



Neutral Citation Number: [2005] EWHC 472 (Ch)

Case No: HC04C02812

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2005

Before :

MR. JUSTICE MANN

Between :

Fraser-Woodward Limited

Claimant

- and -

(1) British Broadcasting Corporation

(2) Brighter Pictures Limited

Defendants

Miss C. Michalos (instructed by **Messrs. Charles Russell**) for the Claimant.
Miss C. May (instructed by **BBC Litigation Department and Messrs. Bristows**)
for the Defendants.

Hearing dates: 22nd, 23rd, 24th and 25th February 2005

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR. JUSTICE MANN

Mr Justice Mann :

Introduction

1. This is an action for infringement of copyright in photographs, the copyright in which is vested in the claimant (“Fraser-Woodward”). They are all photographs of various members of the well-known Beckham family. Mr David Beckham is a very well-known footballer, and his wife Victoria is a well-known pop singer who was formally a member of a group called the Spice Girls, in which context she was known as Posh Spice. Together and individually they have acquired celebrity status, and their private and public lives are apparently of great interest to many people. At the time of the TV programme which is at the heart of this case they had two small children, Brooklyn and Romeo (they have since had a third). The photographs in question were originally published in various tabloid newspapers. That publication was by licence. The second defendant (“Brighter”) is a television production company. It used images of the newspaper pages on which the photographs were published in a programme which it made for, and which was broadcast by, the first defendant (“the BBC”). It is that use which is complained of as being an infringement of copyright. Additional damages for flagrancy are sought, partly on the grounds of the flagrancy of the alleged breaches. The principal defences of the defendants are fair dealing within section 30(1) of the Copyright, Designs and Patents Act 1988 (“the Act”), and incidental inclusion within the meaning of section 31(1) of that Act.

The Facts

2. The fact of the use of the photographs, the existence of copyright and its being vested in the claimant are not in dispute. I will therefore be able to deal with them relatively shortly. There is, however, a dispute as to the level of editorial control exerted by Victoria Beckham, and the state of mind of Brighter when it made the programme (going to flagrancy of breach and additional damages, and going to the fairness of dealing).
3. There are 14 photographs in issue in this case. At the trial they were given the names Beckham 1 to 14, and I shall continue to identify them in that way. Beckhams 1-13 were taken by Mr Jason Fraser, a well-known photographer who has a reputation for taking photographs of celebrities for the purposes of being sold, and ultimately reproduced, in various publications. The claimant company is a company of which he is a shareholder, and it owns the rights in various photographs, which it exploits from time to time. Beckham 14 was taken by Michele Crosera, an Italian photographer with a commercial relationship with both the claimant and Mr Fraser. He originally had the copyright in this last photograph (“Beckham 14”); he has assigned it to the claimant. All the photographs except Beckham 14 are photographs of two or more members of the Beckham family taken in apparently off-guard moments

when their subjects were conducting their day-to-day activities in public. They are not formal photographs in the sense that their subjects formally sat for them; on their face they might be thought to be photographs taken on occasions not intended for photography and in circumstances in which their subjects were not intended to be photographed (though whether that is right or not is one of the points made in the television programme which reproduced them). Beckham 14 is of Mrs Beckham by herself.

4. At the end of 2002 Brighter embarked on the production of the television programme in question, which was ultimately broadcast under the title "Tabloid Tales". The pleaded purpose of the programme (which was one of six in a series) was that it "intended to and did criticise and/or review tabloid journalism and the methods employed by the tabloid press and/or the celebrities featured to build and exploit a story to their advantage" (to quote the Defence in this case). The Beckham programme was broadcast on 29th April 2003 at 10.40 p.m. It was narrated by Mr Piers Morgan, a well-known former Fleet Street tabloid editor. He opens the programme by saying:

"Tonight Tabloid Tales exposes Victoria Beckham's relationship with the press, revealing the truth, the rumours and the lies behind the headlines."

A little later on he says:

"The big question is whether she is really just a canny little minx cleverly manipulating the media for her own gain, or whether the press are a bunch of tabloid vultures, preying on Victoria to sell newspapers."

The programme (which runs for a little under 40 minutes) then contains a sort of survey of press coverage of the Beckhams, and in particular Victoria Beckham, starting with her career as a member of the Spice Girls pop group and showing, or claiming to show, a developing relationship with the press. This is achieved by linking narration of Mr Morgan, clips of interviews with various journalists and media personnel, some short contributions from Mr Fraser himself, rather longer extracts from an interview of Victoria Beckham and her mother by Mr Morgan, and a mixture of film clips, clips from pop videos and (most importantly for the purposes of this case) images of newspaper headlines, articles and photographs. The 14 photographs which are the subject of this action featured in this last context. Apart from one which was on screen for about 4 seconds, they were shown for no more than 2 or 3 seconds each, and some of them less than that. On occasions they were shown as part of a brief still image; on others the camera panned quickly across them or zoomed in relation to them.

5. I now need to go back and set out one or two brief details of how the programme came to be made and how the makers of the programme went about dealing with intellectual property rights. The history is relevant to two

issues – the fairness of the dealing for the purposes of the fair dealing provision, and whether any breach was flagrant or would otherwise attract additional damages under section 97(2) of the Act. The series of which the programme formed part had an original working title of “Set the Record Straight”. At some point the title was changed to “Tabloid Tales”. The claimant sought to suggest that the original title betokened the real purpose of the programme, which was to give the main subject (Victoria Beckham in the subject programme) the opportunity to use the programme as a public relations opportunity, and “put the record straight” in that sense. At the end of the day there was no evidence to support an explicit intention on the part of Brighter that this should be the thrust of the programme, and I find that there was no real significance (for the purposes of the points I have to decide) in the original choice of name (or in its change). Brighter pitched for the series to the BBC, and was commissioned to make it. The budget was about £845,000. 6 programmes were broadcast; the Beckham programme was the first. Miss Jacqueline Williamson was the production manager for the series and she gave evidence before me. One of her concerns was the proper rights clearance for the various images used in the course of the programme (and the other programmes). In addition to the images which are the subject of this action, other still images were used. She consulted a BBC in-house lawyer about this (Mr Alistair Bonnington), and I shall come to that in due course. However, it is clear from her evidence that she considered that the fair dealing provisions were capable of applying, and as a result of her consultation with Mr Bonnington she claims that her view was reinforced. In the circumstances there was no need to seek the permission of any of the owners of the copyright of the photographs with one exception – there was one photograph for which a licence fee of £125 was paid. She produced a document called a Residuals Schedule, which is said to demonstrate that all the photographs except that one were used on the “fair dealing” basis. This is a document that was prepared at the end of the series for the benefit of the BBC so that the BBC could see the basis on which material was used. It is intended to cover all the material used, and shows such things as the basis on which copyright material was used, a summary of any licences obtained and the amounts paid. At the end of the schedule is a page referring to “Headlines” from various newspapers. All have the word “Fair” in the relevant columns relating to licences, indicating (as I was told, and which I accept) that the fair dealing provision was considered to apply to them. These entries do not expressly refer to photographs appearing in newspapers (such as those which are the subject of this action), but I am told that there is no other entry in the Residuals Schedule which is capable of referring to them, and it was intended that this part of the schedule should deal with them thus. I accept that evidence.

6. In those circumstances it is the defendants’ case that it was not necessary to seek Mr Fraser’s consent to the use made of the Beckham photographs, and no such consent was sought. Mr. Fraser’s evidence as to consent was different. He says that some time before 27th February 2003 (he cannot put a date on it) he was told by his personal assistant Cathy Carroll that a researcher from Brighter had telephoned her to request a licence to use photographs of the Beckhams in the programme. He says that he instructed her to tell Brighter that he would not grant such a licence. In saying No he was acting in

accordance with what he said his general (though not invariable) practice was in relation to the use of his photographs on television. These particular photographs had of course already been published, and the newspapers had paid a price of well over £30,000 in aggregate for the right to publish immediately after they were taken, and over the course of time these figures have apparently yielded an unspecified sum which exceeds six figures, but he generally regarded the use of his photographs on television as being very damaging to the residual value of his photographs; hence his general practice, and hence what he says his reaction was on this occasion. Miss Carroll gave evidence. She could not recall receiving and relaying such a request (and refusal), but what Mr Fraser described as happening would have been in accordance with her practice had she received such a request.

7. The making of such a request, if it occurred, formed a material part of the claimant's case on fair dealing. As will be apparent later on in this judgment, I do not think that it affects the point one way or another, but in case that conclusion is wrong and in case this case should be taken further I need to make a finding about it. Having heard the evidence I am not satisfied that this particular request was made (and refused). Miss Carroll's inability to recollect any such request does not point one way or the other – in my view it certainly does not mean that the request was not made, because it is quite conceivable that the request was of a routine nature that would not necessarily be remembered in a busy office. It is unsatisfactory that the researcher on the programme (a Ruth Johnson) has not given evidence – Miss May, who appeared for the defendants, told me she could not be contacted, though Miss Michalos, who appeared for the claimant, told me her solicitors believed they had found her. However, I am satisfied that neither Miss Williamson nor anyone else in a supervisory capacity would have required that it be made. There is no evidence that Miss Williamson was intending to rely on anything other than fair dealing in relation to these (and other) photographs, and no reason emerged why she (or anyone else) would have instructed the researcher to make the call alleged by Mr Fraser. She had an early meeting with Mr Bonnington, before the programmes were shot, at which such things were discussed, and I think it is likely that fair dealing was in her mind from then on. That makes it very unlikely that she would have instructed anyone to seek a licence from Mr Fraser. Of course, it is possible that the researcher might have taken it upon herself to make the request anyway, but if she had then I think it inevitable that any refusal would have been reported back to Miss Williamson, and Miss Williamson told me, and again I accept, that she could not remember receiving any such report and would be likely to have remembered if she had. It is fair to say that a lot of the detail of the making of this programme had obviously passed out of her recollection, but I think that it is likely that that would have stood out in her mind, especially in the context of later discussions about fair dealing to which I will come shortly. So far as Mr Fraser's recollection is concerned, I am quite satisfied that at all times he was a truthful witness who was not deliberately making anything up, but I think it likely that he has confused another occasion with this particular occasion (his evidence was that he had received many requests for the use of his photographs in TV programmes – 3 or 4 per week was his estimate). He clearly felt strongly about the use of his photographs, and there were other

requests for the use of photographs later on, when he was giving an interview for the programme, and it may be that this has all come together in his mind to give him a false recollection, but whatever the explanation is I think that he was mistaken.

