages to the Douglases on the basis of a notional licence fee, we would not, in any event, have thought it right to interfere with the judge's assessment of £125,000. Various factors to which we have made reference render it impossible to contend that the figure adopted by the judge was one which he could not properly have reached. We have in mind the fact that the assessment was a matter of valuation opinion, the difficulties inherent in this particular assessment, the fact that Hello! actually paid £150,000 for the unauthorised photographs, and the fact that Hello! made a loss on the whole exercise.

The discharge of the interlocutory injunction

251. We turn to an issue upon which we were not addressed, but which we believe justifies revisiting. It is the decision of this court in November 2000, reported at [2001] QB 967, to lift the interlocutory injunction granted by Hunt J, restraining Hello! from publishing the unauthorised photographs. In our view, in the light of the law as it can now be seen to be, that decision was wrong, and the interlocutory injunction should in fact have been upheld.

252. The reasons given by the three members of this court for concluding that an interlocutory injunction was inappropriate were slightly different. Brooke LJ considered that it was no more than arguable that the Douglases "had a right to privacy which English Law would recognise", and that their claim based on privacy was "not a particularly strong one" (paragraphs 60 and 95). Although Sedley LJ

thought that the Douglases had "a powerful prima facie claim to redress for invasion of their privacy", he considered that "by far the greater part of that privacy has already been traded and falls to be protected, if at all, as a commodity in the hands of [OK!]" - paragraphs 137 and 144). At paragraph 171, Keene LJ was primarily influenced by the point that the "court in exercising its discretion at this interlocutory stage must still take account of the widespread publicity arranged by the [Douglases] for this occasion".

253. In our view, these analyses, and indeed the decision to discharge the injunction, did not give sufficient weight to two factors. The first was the strength of the Douglases' claim for an injunction restraining publication of the unauthorised photographs. Although Sedley LJ took the view that they had a strong case in this connection, it would appear that Brooke and Keene LJJ were more doubtful. The Court of Appeal did not have the benefit of the reasoning in the House of Lords in *Campbell v MGN* or, even more significantly for present purposes, the reasoning of the ECtHR in *von Hannover v Germany*. Had the court had the opportunity to consider those two decisions, we believe that it would have reached the conclusion that the Douglases appeared to have a virtually unanswerable case for contending that publication of the unauthorised photographs would infringe their privacy.

254. Of course, even where a claimant has a very strong case indeed for contending that publication of information would infringe his privacy, there may be good reasons for refusing an interlocutory injunction. In the present case, however, we find it difficult to see how it could be contended that the public interest (as opposed to public curiosity) could be involved over and above the general public interest in a free press. Particularly so, as it was clearly the intention of the Douglases and OK! to publish a large number of (much clearer) photographs of the same event. The fact that the Douglases can be fairly said to have "traded" their privacy to a substantial extent as a result of their contract with OK! does not undermine the point that publication of the unauthorised photographs would infringe their privacy.

255. The second factor to which this court appears to have given insufficient weight was the likely level of damages which the Douglases would recover if an interlocutory injunction was refused and, as now turns out, publication of the unauthorised photographs infringed their rights. We have been provided with transcripts recording remarks from the Bench during the argument, which suggested that the level of damages which would be awarded to the Douglases, if they established that the publication of the unauthorised photographs infringed their right to privacy, would be very substantial. In the event, the damages awarded to them was the relatively small sum of £14,600 (of which nearly half is attributable to the inconvenience they suffered as a result of having to select photographs for publication by OK! owing to the imminent publication of the unauthorised photographs by Hello!).

256. The characterisation of this sum as "relatively small" is not intended to indicate that we think that the level of damages should have been greater. The description is appropriate because damages, particularly in that sum, cannot fairly be regarded as an adequate remedy. As we have already observed, the Douglases would never have agreed to the publication of the unauthorised photographs. In those circumstances, bearing in mind the nature of the injury they suffered, namely mental distress, a modest sum by way of damages does not represent an adequate remedy.

257. The sum is also small in the sense that it could not represent any real deterrent to a newspaper or magazine, with a large circulation, contemplating the publication of photographs which infringed an individual's privacy. Accordingly, particularly in the light of the state of competition in the newspaper and magazine industry, the refusal of an interlocutory injunction in a case such as this represents a strong potential disincentive to respect for aspects of private life, which the Convention intends should be respected.

258. Of course, as recently emphasised by the House of Lords in *Cream Holdings Limited v Banerjee* [2004] 3 WLR 918, a claimant seeking an interlocutory injunction restraining publication has to satisfy a particularly high threshold test, in light of section 12(3) of the Human Rights Act 1998. However, with the benefit of the reasoning in *Campbell v MGN* and *von Hannover v Germany*, we consider that this threshold test was in fact satisfied by the Douglases when they sought the interlocutory injunction in this case.

259. The Douglases had a very strong claim; indeed, in the light of the two recent authorities to which we have referred, we would have thought that it was one which may well have been clear enough to justify summary judgment in their favour. The award of damages eventually made to the Douglases, although unassailable in principle, was not at a level which, when measured against the effect of refusing them an interlocutory injunction, can fairly be characterised as adequate or satisfactory. Only by the grant of an interlocutory injunction could the Douglases' rights have been satisfactorily protected. Further, the interests of Hello! at the interlocutory stage, which were essentially only financial, could have been protected by an appropriate undertaking in damages by the Douglases.

Conclusion

260. In the event, the outcome of this appeal is as follows:

- Hello!'s appeal against the judgment in favour of the Douglases based on privacy and commercial confidence is dismissed.

- Hello!'s appeal against the judgment in favour of OK! based on commercial confidence is allowed.

- OK!'s cross-appeal based on the economic torts is dismissed.

- The claimants' cross-appeal on damages based on a notional licence fee is dismissed.