8. However, there came a time when he was, as I find, asked whether his photographs could be used in a different way, and in respect of which he did refuse consent. In early 2003 he was contacted on a number of occasions by representatives of Brighter and asked if he would give an interview. He declined, until eventually he was persuaded to do so personally by Mr Piers Morgan. He told me that he agreed once it had been made clear that the programme would not be a “hatchet job” on Victoria Beckham. Four proposed appointments were cancelled before the interview was finally filmed on 27th February 2003. In the context of that filmed interview Mr Fraser was asked if he would allow his photographs to appear during the interview, spread out on the table. Mr Fraser told me that he refused that, and I accept his evidence. I also accept his evidence that he declined a request made by the producer conducting the interview for sending copies of photographs of the Beckhams for inclusion in the programme. I think that this was probably a casual request, but I accept that what he described about this occasion actually happened. As a result no photographs were shown as part of Mr Fraser’s interview.
9. Production of the programme had started at about the end of November 2002 – Miss Williamson could not quite remember more precisely when, but it was about then. In the first month of production Miss Williamson had a meeting with Mr Bonnington to discuss the use of material, and it is likely that fair dealing was discussed. The idea assumed more importance in her mind as production progressed, and on 11th February 2003 she emailed Gloria Wood, who was the series producer, to pass on a request to Mrs May Mitchinson (the executive producer at the BBC) asking, amongst other things, the following:

“ I am slightly nervous of the fair dealing photo rule with Posh because the photographs of her are worth money – the vultures could be knocking at her door after the programme goes out. I would really like to talk to Alistair about this and get something in writing... and with regard to fair dealing photos in general. Any chance of asking May if I can talk to Alistair as I need to get my head fully round this or I could be calling her every day.”

She was obviously given permission because later that day she emailed him asking if he could spare some time to see her because:

“I need to be very clear so I can be very clear with the Producers exactly how they show photos of Ms Beckham in newspapers and magazines”

They had a meeting the next day, but no note of what was said survives. However, Mr Bonnington wrote an email on 13th February in which he confirmed his advice:

“I confirm that our approach to the use of newspaper ‘tear-outs’, which contain both newspaper copy and newspaper photographs is that the fair dealing provisions of the Copyright Designs and Patents Act will give us legal protection. That is because there is an exemption for criticism and review. It is our view that the programmes we are making here are both criticism and review of the way in which tabloid newspapers report matters which they regard as being of significance.

“As you know, I was concerned when we met yesterday about the possible use of a photograph of Victoria Beckham from Hello! Magazine without the permission of the owners of the copyright in that photograph. I am not saying it is impossible that we could successfully plead the same defence in court proceedings, should they be raised against us by Hello! Magazine. However, Hello! are a litigious organisation and in their case photographs are very much their stock-in-trade. In the case of Victoria Beckham I think substantial sums have been paid over to her before the “photo shoot” took place.

“What concerns me is the possibility of an interim injunction/interdict being granted...

“Of course, if it was the case that the Hello! pictures are regarded as absolutely vital to the programme, it might be we took the view that we should revisit the question of risk here. My impression from our discussions yesterday was that, although it would be desirable to use the Hello! pictures, they were by no means essential for the telling of the story in this case”.

10. This email featured quite largely in Miss Williamson’s cross-examination by Miss Michalos. It was put to her that it said, and she should have understood, that the advice was that the fair dealing exception could apply only if the photographs and some text appeared in the same shot – photographs without text would not bring the use within the exception. This point is said to go to flagrancy – it was said that when, in due course, the programme showed pictures without showing text at the same time Brighter was acting contrary to its own legal advice. I can deal with that point now. The point is, I find, a bad one. The email is not a formally written opinion, but looking at it realistically and placing it in context it is clear that the writer was not being that sophisticated. The attempt to read it in the manner suggested by Miss Michalos was one that obviously puzzled Miss Williamson in the witness box, and I am not surprised. The reasonably obvious sense would be conveyed if the letter had contained the words “either or both of” instead of “both”, but that would be a level of formality of expression which (as a matter of every day experience) one seldom finds in emails. That this was intended is borne out by other things. First, the subject line of the email reads: “Subject: Tabloid Tales: Use of Newspaper Photographs and Copy from Newspapers”. That suggests that photographs and text were being treated separately. Second is the puzzlement of Miss Williamson. She had talked to Mr Bonnington, and her puzzlement indicated that the refinement suggested by Miss Michalos had not been referred to in their conversations. Third is the fact that the final form

of the programme was subsequently seen by lawyers, and Miss Williamson thought that Mr Bonnington had seen it. The programme shows some photographs which are sometimes, albeit briefly, unaccompanied by text, yet there was no indication that Mr Bonnington (or any other lawyer) sounded any warning about that. Last, but by no means least, the advice as construed by Miss Michalos does not make much sense – fair dealing is, as a matter of principle, applicable to photographs whether they are with or without text (and to be fair to her, Miss Michalos did not contend otherwise – all her submissions on this point were on what the email said, not whether it was right or not) and it is hard to justify the effects of Miss Michalos’s construction as a matter of common sense, let alone law. In circumstances such as these I see no merit in construing a document such as this in a manner which does not coincide with common or legal sense if there is a perfectly good alternative construction which makes better sense. This email, and any subsequent display of photos without text, is therefore neither departing from any legal advice, nor is it any basis for any claim that any infringement of copyright was flagrant.

11. The programme was broadcast in the late evening of 29th April 2003. Earlier that day Mr Fraser had found out that the programme was to include some of his photographs and he telephoned to object and to demand their withdrawal. This was refused, and a similar request later that same day, made by his solicitors, met with the same fate. The programme went out with Mr Fraser’s photographs in it, and in due course he commenced this action.

Fair dealing and incidental use – the nature of the parties’ respective cases

12. Before turning to the details of the use of the photographs in question it will be useful to indicate what the respective cases of the parties are on the point.

13. Section 30(1) is in the following terms:

“30 (1). Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement”

14. The criticism or review on which the defendants rely for these purposes is twofold. First, there is said to be criticism and review of the photographs themselves (or at least some of them). Second, their use was said to have taken place in the context of criticism or review of another work (or more appropriately, works), namely the tabloid press’s coverage of celebrities. It is said that the use of the photographs was fair for the purposes of the concept of

“fair dealing” – their use on screen was not over-long, and the use in the context of criticism and review was not a contrivance to justify a use whose purpose was in substance not that of criticism and review. For the claimant it was said that criticism or review, at least in the present context, had to be criticism or review of the photographs themselves, and that criticism or review had to be with some degree of particularity – a passing and unargued observation (for example, and by way of illustration, “this photograph is a bad photograph”) was not sufficient to bring the act within the section. In the context of fairness of dealing, the use should not conflict with the normal exploitation of the work, or unreasonably prejudice the legitimate interests of the author. The true purpose must be genuine criticism or review, and the use must not be something else dressed up in criticism’s clothing. The extent to which the work is reproduced is also said to be relevant to fair dealing – in the case of photographs, the longer the display, and the more completely the photograph is displayed, the less likely it is that the use is fair, particularly if the criticism is slight. In addition, there was insufficient acknowledgment.

15. I shall elaborate on those arguments later, but that indication is sufficient for the purposes of enabling me to set out a description of the programme, its contents and the use of the photographs in it. I have, of course, had the opportunity of seeing it, and counsel have been able to take me through relevant parts of it.

The alleged infringements of copyright in their context – the appearance of the photographs in the programme.

16. The programme starts with a shot of Mrs Beckham reflecting on fame. Then it has the first of the two extracts from Mr Morgan referred to above. Various contributors then make observations (by way of clips from previously filmed interviews), including one from a Mr Neil Wallace who says:

“There are few people better in this country at working the press [than Victoria Beckham]”

After 25 seconds there is an observation from Mr Morgan:

“...today [Posh Spice] is Britain’s most written about, talked about and photographed A List celebrity and the readers still can’t get enough”

After a short break he then makes the second of the two observations referred to above, which I will repeat here in its context:

“I have worked in Fleet Street for more than 15 years and I have rarely encountered anybody more adept in handling the tabloids than Victoria Beckham. Big question is whether she is really just a cunning little minx cleverly manipulating the media for her own gain

or whether the press are a bunch of tabloid vultures preying on Victoria to sell newspapers. Fleet Street has always had a two-way relationship with celebrities. One day you are cock of the walk and the next you are a feather duster. In Posh Spice's case you learn the hard way after a rather brutal apprenticeship with the Spice Girls."

There is then a cut to the previously filmed interview with Mrs Beckham in which the following exchange takes place:

"Piers Morgan: 'So you are using the media and all you want is that front cover, I mean that is true, isn't it?'"

Victoria Beckham: 'Yeh, I can't say anything but yeh, I mean its very true, we had a message to put out there, you know, we loved our music and of course to get that message to people you have to use the media because that's the easiest way'."

17. The next section of the programme refers briefly to the wedding of the Beckhams and a short reference to their first son (Brooklyn). A Mr Mark Jagasia is then seen saying:

"There was a sense in the press that we are going to milk this one [i.e. the birth of Brooklyn] as long as we can because in a sense it is good for everyone, it sells newspapers, people enjoy reading about them, they clearly enjoy the spotlight to an extent so it was a kind of a win win situation."

The programme then returns to the Beckham wedding and various contributors refer to the desire of the media to have pictures of the wedding, in circumstances in which that desire was frustrated by control by the Beckhams. Mr Morgan observes (at 5 mins 33 secs into the broadcast):

"To maintain absolute control over how the wedding was reported, Victoria gagged everyone working on it with strict confidentiality agreements."

And a little later on, having described how a magazine (OK Magazine) had bought the sole right to take and show photographs, Mr Morgan observes:

"When OK hit the stands on Friday it sold more than 1.7 million copies, three times its normal circulation, and Victoria by almost controlling the story had successfully re-launched herself as the new people's princess."

Two contributors then observed how strange, or even “ludicrous” according to one contributor, it was to think of two people on their wedding day going through the proofs of photographs to decide which should be published, which is clearly an implicit reference to the degree of control exerted by the Beckhams over their own publicity as well as being a reflection on it. The control is recognised in the next contribution from Mrs Beckham, when she says:

“The fans wanted to see our wedding and there were going to be pictures anyway, so I wanted there to be pictures that we had a certain amount of control over.”

Another contributor, a Mr Geoffrey Wansell, observes:

“It’s not just about the million pounds, that’s incidental in a way, it is controlling the pictures that emerge, so what Posh is really doing is saying I am only going to present myself in a way in which I want to be seen, my image is more significant than anything else.”

Thus far, therefore, the programme has been referring to the content of the newspapers by reference to control over the input, and therefore the output, of material. This is said by the defendants to be criticism of other works.

18. The programme then turns to the theme of new haircuts acquired by the Beckhams in the context of which the first of the subject photographs were shown. Having averted to the fact that the “Posh and Becks Plc... brand” was now a big one, Mr Morgan observed:

“... Victoria was learning that you must keep re-inventing your product if you are going to keep the press and the public interested. Nine months after the wedding in a prime example of Fleet Street’s rather warped news agenda, the new Beckham hairstyle smashed war and famine off the front pages.”

Another contributor (a Ms Blackburn) observed that that:

“was just another example of their unerring sense of what would get them on the front pages.”

Mr Sean O’Brien was heard to say:

“and Posh also had gone completely blonde, absolutely white blonde, she looked like Billy Idol walking down the street.”

As he spoke the words “she looked like Billy Idol” the scene cuts to a picture of most of the page in the newspaper which contained the first photograph. At the top of the page, slightly cut off, one can see two or three other photographs which are not material. Below that occupying the right hand half of the page and the bottom two thirds of the page was a picture of the Beckhams with their new haircuts, both being shown full length with Mr Beckham pushing a pushchair with young Brooklyn in it. On the left hand side of the page next to the photograph, there is visible a headline and the story, described as a “picture exclusive”. The camera then pans slightly down the photograph and at the same time zooms into the bottom of it to show, prominently and obviously, at the bottom of the article and just to the left of the bottom of the image, the words “Pictures: JASON FRASER”. This is accompanied by Mr Morgan (off screen) saying:

“The exclusive pictures of the change of image were taken by Jason Fraser.”

The claimant accepts that this is a sufficient acknowledgment of authorship in relation to this appearance of this photograph because, I think, of the written attribution, not because of the oral attribution.

19. Immediately after that Mr Fraser appeared on screen referring to an occasion which he managed to get a shot of the Beckhams with new haircuts. He describes how, on the occasion that he is referring to:

“I had a tip and I went out and I took photographs and I got them together.”

The Defendants sought to say that that was an express reference to Beckham 1, and that may well be so, but the context of the remark in the interview has to be taken into account in reaching that conclusion, and the defendants had successfully resisted disclosure of the unedited interview at an earlier stage in these proceedings. In those circumstances, and in the absence of an admission by Mr Fraser that that is indeed what he was referring to (or at least a sufficiently clear admission) it would be unfair to him to make that finding. However, nothing in this action is going to turn on that.

20. Immediately following that Mr Morgan is heard saying the following over fuzzy images of what are obviously Beckham stand-ins apparently carrying out the mundane activity of assembling a pushchair in a car park. As they do that Mr Morgan says:

“Throughout Victoria’s career Jason Fraser always mysteriously seems to be the photographer in the right place at the right time, which has raised a few questions about exactly where he gets his information from.”

In order to make sense of this remark, and what follows, it is necessary to understand the nature of the Beckham photographs which are the subject of this action. With one possible exception (Beckham 14) they are not photographs for which the subject has apparently deliberately sat or posed. They are all photographs in which the subject was apparently going about his or her everyday activities, ostensibly irrespective of the presence of a photographer, and they are apparently just “snapped” as they walked along or sat. The next voice to be heard was that of Mr Geoffrey Wansell, who observed that:

“Gradually she began to realise that certain photographers and certain places could be manipulated to her advantage.”

This followed by a contribution from Mr Andrew Morton, who was seen and heard to say:

“So for example on the day in question when David’s about to get his hair cut and she is about to go blonde, they evade the photographers waiting outside their home...”

and at this point four more photographs of the Beckhams (Beckhams 2-5) are shown by showing the newspaper pages on which they appeared, accompanied by Mr Morton continuing:

“And they have a pre-arranged assignment with another photographer, effectively their court photographer, a chap called Jason Fraser. It looks as though they’re snatched pictures, that they’re taken off guard, off duty, when all along those pictures were rehearsed and pre-arranged.”

The pictures are shown until the words “snatched pictures” at which point the camera returns to show Mr Morton speaking. Beckham 2 is shown for just over 2 seconds. It is apparently on the front page of The Sun, and one can see what is probably the top half of it. From what one can see it looks as though it was probably taken on the same occasion as Beckham 1 (and Mr Fraser confirmed that in the witness box), but one cannot see the pushchair; the remaining three photographs (Beckham 3, 4 and 5) are similar photographs, showing half-shots of the Beckhams with their new haircuts, and apparently displayed in a row across a newspaper page. Each is displayed for about 1.5 seconds. Then before the next interview contribution (Mr Fraser again) Beckham 3-5 are shown again briefly, this time for less than 1 second each, flashed on the screen and accompanied by the sound of a camera shutter.

21. Mr Fraser was then seen and heard making observations on how one might get tips in order to get the photographs, and Victoria Beckham then says, as part

of her interview, that on occasions she might make an arrangement with a photographer to repeat an exit from a building for photography purposes after she had exited for the first time, having (for example) put her children in the car first so that they were safe and out of shot. Mr Morgan then observes, partly to camera and partly by other images:

“Victoria may favour certain photographers, but she also knows she is likely to be snatched at any time and any place, whether she has helped arrange the picture or not. When you are riding high in the press, there is a huge industry out there making vast amounts of money from your photograph.”

Another contributor (Mr Joe Sene) makes observations about getting tip-offs of what Victoria Beckham is doing, and then that is contrasted by Mr Morgan with photographers who stalk their victims more patiently.

22. 12 minutes in, the programme returns to the interview with Victoria Beckham, and she observes that every time she comes out of her house she is aware that there could be a photographer ready to capture the moment or whatever she looks like. While she is saying this Beckhams 6-10 are displayed. They are shown as they appeared in a sort of montage in one of the tabloids. They (or parts of them) were all taken when Mr and Mrs Beckham and Brooklyn visited a wildlife park. Beckham 6 is a photograph of Mrs Beckham carrying Brooklyn; as published in the newspaper it is heavily cropped to exclude a number of other people who would otherwise appear in it. In the left hand one-third of the page, appearing one above the other, are Beckhams 7, 9 and 10 (in that order) which show pictures of Brooklyn, sometimes with one or other of his parents. Two of them are again heavily cropped in order to focus on Brooklyn. On the right hand side of the page is a large blown up extract of Brooklyn taken from Beckham 8; he is apparently in the course of doing messy battle with an ice cream. In order to show these photographs the camera pans down the page over the course of about 4 seconds, ending up by zooming in on Mr Fraser’s name predominantly displayed in a red box at the foot of the photographs. Mr Fraser is then heard and seen to observe that it is hard to take a bad picture of Victoria Beckham.
23. The theme of the programme then moves on to less favourable newspaper coverage of Mrs Beckham, and Mr Morgan observes:

“The debate [about an eating disorder] refused to go away, raging out of Victoria’s control, especially after her appearance in London Fashion Week.”

This is said in relation to press coverage of her eating disorder in one or more newspapers, and Mr Morgan contrasts the coverage of two rival publications. Mrs Beckham and her mother are seen and heard to comment on that sort of coverage, and then there is an extensive part of the interview with Mrs

Beckham at which comments on other parts of her appearance are referred to. Then Mr Morgan turns to the occasion when:

“In the summer of 2000 the press were still having huge fun knocking great lumps out of Posh’s pedestal, which did not bode very well for the start of her new solo singing career. In an attempt to gain some street cred ... and in spite of a cynical press, Victoria used every trick in the book to grab headlines with the tabloids rubbing their hands in glee.”

There are then several minutes relating to less than flattering coverage of Victoria Beckham and a reference to a point of time at which Victoria Beckham was thought to have acquired a lip ring but it turned out that the ring was false, although not before the Daily Mail was said by Mr Morgan to have “vent[ed] its high moral spleen” about it. This incident was presented as her deliberately seeking media attention.

24. From time to time in the remainder of the programme contributors returned to the question of Mrs Beckham’s attempts to control the publicity she received in the media, and to turn it to her advantage, and the need of the media to show her activities from time to time:

“With normal artists the manager PR or manager press relationship is reasonably simple to control, it’s entirely different with the Beckhams, she is one of those faces that sells magazines, so if you haven’t got a real story for them, they will make it up.” (per Mr John Glover).

Half an hour into the programme it sought to draw attention to the fact that on the day that Mrs Beckham was dropped by her record label she announced that she was having her second child:

“Fantastic news but obviously buries the fact that her solo career had completely died and she was now on skid row as far as her career was concerned.” (per Clare Morrisoe).

Mr John Glover attributed the timing of the announcement to the fact that the Beckhams did not want to announce it publicly until Mrs Beckham had had her three month test. This was all presented as part of the debate as to who was controlling whom in terms of publicity. Mr Morgan observed:

“Once it was known that Victoria was pregnant again the tabloids turned off the knocking copy and turned on the charm, Posh was back in favour. The press know that its readers adore little famous babies and with the Beckhams speculative stories about what sex, what

name, what date could be strung out for months.”

In other words, he was observing that the media would exploit pregnancies involving famous babies.

25. The birth of the second child (Romeo) was then the context for showing most of the remaining photographs which are the subject of this action. After 32 minutes of the programme Mr Geoffrey Wansell observes:

“After the birth of Romeo, the second child, she didn’t go out, she quite deliberately kept herself back until she was prepared to make a formal appearance, because she knows that that is what keeps her brand going.”

Piers Morgan:

“When Victoria was eventually seen in public for the first time with little Romeo, she looked amazingly glamorous and slim, and surprise surprise there is her old friend Jason Fraser to capture the happy moment, splattered across the tabloids, blasted across the magazines of the world, Jason Fraser calmly, and rather easily, helped himself to another six figure sum.”

As he speaks the words “and surprise surprise” to the words “happy moment”, Beckham 11 is shown. It is a photograph of Mrs Beckham apparently leaving a house with Brooklyn by her side, and holding the new baby in her arms. Like the other photographs, it is apparently an unstaged, casually snapped photograph; she appears full-length in it. What is reproduced is, again, the relevant page from the relevant newspaper, with the headline and the story printed in the top right hand quadrant of the page. During the course of 4 seconds, the camera pans down from the top of the photograph and, at the end of the shot, it zooms in on the words “Pictures: JASON FRASER” in fairly large type just below the bottom of the photograph. As Mr Morgan utters the words “splattered across the tabloids, blasted across the magazines of the world”, Beckham 12 is shown. This is similar to Beckham 11, though it is either taken rather closer to its subject or the photographer has zoomed in or enlarged it. Again, what is produced is a picture of the newspaper page on which the photograph appeared; it seems to have occupied roughly the top half of the newspaper page. The original photograph shows Mrs Beckham almost full length, carrying Romeo and with Brooklyn at her side. As it appears in the newspaper it is approximately half length shot, still showing Romeo but Brooklyn has been cropped out. To the left of the image of Mrs Beckham is the headline “Romeo takes a bow” and below that, in smaller type, the words “a five week old superstar sleeps through his debut”. This time the shot zooms out from just showing Romeo to showing the rest of the photograph; it takes about four seconds to do that. Unlike previous occasions, there is no

identification on screen of Jason Fraser as the author of the photograph.

26. In this context I should add something about the matter in which Mr Morgan delivers the last 13 words of his piece. The commas after the words “calmly” and “easily” were stressed by significant pauses, and the words “and rather easily” were themselves given some stress. The overall effect is to make it clear that the words were used ironically.
27. The next contributor is Mr Fraser again. He is shown uttering the words:

“A style fashion icon, a cute baby with a pretty quaint name as well, you know, how can you go wrong? It’s a great shot.”

As he utters the words “you know, how can you go wrong?” Beckham 13 appears. This again shows Mrs Beckham holding Romeo, taken from a slightly different angle from Beckhams 11 and 12, but otherwise very similar and, judging from Mrs Beckham’s appearance and the way she is holding the baby, from the same series. It is on screen for almost 5 seconds; it remains on screen until just after the end of his short piece. This time one can see the text below the photograph, and if one looks very carefully at the text (with an opportunity to stop the tape) one can see his name appearing as the author of the photograph, but that cannot be taken as any real attempt to identify him, in text, as the author since that would not realistically be seen by anybody viewing the television programme as a programme.

Immediately after that contribution from Mr Fraser, Mr Morgan’s voice is heard again. He says:

“With the help of these photographs, Victoria was the subject of glowing headlines once again.”

As he says that the picture shows Beckhams 11 and 12 again, this time appearing on the same page of a different newspaper. Beckham 11 is shown at roughly twice the size of Beckham 12 – they are shown side by side on the same page, and on the left hand page there is the headline “Lets See Daddio, Romeo”, and some copy below that. As that finishes, Clare Morrisoe says:

“I think now she’s Mum Spice isn’t she? She is embracing the role as perfect wife and perfect mother.”

The suggestion behind the content and the delivery is that she was deliberately projecting herself in that way; in other words, that the photographs were deliberately contrived by her notwithstanding their appearance of non-contrivance. As she says this a video is shown of Mrs Beckham in a kitchen with Mrs Beckham apparently tidying up. Then Mr Roy Greenslade (media

commentator for the Guardian) says:

“Let’s do this scenario. She has two children, she appears in public with two children, the press take a picture and then days later, columnists as they like to call themselves, suddenly start saying, oh, you see she’s re-branding herself, she is now wanting to appear as mother.”

As he utters the words “the press take a picture” the camera shot switches to a picture of most of the front page of the Daily Mirror, the right hand one third of which is occupied by a slightly cropped version of Beckham 13 (its second appearance). Mrs Beckham is shown from just below the waist upwards, and over the course of 3 seconds the shot zooms in and away from the photograph and up to the headline at the top of the page (“Romeo’s debut – the new Beckham takes centre stage”), so that after those 3 seconds all one can see is a small part of the top of Mrs Beckham’s head.

28. The theme of the programme then moves onto an occasion featured in the newspapers when it was reported that there was a plot to kidnap Mrs Beckham and her family. To the accompaniment of words taken from a TV news item, the programme then showed Beckham 14. This is quite hard to spot. What is actually shown on screen, for just over 4 seconds, is a headline appearing at the bottom right hand part of what I assume is the front page of a newspaper. In very bold type is the headline:

“£5m PLOT TO
KIDNAP
POSH AND KIDS”

laid out in that manner. To the right of the headline is a small square of text – the beginning of the account of the story. Tucked in the gap bounded by the words “PLOT TO”, “KIDNAP” and “KIDS” on three sides, and the text on the fourth, is a small photograph of Mrs Beckham. I would judge that the photograph in the newspaper is a little bigger than a passport photograph. The full picture (which was not shown on the programme, because the programme merely reproduced newspaper photographs) was a three-quarter length shot of Mrs Beckham taken out of doors somewhere, which looks as though it might have been a little more posed than the other photographs, but nothing turns on that. Although the shot is just a shot of her head, and the rest of the photograph has been cropped, no point was taken by the defendants that they had not reproduced a substantial part of the original. After that appearance Mr Morgan comments on the story and says:

“The gang was arrested in London for the theft of antiques but it was their alleged kidnap plot that set the media into meltdown. The words Beckham and kidnap

were tabloid gold dust, which left some to question whether the story may have been hyped up to create a bigger scoop.”

As he speaks the words “May have been hyped up to create a bigger scoop” the picture shows two thirds of a newspaper page with Beckham 12 to the top right. To the left of the photograph is a headline “£5m kidnap plot...or just a tabloid sting?” Below that is a picture of a house and some unreadable text. Over the course of 3 seconds the camera zoomed into the headline so that all that can be seen of Beckham 12 is Romeo in the arms of his mother. As this happens Mr Roy Greenslade comments on the apparent farfetched nature of the kidnap story.

29. There are then some contributions in which comment is made on legal steps that the Beckhams were prepared to take in order to stop false rumours and in his last piece to camera, Mr Morgan observes:

“So has Victoria used and abused the press, or has the press used and abused Victoria? There is no doubt that between us we have created a sort of unofficial royal family, but the big question for Victoria is whether she can now reinvent herself again to be something more than just the wife of David Beckham, and the big question for the tabloids is whether they will ever let her.”

The programme then closes with remarks which are not germane to this action.

30. I have sought to describe the programme in some detail, and have set out extensive extracts from the soundtrack, because the context of the photographs is essential to the defences of the defendants. What I have not done hitherto is to indicate the nature of some of the other accompanying material. That can be described generally, but it is, in its own way, equally important. As the programme progresses, in addition to the short extracts from a number of interviews with contributors, the programme shows a considerable number of other press stories about the Beckhams. It does so by showing dramatic headlines, invariably accompanied by other pictures of the Beckhams. There are a considerable number of these. It also contains film footage of the Beckhams appearing in public (on catwalks, signing autographs, going on holiday and in other contexts) all of which have obviously been taken from film archives of some sort. How the Beckhams have been treated in the press is obviously a key part of the programme.

The Defences

31. Having set out that material, I can now turn to the Defences, and I shall take

fair dealing first.

Criticism and review

32. The first question which arises under this head is whether the use made of the photographs was for the purposes of criticism and review of the work (ie the photographs) or of another work. This raises two separate points – was there criticism or review, and if so what was the work being criticised or reviewed? In what follows, for ease of exposition I shall use the expression “other work” as if it were the expression appearing in the statute (which refers to “another work”) – they do not differ materially.
33. The defendants’ case was that the concept of criticism or review had to be interpreted liberally. Here there was criticism or review of both the photographs and of another work or works, namely the coverage of the Beckhams (and in particular Mrs Beckham) in the tabloid press. The criticism and/or review was thus of two things – there was criticism and review of the photographs themselves (or some of them at least) and the philosophy or ideas behind them, and there was criticism and review of another work (or works) namely the tabloid press. One had to look at the programme as a whole, and not dissect it too readily into unrealistic parts, and one had to look at the programme as it would strike the reasonable viewer.
34. The claimant had a number of answers to this. First, so far as it was alleged that there was criticism or review of the photographs themselves, it had to be more than mere passing comment or passing reference, and in the present case there was no such thing. One pointer as to whether there is genuine criticism or review is whether the same point can be made without displaying the copyright material. Second, so far as criticism or review of another work was concerned, then that other work had to be a copyright work within the meaning of the Act, that is to say a work falling within section 1 of the Act, and that other work must be identified (which it was not in the present case). Miss Michalos disputed that the other work could be general media attitude, or that references to underlying philosophy and ideas appearing in the authorities should be taken as being a reference to any such concepts other than those appearing in the actual specific work itself.
35. The meaning of “criticism” and “review” were considered in the Australian case of *De Garis v Nevill Jeffress Pidler Pty Ltd* (1990) 18 IPR 292, relied on by Miss Michalos. Beaumont J proceeded from dictionary definitions in the *MacQuarie Dictionary* as follows:

“Criticism - 1. “The act or art of analysing and judging the quality of a literary or artistic work, etc: literary criticism; 2 the act of passing judgment as to the merits of something ... 4. a critical comment, article or essay; a critique.”

Review – “1. a critical article or report, as in a periodical, on some literary work, commonly some work of recent appearance; a critique ...”

In that case the subject of the action was press clippings, so it is not surprising that the extracted definitions tend to focus on literary criticism or review. Miss May, for the defendants, chose to counter that with the Shorter Oxford English Dictionary definitions:

“Criticism: ...2a the work of a critic. B – an article, essay etc expressing or containing an analytical evaluation of something.”

“Review: 1. a general survey or assessment of a subject or thing ...”

36. These definitions are of some assistance, so far as they go, but it is important to have in mind what Robert Walker LJ said in *Pro Sieben Media AG v Carlton UK TV Ltd* [1999] FSR 160 at p 620:

“‘Criticism or review’ and ‘reporting current events’ are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They should be interpreted liberally ...”

Miss May drew my attention to the fact that in *Ashdown v Telegraph Group Ltd* [[2002] Ch 149 the fair dealing provision was an instance of the right of freedom of expression displacing copyright protection (see para 33), but I do not think that that idea assists in determining the nature of “criticism or review” which falls within the section. It may be that that can be said to be the basis for adopting a liberal interpretation, as required to by Walker LJ in *Pro Seiben*, but beyond that it does not assist. I therefore approach the question with the assistance of the concepts behind the definitions but not rigidly bound by them, and bearing in mind what Robert Walker LJ said.

37. This impossibility of plotting boundaries makes it impossible to accept Miss Michalos’s submission that there must be something beyond a bare comment. It is not helpful to try to introduce such limitations into the debate; at worst it is misleading, and at best is unhelpful because it will merely shift the debate to the question of whether, in its own context, the relevant remark is merely a “bare comment” or goes further and is criticism. The context is likely to be all-important.
38. The next point is to what I apply those concepts – what is capable of being the subject of criticism or review for the purposes of the section? The photographs, as subjects, are easy enough as a concept. However, there is more difficulty (in the present case) about criticisms of what Miss May called the philosophy and ideas underlying a work, and what (if any) other works

were the subject of any criticism or review in this case.

39. Miss May said that, in addition to relying on criticism of the photographs themselves, she was entitled to rely on criticism or review of the philosophy or ideas underlying them. By the end of the case I do not think that there was any difference in principle between her and Miss Michalos on this. That it is correct appears from *Hubbard v Vosper* [1972] 2 QB 84, in which the copyright works were various works about Scientology, extracts of which appeared in the defendant's book which was critical of the cult. It was submitted that the fair dealing section applied only to criticism of the work, not of the doctrine or philosophy underlying it. Lord Denning disagreed with this submission:

“I do not think that this proviso is confined as narrowly as Mr Pain submits. A literary work consists, not only of the literary style, but also of the thoughts underlying it, as expressed in the words. Under the defence of “fair dealing” both can be criticised. Mr Vosper is entitled to criticise not only the literary style, but also the doctrine or philosophy of Mr Hubbard as expounded in the books.” (at page 94).

The same view was expressed in *Time Warner Entertainments LP v Channel Four Television Corporation plc* [1994] EMLR 1 at pp 13 and 15, and confirmed in *Pro Sieben* (at p 621). I agree with Miss Michalos that on analysis this is because criticising the philosophy is criticising the work. It must follow that if the review or criticism is of another work (ie a work other than the one in respect of which fair dealing is claimed) then that review or criticism can extend to, or even be confined to, the ideas and philosophy underlying that other work. Furthermore, it is not appropriate to confine the notion to “ideas and philosophy” – that is merely one formulation of the extent to which criticism may extend. Walker LJ expressed himself thus in *Pro Sieben* at p 621:

“Criticism of a work need not be limited to criticism of style. It may also extend to the ideas to be found in a work and its social or moral implications.”

40. I was not shown any authority dealing with the nature of the “other work” for the purposes of section 30(1). Miss Michalos submitted in her written submissions in reply that it had to be a copyright work. That seems to me to be wrong so far as it requires the other work to be in copyright – why should the fair dealing defence in relation to a current copyright work depend on whether the other work, which is the subject of criticism, is itself in copyright. However, there is more in her submission if one removes the requirement of subsisting copyright from another work. Since the same word (“work”) is used to describe both the copyright item whose infringement is in issue, and the other item or items which can be the subject of the criticism or review, it is likely that it has the same meaning in both instances. Since copyright can

only exist in a work of the kind described in section 1 of the Act (as elaborated in the following sections), it seems to me to follow that what must be the subject of criticism is something which is a “work” in the same sense.

41. This point was not dealt with as such in *Pro Sieben*, though my conclusion is consistent with it. In that case the defendant was accused of infringing copyright in a TV programme (called the TAFF report) relating to the pregnancy of a woman with eight foetuses. The defendant relied on fair dealing, but that defence was rejected by the trial judge. That rejection was reversed by the Court of Appeal. At p 621 Robert Walker LJ refers to the defendant’s pleaded case which was that the works being criticised were:

“The Plaintiff’s Film and/or the Plaintiff’s Broadcast
and/or other media exploitation” (my emphasis)

He then observes that the judge did not comment on the words that I have emphasised and says (all emphases being mine):

“It may be said that those words are very vague ... Nevertheless the judge should in my view have taken as his starting point that the appellants’ pleaded case was that the Carlton Programme was *criticising various works representing the fruits of chequebook journalism*, of which the TAFF report was one. The other (which might have been more particularised if *Pro Sieben* had pressed) were daily or weekly newspapers mentioned as having run stories on Ms Allwood or her partner or one or more of the other “ordinary people” to whom “something extraordinary happens in their lives”. Four newspapers – the News of the World, the Sun, the Daily Mirror and the Daily Mail – were mentioned frequently in the Carlton programme, with shots of mastheads, headlines and parts of articles in those papers. Other newspapers (and one British television programme) received passing references.”

Then he goes on to criticise the trial judge because

“He did not consider the possibility that [the programme’s use] might have been for the purpose of criticism or review of the TAFF report *and the newspaper material mentioned above, taken collectively as a genre of the fruits of chequebook journalism*”

thereby clearly indicating that such use, thus described, was capable of falling within the section. At p 623 he then concludes:

“The Carlton programme as a whole was in my judgment made for the purpose of *criticism of works of*

chequebook journalism in general, and in particular the (then very recent) treatment by the media of the story of Ms Allwood's multiple pregnancy.”

42. In my view it is quite clear from those extracts that the other works which Robert Walker LJ had in mind for these purposes (that is to say, the works other than the TAFF report itself in respect of which criticism was being made) were newspapers and broadcasts of a particular type. Certain newspapers are actually identified in those extracts. All those works are, collectively and individually, the “fruits of chequebook journalism”, and “works of chequebook journalism”. Newspapers and broadcasts are “works” within the meaning of section 1. The decision is therefore consistent with my view of the proper interpretation of section 30.
43. The decision also assists on two other points. First, it demonstrates that the ideas or philosophy underlying a certain style of journalism, as manifested in the works themselves, can be the subject of criticism which falls within section 30. That, as will become apparent, is important in the present case. Second, it demonstrates the fallacy of a submission that at one point Miss Michalos seemed to be making (though at the end it was not clear that she was putting the matter in this way) namely that the other work or works must be specifically identified. I can see no reason in principle why that should be so and the reasoning and decision in *Pro Sieben* clearly indicates that it is not. It was no part of Robert Walker LJ's reasoning that specific editions of specific newspapers, or specific broadcasts, were identified. Four newspapers were specifically identified, but others (and broadcasts) were identified only in general terms, by type, as falling within the genre. That was sufficient in that case, and is therefore sufficient (so far as relevant) in the present one.
44. With those points established and in mind, I can now turn to the assertion of the defendants that the programme contained relevant criticism. They say that it contained criticism both of the photographs themselves (except Beckham 14) and of a certain style of tabloid journalism which amounted to criticism of the newspapers themselves and the ideas behind their reporting of celebrities. If that is a proper description of the nature of criticism then there is criticism (or review) within the meaning of section 30 in precisely the same way as there was such criticism in the *Pro Sieben* case.
45. Having viewed a recording of the programme, I have come to the clear conclusion that the deployment of the first 13 photographs is for the purpose of criticism or review within the meaning of section 30. I have sought to set out the shape of, and the most significant points in, the programme in the extracts referred to above. Like the programme in *Pro Sieben* (as that programme is described in the law report), *Tabloid Tales* contains frequent shots of newspapers, their mastheads and their stories, and in addition their pictures. It also contains various film clips demonstrating the public presentation of, or public appearances of, the Beckhams. They are all there to demonstrate a certain style of journalism – the coverage of celebrity – and to

comment on (in the form of criticism) that style as manifested in the relevant publications (tabloid newspapers and, to a certain extent, magazines). Various points are made in the course of the programme, including important reflections on the fact that certain items are covered at all (for example, the haircuts), the extent of the coverage, the extent to which rival newspapers cover or disdain to cover matters such as Victoria Beckham's alleged eating disorder (which she denies in her interview), and the extent to which the newsworthiness of the everyday lives of these particular celebrities is capable of pushing other matters which might be thought to be more important ("war and famine") off the front page. So far as the dictionary definitions are concerned, it falls fairly and squarely within the definitions of "criticism" when applied to the ideas underlying the reporting, and to some extent to the reports themselves, though those reports are not actually cited save insofar as headlines are sometimes briefly in shot.

46. All the photographs apart from Beckham 14 are used in that context. Beckham 1-5 are used 9 minutes into the programme after the scene of the programme has been set by remarks reflecting on the interest of the public in the lives of celebrities and the fact that the Beckhams sought (with some success) to manipulate that to their own advantage. That is clearly criticism within the meaning of the section. These particular photographs then appear having been foreshadowed by Mr Morgan's reflection as to how the change in the Beckhams' hairstyles achieved media prominence in "a prime example of Fleet Street's rather warped news agenda" (again, something clearly in the nature of criticism in the context of this programme). Ms Blackburn is seen and heard to describe this as something that would get them on to the front pages, and almost immediately afterwards these pictures appear as an example of that. That is clearly use in the context of criticism of the newspapers and their reporting ethos. They are also shown as an arguable example of manipulation of that ethos by being arguably staged, and that also seems to me to be criticism of the "other works". I shall return to that when considering the case made by the defendants that there is also criticism of the photographs themselves. When Beckhams 3-5 are shown for a second time accompanied by shutter sounds the context and purpose is still essentially the same.

47. Beckhams 6-10 are shown in a similar critical context. These are the shots of the family in the wildlife park. They are shown when Mrs Beckham is musing on the fact that photographers are apparently ready to capture any moment – a criticism of journalistic style and content – and the photographs are apparently shown as examples of that. There is little fundamentally interesting about someone else's family having a day out with some animals; but nevertheless here is a photographer who has snapped the event, and here is a newspaper which has published it because it believes its readers are interested. That is what the programme is apparently saying. This is all part of the overall critical or reviewing theme. They are genuine illustrations of what the programme is saying – "Section 30 is designed to protect a critic or reviewer who may bona fide wish to use copyright material *to illustrate* his review or criticism." (*Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815) (emphasis supplied).

48. The first showing of Beckhams 11, 12 and 13 occurred in the context of that part of the programme which dealt with the question of who was controlling whom – was Mrs Beckham controlling the media in order to divert attention to good news when she wanted. These photographs are shown in order to demonstrate the effects of that – the timing of her first appearance after childbirth is held back until she is ready (in terms of personal appearance and, on one suggestion in the programme, in terms of diverting attention from less welcome news about her record label), and the photographs are the coverage that she got. The content of the media has been contrived by the subject of the story – that is the suggestion. The same applies to the second showing of each of those photographs. They accompany, illustrate, elaborate and to a certain extent make good what the programme is saying about the content of the tabloids, which it portrays as putting forward Victoria Beckham in a new role or new light. There is then one more occurrence of Beckham 12, which appears in the context of a recital of the kidnap story. This part of the programme critiques the coverage of that story and the extent to which it was, or may have been, hyped, and how it fitted into the media coverage of the affairs of the Beckhams. The newspaper used a certain headline, and with that headline a picture of Mrs Beckham appeared, holding a baby. That is part of the dramatic treatment of the story, and it is the coverage that is being criticised, or reviewed. Accordingly, it is a further use of the photograph in the context of a criticism of the “other works”.
49. I do not think that this applies to Beckham 14, however. That is the small photograph appearing tucked into the sensational headline about the Beckham kidnap plot. The point of the shot in question is to show the headline. The small photograph happens to be there. While the photograph appears in the context of criticism or review of the other works, it does not appear “for the purpose” of criticism or review. Its proper place appears below when I consider it again in the context of incidental use.
50. Accordingly all of Beckhams 1 to 13 are deployed in the context of, and for the purpose of, criticism or review of the other works, that is to say the tabloid press and magazines, and I so find. In addition, it is clear to me that in relation to most of the photographs there is also criticism of the photographs themselves. Beckham 1 first appears when the programme turns to the Beckham haircut. As it is shown there is an oral attribution of the photograph to Mr Fraser by Mr Morgan. After Mr Fraser’s contribution Mr Morgan makes his remark about how mysterious it is that Mr Fraser manages to be in the right place at the right time, and questions where he gets his information from. The question is answered almost immediately by Mr Wansell’s saying that Mrs Beckham can manipulate “certain photographers” and by Mr Morton’s explicit allegation that the photographs are pre-arranged and

“It looks as though they’re snatched pictures, that they’re taken off guard, off duty, when all along those pictures were rehearsed and pre-arranged.”

This is accompanied by Beckham 2 to 5 being shown simultaneously, and Beckhams 3-5 appearing again almost immediately afterwards. It is clear that Mr Morton is speaking about the Jason Fraser photographs. That is a clear criticism of the photographs – it is said that the photographs are not in fact as they appear, or as the subject and photographer would wish them to appear. That is a clear act of criticism of the photographs themselves, and the context in which all 5 are shown indicates that it applies to all 5. Similar remarks do not accompany the showing of Beckham 6 to 10, but in my view the criticism can and should be taken as extending to them. The photographs are shown in a section of the programme which deals with unstaged or non-pre-arranged photographs, but there is a clear shot of the Jason Fraser name, and I think that the programme is implicitly inviting the reader to consider whether these apparently unarranged photographs are nevertheless as pre-arranged as the others because they are by the same person (Mr Morton’s “court photographer”). With Beckhams 11 and 12 the link becomes stronger again, because of the ironic tone and content of the accompanying words from Mr Morgan (“surprise surprise, there’s her old friend Jason Fraser” and “Jason Fraser calmly, and rather easily, helped himself to another six figure sum”), which is a return to the theme that these apparently casual and opportunistic snaps are not so casual and opportunistic as would appear. This clearly carries over to Beckham 13, and the repetition of Beckhams 11 and 12. They are shown within 30 seconds of the first showing of Beckham 11, while the theme is still being advanced or is fresh in the mind, and the second showings of Beckhams 11 and 12 are accompanied by Mr Morgan’s remarks about the “help of these photographs”, which is again tinged with a little irony – the suggestion is that the help is not wholly accidental because the photographs are not wholly accidental. The criticism is still operating when Beckham 13 is shown for a second time. It is, however, not implicitly operating when Beckham 12 is shown for the third time (in the context of the kidnap story). The theme of the programme has moved on here, and the photograph itself is not being criticised or reviewed at this point. There is no suggestion of criticism of Beckham 14, either.

51. For those reasons, therefore, each of the publications of the photographs, save for the third showing of Beckham 12 and the only showing of Beckham 14 are in the context of criticism of the photographs themselves within the meaning of section 30(1).
52. For the sake of completeness I should deal with a couple of submissions of Miss Michalos on this point, each of which I reject.
53. First, she said that something could not be criticism or review unless there is specific reference to the content of that which is being criticised. Since there is no sufficiently specific reference to the photographs then there is no criticism (or review). All there is, she says, is criticism of Victoria Beckham. She claims to derive support for her submission as to what is required from *Ashdown v Telegraph Group Ltd*. In that case the Court of Appeal rejected a fair dealing defence in relation to a copy of a minute of a meeting, in the

course of which they quoted with approval from the judgment of Sir Andrew Morritt V-C at first instance:

“But what is required is that the copying shall take place as part of and for the purpose of criticising and reviewing the work. The work is the minute. But the articles are not criticising or reviewing the minute: they are criticising or reviewing the actions of the Prime Minister and the claimant in October 1997”

I do not think that that citation supports a submission that there must be some form of specific reference to the work in question. That citation demonstrates clearly that it is not sufficient to criticise something (anything) in order to invoke the section; there has to be a criticism of the work; and one has to add the rider “or another work”, a point which was not germane to that particular case. When judging whether what has happened is a sufficient criticism or review there is no requirement of any particular degree of specificity. There has to be sufficient content to amount to criticism of whatever is being criticised (the copyright work or another work). In the present case there is sufficient content in the programme to amount to a criticism of other works (the tabloid newspapers and magazines), and in most cases the photographs themselves.

54. She also submitted that a helpful indication as to whether what was taking place was criticism or review was whether the “criticism” could be done without using the copyright work. If it could then that was a strong pointer against its being criticism (though it was not determinative). I reject this submission too. It has no foundation in the statute. What the statute permits is “fair dealing” for the purposes of criticism or review. There is no requirement of necessity of use in section 30(1); there is merely a requirement of fair dealing.

Fair dealing

55. If use of copyright material is to fall within section 30(1) then that use must amount to “fair dealing”. In considering whether the use in the present case amounted to fair dealing (and the claimant says it was not) the following guidelines are relevant:
- i) It is relevant to have regard to the motives of the user (contrast the question of criticism and review where the focus is more on the actual use without, or without so much, reference to the motive – see *Pro Sieben* at page 620).
 - ii) Whether there is fair dealing is a matter of impression.

“What amounts to fair dealing must depend on the facts of the particular case and must to a degree be a matter of impression. What is of prime importance is to consider the real objective of the party using the copyright work. Section 30 is designed to protect a critic or reviewer who may bona fide wish to use the copyright material to illustrate his review or criticism.” (*Banier v News Group Newspapers Ltd* [1997] FSR 812 at 815.

iii) If some degree of use would be fair dealing, excessive use can render the use unfair – *Hyde Park Residence Ltd v Yelland* [2001] Ch 143 at para 40.

iv) In assessing whether the dealing is fair the court can have regard to the actual purpose of the work, and will be live to any pretence in the purported purpose of the work:

“... it is necessary to have regard to the true purpose of the work. Is it a genuine piece of criticism or review, or is it something else, such as an attempt to dress up the infringement of another’s copyright in the guise of criticism, and so profit unfairly from another’s work?” (*Time Warner*, supra, at p 14).

v) In the same vein, the amount of the work used can be relevant:

“I may add, however, that the substantiality of the part reproduced is, in my view, an element which the Court will take into consideration in arriving at a conclusion whether what has been done is a fair dealing or not. To take an example, if a defendant published long and important extracts from a plaintiff’s work and added to those extracts some brief criticisms upon them, I think that the Court would be very ready to arrive at the conclusion that that was not fair dealing within the section (Morton J in *Johnstone v Bernard Jones Publications Ltd* [1938 2 Ch 599 at 603-4).

vi) However, this must be carefully applied in relation to photographs. It makes more sense in relation to extended literary or musical works. If one is critiquing a photograph, or using it for the purpose of criticising another work, then the nature of the medium means that any reference is likely to be by means of an inclusion of most of the work because otherwise the reference will not make much sense. This degree of care is particularly appropriate in the context of a television programme where the exposure is not as (for example) continuous or permanent as publication in printed form would be.

vii) Reproduction should not unreasonably prejudice the legitimate interests

of the author or conflict with the author's normal exploitation of the work – see the Berne Copyright Convention Article 9(2).

56. These factors were not seriously in dispute between the parties. Miss May said that none of them pointed towards unfairness of use or dealing, and Miss Michalos said that they did, when one looked at the actual use and at the evidence of the parties. Despite the many points that Miss Michalos made in relation to fairness, my clear view is that there was nothing unfair about the use of the photographs in this case in relation to which I have found criticism or review to have occurred (Beckhams 1 to 13). It was the defendants' case that the use of the photographs was genuinely for the purpose of criticism and review; that there was no hidden or ulterior motive; that manner of use was not unfair; and that the interests of the claimant were not unfairly prejudiced (if indeed they were prejudiced at all). The claimant alleged, for the reasons appearing below, that the use of the photographs was not fair in the circumstances, and put forward a number of reasons for saying this.
57. First, it was said that the use was not fair because the programme relied on comments by Mr Fraser when he had refused consent to use his photographs. It was unfair to obtain those comments from someone who gave them voluntarily believing that the defendants were not going to use his works. I have already held that I am not satisfied that one of the requests was made (and refused), so much of the point of Miss Michalos in this respect does not arise on the facts. So far as the actual refusal of consent which I have found is concerned, there is no link between that refusal and the use which would make the use unfair. That refusal would not reasonably give rise to any belief on the part of Mr Fraser that the photographs would not be used, since it says nothing about whether they would be used from another source. On the evidence and on the basis of my findings, therefore, there was no unfairness in this respect. However, even if I had found in favour of Mr Fraser's case on the evidence (that is to say, even if I had found that he had been explicitly asked for consent by a researcher and had refused) I would still not have found that this made the use of his photographs in the programme unfair (within the section). The unfairness has to arise in relation to the dealing with photographs – it has to go beyond some aspect of unfairness as between the parties which is not related to the use of the photographs. It principally relates to the manner and purpose of use, though it can extend to the circumstances in which the copyright material was obtained (see eg *Hyde Park Residence v Yelland*, where the photographs in question had been dishonestly obtained). It might just be that if Mr Fraser's evidence were that he participated on the basis of express assurance that none of his photographs would be used then the subsequent use of film of the newspaper photographs could become unfair dealing, but the evidence in this case stopped short of that even if Mr Fraser's evidence about the request for use were accepted in full. On that hypothesis what would have happened would have been that a researcher asked for a consent that would not have been necessary (if there were no other bar to fair dealing), and the other programme makers, apparently unaware of that request and refusal, made a legitimate use and innocently asked Mr Fraser for some participation. That might entitle Mr Fraser to feel personally let down in relation to the circumstances of his interview, but it does not entitle him to say that it renders

what would otherwise be fair dealing unfair in relation to the use of his photographs.

58. Next, it was said that there was excessive use of the photographs in the sense that they were substantially reproduced when that was not justified by the brief criticism of the photographs themselves. I do not consider that this criticism is justified. It is true that in every case what the programme showed was what the newspaper printed. It is also true that in many, though not all, cases what the newspaper reproduced was substantially the whole of the photograph (it was not true of Beckham 8 and Beckham 10, which were heavily cropped to reveal what the newspaper wished to use as the central subject). However, any legitimate use of a photograph for the purposes of criticism and review is likely to require display of a large part of the photograph in order to make the point that is being made. That is certainly true of the photographs in this case. Unless the photographs had been shown as printed the point made by the programme could not have been made, either in relation to the criticism of the tabloid press coverage or in relation to the particular photographs themselves. The length of display of the whole photograph has to be taken into account here too. It could not conceivably be treated as too lingering on the facts of this case. In no case was the display of any photograph longer than about 3 seconds, and many were shorter. And in the case of some of the longer periods the whole photograph was not shown for the entire period because the camera panned across it or zoomed into some limited part of it, thus preventing any potentially unjustifiable lingering. In some cases the exposure was so brief as to make it difficult to spot exactly which photograph was being shown – see the second uses of Beckhams 3 to 5, which are little more than flashes on the screen as a directorial nuance demonstrating “snapping” (perhaps with some irony). Overall I regard this criticism as unjustified. If there is such a thing as a limit defined by a criticism:exposure ratio, then this case fell easily on the “fair” side of the line.
59. The claimant then relied on the fact that this was a commercial use of the photographs which makes the use unfair. Miss Michalos did not go so far as to say that any commercial use was unfair, and obviously she could not sensibly do so – there is no reason why a review done for commercial purposes (which most reviews will be, since they will appear in some commercial publication) should be deprived of the use of the reviewed material when a non-commercial review would not be. However, she said that a use which had a commercial purpose would or could be unfair, and should be put in the scales when weighing up matters in order to arrive at an overall impression. As an example she relied on *Associated Newspapers Group plc v News Group Newspapers* [1986] RPC 515 where one newspaper (the Sun) printed copyright letters passing between the late Duke and Duchess of Windsor, the exclusive rights to which had been obtained by another. At page 518 Walton J referred to a passage in *Hubbard v Vosper* in which it was said to be not fair for a rival “to take copyright material and use it to his own benefit”. Walton J said:

“That seems to be exactly what has happened in the present case.

There is no blinking the fact that the Sun is trying to attract readers by means of printing these letters or extracts from letters.” (at page 518)

It is not clear to what extent there was any attempt at criticism or review in that case, but what I think Walton J was seeking to say is that it is not fair if what the user of the material is actually doing is seeking to deploy the copyright material so as to derive benefit from that deployment. That is basically a user which is coloured by the motive. The motive was not to use the letters so as to criticise them (see the examples of genuine criticism given earlier on the same page of *Associated Newspapers*), but “to attract readers”. There is absolutely no evidential basis on which that can be said in the present case. There was, for example, no suggestion that the programme was trailed by alerting viewers to the fact that it would contain these photographs, or even photographs of a similar nature which would have the viewers switching on to see them. Nor is it plausible that that was the motive when one looks at the programme itself. The photographs were deployed briefly at various points in the programme, amidst a lot of other visual material. There is no way in which it can sensibly be said that these photographs were somehow intended as a ratings booster, and no evidence which would begin to justify such an assertion (let alone a finding) to that effect.

60. The same point can be made in relation to the allied point that this was copyright infringement dressed up as criticism and review. The criticism and review were, on their face, genuine enough – I have so found above. It is not readily apparent that there was a disguise to be penetrated when one looked at the programme. Having heard about the making of the programme from Miss Williamson, there is no evidence that behind the scenes there was any attempt at dressing up either.

61. Next is the point that the use in the programme competes with the claimant’s own commercial use of the material in such a way, and to such an extent, as to tend to render the use unfair. Mr Fraser gave very firm evidence that he was generally reluctant to allow use of his photographs in television programmes because the more lucrative press market was “hugely diminished” by over exposure to large TV audiences, and for that reason he would never have considered allowing the use of his exclusive photographs of the Beckhams to be included in this programme. There were occasions when he would allow his photographs to be used, and he had even allowed a use of one of the subject photographs in a prior programme called Diet Another Day. In that programme there was a brief shot of the front page of a magazine, and one of the Beckham photographs (Beckham 11) appeared as part of that front page. He made a charge of £500 for the licence to use that photograph and countered a suggestion that that showed that the photograph had declined in value, and that it demonstrated that he was not as reluctant to allow TV exposure as he sought to make out, by saying that this was a brief appearance on a programme on a TV station which he clearly thought would not give it the same exposure as a BBC (or indeed an ITV) programme would give it, particularly a programme of the nature of the Tabloid Tales Beckham programme. I was urged to accept Mr Fraser’s evidence as to the devaluing

effect of TV exposure since Mr Fraser knew the business generally, and knew his own business in particular, and that therefore the exposure of these photographs on this programme would indeed compete seriously with his own exploitation of the photographs in the future.

62. I do not doubt that Mr Fraser knows his own business, and is a master at exploiting his own photographs. It is also true that the defendants did not adduce much evidence of their own as to the effect of broadcasting on the residual value of photographs such as the Beckham photographs. All they adduced was a statement of Miss Williamson that she had never heard such an argument being advanced. Bearing in mind the nature of her experience in the industry I think that that is of more limited value when compared with Mr Fraser's greater experience of dealing with his own photographs. However, despite the lack of countervailing evidence I think that some of Mr Fraser's evidence has to be viewed with care. These are photographs whose principal benefit as photographs lies in the ability to view and consider their content at the viewer's pace. Anyone really interested in their content would want to be able to study them for a period of many seconds, if not longer. The viewer of the programme would not have that opportunity. I have indicated the length of time for which they were on the screen. Anyone interested, for example, in the Beckham haircuts and hoping to see a good shot of them would have to be pretty quick and would ultimately be very disappointed at the length of time they were given to reflect on the subject matter. They would be better off getting hold of a back copy of the newspaper. It seems to me to be unrealistic to suppose that, so far as the interested tabloid reader is concerned, this exposure will lead to increased boredom with these pictures. I accept that that is not determinative of a devaluing effect, because it may be that despite that the photos would be devalued in the amounts that future users would pay no matter how blasé the average tabloid viewer had become, and I accept that that is possible. Mr Fraser sought to address that point. At one point he asserted that the value of these photographs was "crippled" by their use in the Tabloid Tales programme, but it immediately appeared that he did not mean that in the sense that no-one else wanted to use them afterwards. He was still asked for licences to use them afterwards, and gave no details about those requests which would have enabled me to judge the extent to which he was no longer able to ask the sums that he had asked hitherto. Over the course of his evidence he indicated the sort of things that he would take into account in deciding whether to license photographs for TV use. They included the nature of the programme, the broadcaster, the time of broadcast, the number of times the photograph was to be shown and the extent to which the programme might be repeated. At one point he said:

"My fear is always repeats. This is one of the reasons why I do not come to agreements very often because people will want to repeat a programme again and again and again.

63. Taken overall I think that his evidence does not show that the value of these photographs was inevitably and seriously damaged by their use in this programme. It was not inevitable that any TV use would "cripple" a

photograph, because otherwise he would never license them at all, and he admitted that he did. Alternatively, if there were always likely to be a serious damaging effect then he would charge a large fee, and the evidence was that when he licensed TV use he would charge a smaller fee. He said that this was because TV companies were not able to pay the sort of sums that newspapers would pay, but that does not really meet the point. That explains why they would not pay large sums. It does not explain why he would agree to license at smaller sums. He also explained that such exposure would sometimes have the merit of maintaining his profile, but again to my mind that does not explain why he would tolerate an inevitably “crippling” effect. The fact that he would license at all at the smaller sums he referred to (usually a few hundred pounds, though he did refer to a more substantial TV deal) demonstrates that the damaging effect was not inevitable, or always significant. He even licensed what he obviously regarded as some of his most precious (and therefore controlled) photographs of Mr Dodi Fayed and Princess Diana kissing on a boat to a TV programme which was discussing iconic photographs (there was a debate as to which were the most famous pictures of all time) – apparently therefore a programme containing criticism or review – and to 2 or 3 other TV programmes, without apparently “crippling” their value. So the most I can get out of the evidence is that putting a photograph on TV is capable of adversely affecting the future value of the photograph, but it depends on the circumstances. Mr Fraser’s attitude to the use of a photograph in the “Diet Another Day” programme demonstrates this – he clearly thought that the use of the photograph in that television context did not risk the same damage as use in other television contexts would. It was indeed a very brief appearance, and I can quite see why he might take the view he did about it. If repeats are damaging, then that point would go to any repeats of the Tabloid Tales programme, which have not (so far as I know) taken place. I find that on the evidence presented to me it was not proved that the exposure of the photos in the Tabloid Tales programme had a diminishing effect on the value of the photos of any, or any significant, amount. I accept that Mr Fraser thought that it might, and that his fear was genuinely felt, but overall he has not made out more than his fear of the risk of damage. He has not made out any actual damage to his commercial interests, and he has not established any particular level of significant risk.

64. How, then, does that affect the assessment as to the fairness of the dealing? Risk to the commercial value of the copyright may go towards demonstrating or creating unfairness, but it does not follow that any damage or any risk makes any use of the material unfair. If it did then there could be no use of copyright material in criticism or review if it could be said that that use might damage the value of the material to the copyright owner. That would be inconsistent with the purpose of the section which is to balance the interests of the copyright owner and the critic. It is all a question of balance. In the present case I consider it to be clear that the level of risk of damage (whatever it may be) is not sufficiently great to mean that the use of the photographs was unfair. The exploitation of the photographs in the programme was not gratuitous or lingering, so if there was any risk of over-exposure it was kept to an acceptable minimum. So far as this factor is concerned the use of the photographs was well on the “fair” side of the fair/unfair borderline (wherever

that may lie).

65. For the sake of completeness I would add that as part of her written reply Miss Michalos put before me a short summary report of a decision of Hart J delivered on 24th February 2005 in *IPC Media Ltd v News Group Newspapers Ltd*. The report was a very brief Lawtel report and a transcript is not yet available. Hart J seems to have found that on the facts the reproduction of the front page of a competitor's magazine on the front page of the defendant's magazine was not fair dealing because such criticism as there was could have been done without it, and in copying the work to advance its own competing purposes at the claimant's expense the defendant was advancing its own work, and that did not amount to fair dealing. So far as one can tell, that is a decision on the facts where the balance on fair dealing went the other way. I can detect nothing in that case which would affect the decision which I have reached without it.
66. Last, as an aspect of "dressing up", it was alleged that the programme was not genuine criticism or review because what the programme makers in fact set out to do was to produce a lightweight piece of entertainment which was in fact a public relations exercise for Mrs Beckham. It was even asserted that Mrs Beckham had editorial control over the programme. Having seen the programme, and considered the evidence, I am satisfied that there is nothing in this point. Objectively speaking the programme contains criticism; I have already dealt with that above. It may or may not amount to entertainment as well, but I do not think that entertainment is necessarily inconsistent with criticism or review. If "lightweight entertainment" is intended as some sort of antithesis to criticism and review, then this programme does not fall into that category, but in truth it does not seem to me that the question of whether use is fair dealing or not can be determined by deciding what other labels can be applied to it. The real question here is whether this is a trivial programme dressed up as criticism or review so as to provide an ostensible justification for showing copyright material under some pretence, or whether it is genuinely critical and reviewing. Objectively speaking it is the latter, as I have already found, and nothing in the evidence suggests that anyone behind the scenes had any other, more sinister, intention.
67. If it were established that Mrs Beckham had editorial control over the programme, then that might tend to indicate that it was not genuine criticism or review, though what would be more significant would be how she exercised it. However, it is quite clear on the evidence that she had no such thing. What was established was that she had managed to extract some concessions from Brighter in relation to the use of her recorded interview. Like other contributors, she signed a release form which governed the terms on which she permitted her taped interview to be broadcast, but hers contained additional terms. It provided:

"The Contributor shall be provided with an opportunity to view the transcript of her edited interview prior to the final edit of any

Programme in which she features and she shall have twenty four (24) hours to notify the Company of any element of the edited interview which is legally sensitive and therefore unsuitable for transmission in which case the Company shall re-edit the Programme to remove the offending element to make the Programme suitable for transmission ...”

68. This was negotiated in her case because she was thought to have some ongoing legal disputes as to which she was sensitive. Mrs Mitchinson, a BBC executive producer who was responsible for this programme, gave evidence that the BBC approved this wording in this particular case because of that sensitivity. She was aware of what she thought was a couple of disputes, (though it appears she was wrong about one of them because it had been previously settled, but nothing much turns on that). What is important is that the control was limited as to the basis of intervention by Mrs Beckham, and that in its terms it did not contravene BBC guidelines which prevented the ceding of editorial control to a contributor. The actual wording of the clause gives no foundation for saying that Mrs Beckham had editorial control. She had a limited right of objection in relation to her interview, and not in relation to the rest of the programme, and that remains the case even if (as may have been the case) there would have been question marks over whether the programme would have been broadcast without it.
69. However, the matter does not quite stop there. The actual operation of the clause went beyond its strict terms. First, Mrs Beckham was given the opportunity to see a tape of the interview, not just a transcript. There was some uncertainty as to whether she was sent a tape of the rushes (that is to say a rough version) of the whole programme or just of her interview. I think it likely, and find, that it was the latter. That gave Mrs Beckham an additional advantage over just seeing transcripts, but it does not betoken any greater degree of editorial control. However, she also put forward objections which for the most part clearly went beyond anything that would impact on apparent existing legal disputes. The first objection was as to the appearance of her skin tone. Then she raised a point about not wishing to have broadcast small parts dealing with the following: a question concerning whether she had taken money for setting up photographs with paparazzi; a bit about her husband’s personal life; a reflection on her own honesty and willingness to disclose; and a passage reflecting a certain haziness as to whether Essex has a coastline or not. All her requests were conceded, apart from the last where something that she wanted added in was not added (perhaps because the requested additional material did not in fact exist). Mr Morgan himself approved the relevant alterations. Only one (the reference to payment) was referred to by Brighter as apparently having reference to an ongoing legal dispute, and Brighter may have been under a misapprehension about that. The others were not ostensibly justified in that way, and they seem to have resulted from the personal preferences of Mrs Beckham. However, this does not mean that she had editorial control over the programme. She had some limited control over part of it for legal reasons; and she took the opportunity of making some requests, in relation to her interview, which were granted. To say that this amounted to, or betokened, some significant degree of editorial control so as to make the

whole programme a piece of PR for her seems to me to be unarguable. Mrs Beckham's participation in the programme might have been important, but there is absolutely no evidence that anyone thought it was so important that they would, in substance, be forced to cede editorial control over the programme. Since it appears the whole programme (even in rushes form) was not sent to her I do not see how she can have exercised it. Had she had that power, then (judging by the sensitivity demonstrated by her actual requests) I think it likely that other aspects of the programme would have been challenged as well. At the end of the day to say that this programme, with the slants that it adopts, is a PR piece for Mrs Beckham is seriously to mischaracterize it. The suggestion that she arranges her own publicity under the guise of chance photographs, and the less than flattering treatment of her solo singing career, are demonstrations of that. Last, no support is to be gleaned in this respect from the apparent change of name of the series from "Set The Record Straight" to "Tabloid Tales". That does not disguise some hidden agenda in this respect.

70. In the circumstances I find that the use of the photographs amounted to fair dealing for the purposes of section 30(1) of the Act.

Sufficient acknowledgment

Under section 30(1), fair dealing is only a defence:

“...provided that it is accompanied by a sufficient acknowledgment”

It is accepted by the claimant that there was sufficient acknowledgment in relation to Beckhams 1, 6-10 and the first use of 11, but not in respect of the other use of photographs said to be covered by the fair dealing defence. I must therefore consider it in relation to those.

71. “Sufficient acknowledgment” is defined in section 178:

“ ‘sufficient acknowledgment’ means an acknowledgment identifying the work in question by its title or other description, and identifying the author unless-

(a) in the case of a published work it is published anonymously;

(b) [immaterial on the facts of this case]”

No question arises as to anonymous publication in this case, nor does any question arise in relation to an identification of the work in question. The questions that are said to arise do so in relation to the requirement to identify the author. Miss Michalos's point was that the identification of the author had to be express, and it was not sufficient for it to be implied.

72. There is no authority in support of Miss Michalos's submission, and it does not seem to me to accord with principle. The borderline between what is express and what is implied can get blurred anyway, and it is not a satisfactory distinction to introduce in this area of the law. What is important in principle is that there is something which can properly be seen as an identification of the author. Miss Michalos drew my attention to *Sillitoe v McGraw-Hill Book Co* [1983] FSR 545, where the absence of an express recognition of authorship meant that there was no sufficient acknowledgment, but on this point the case was simply a decision on the facts. Such identification as there was of the author of the material in that case was too far divorced from the appearance of the material to be associated with it, apparently, because the copyright works were treated as though they were non-copyright (see page 565). It is not an authority for the proposition that any identification must be express. All that is required is that it is an identification, though I think that I can accept that it probably has to be one that can be readily seen and not require some form of hunting around or detective work in order to ascertain it. It is probably not enough to say that the author can be identified if you look hard enough; the authorship must be more apparent than that. However, at the end of the day it is a question of fact whether there has been an identification.

73. I turn therefore to consider the dispute in relation to the photographs. The identification of the author of Beckham 1 is presumably conceded because the camera pans down to and zooms in on Mr Fraser's name at the foot of the newspaper photograph. That does not occur in relation to Beckhams 2 to 5, but the voice over of Mr Morton (the text of which appears above) identifies him, and in that context I consider that he is sufficiently identified as the author. That is reinforced by the fact that not long before, Beckham 1 had been shown with Mr Fraser's name, and anyone paying a moderate amount of attention would be able to identify the photographs as being from the same series (and therefore by the same photographer), particularly bearing in mind that Mr Morgan had identified "the exclusive pictures of the change of image" as being Mr Fraser's. The whole context of the appearance of these photographs clearly links them with Mr Fraser, and there is sufficient identification of him to amount to a "sufficient acknowledgment".

74. Next there is the second appearance of Beckham 11. The first appearance is accompanied by a shot of his name, so he is identified there, as well as by the oral statements of Mr Morgan which accompany it. The second appearance of the photograph is not so accompanied, but I consider that it is sufficiently clearly a repetition of the earlier photograph that the identification of the author can be said to be carried over – bearing in mind the emphasis given to the authorship in its first appearance ("surprise surprise") this repetition will

be even clearer than it otherwise would be. Accordingly this appearance sufficiently identifies the author.

75. Next there are all three appearances of Beckham 12. The first appearance is not accompanied by any clear separate visual identification of Mr Fraser as an author, but the accompanying words are the clearest attribution of authorship short of that. Mr Morgan all but says in terms “the author of this photograph was Jason Fraser” – his actual words appear above, and are in my view clearly sufficient to identify him as the author. The second appearance of Beckham 12 is sufficiently clearly linked with the first appearance to carry over the identification. The third appearance is more distanced in time and when the programme has moved on. One cannot say that the identification is carried over in the same way. However, the photograph is sufficiently clearly a repetition of the earlier photograph for the identification to be carried over simply by virtue of its being the same photograph. I do not think that the concept of identification means that there has to be a precisely or virtually contemporaneous act of identification. Once the identification has been provided then it is capable of operating in relation to a later appearance of the copyright material, and I find that on the facts that is what has happened here. There is therefore sufficient identification of the author in all three appearances of Beckham 12.
76. The claimant then says there is no sufficient identification in relation to both appearances of Beckham 13. The first occurrence follows very shortly after Beckhams 11 and 12. Its appearance (the subject matter is very similar to 11 and 12), its positioning in the programme and the fact that its showing is accompanied by Mr Fraser speaking, makes it sufficiently plain that it has the same author. This is so whether or not Mr Fraser was, subjectively speaking, talking about this photograph during his interview. What matters for these purposes is how the material appears in the programme, and there is a sufficient link to make the identification. This is sufficiently clearly a repetition of the previous photograph for the identification to carry over for the purposes of the acknowledgment provision.
77. I therefore find that there was a sufficient acknowledgment in relation to all occurrences of Beckhams 1-13.

Conclusions on fair dealing

78. It follows from the above, and I find, that the defendants are entitled to the benefit of the fair dealing provisions of section 30(1) in relation to each of

Beckhams 1 to 13.

Incidental inclusion

79. Section 31(1) provides:
80. “Copyright is not infringed by its incidental inclusion in an artistic work, sound recording or broadcast”.
81. The defendants rely on this provision as an additional or alternative defence in relation to the third appearance of Beckham 12, and the appearance of Beckham 14. Their case is that both photographs were included as an integral part of the headlines or coverage of the kidnap plot.
82. Guidance as to the law as to incidental inclusion can be found in *Football Association Premier League Ltd v Panini UK Ltd* [2004] FSR 1. In that case the defendants had published photographs of Premier League footballers in their club strip, which included Premier League or club logos; the League and clubs claimed copyright in their logos. The defendants relied on the defence of incidental inclusion, and it was rejected on the facts of the case. Chadwick LJ said that the question of whether there was incidental inclusion:

“is to be answered by considering the circumstances in which the relevant artistic work – the image of the player as it appears on the sticker or in the album – was created”

And whether or not the inclusion is incidental

“turns on the question: why – having regard to the circumstances in which the [allegedly infringing work] was created - has [the original copyright work] been included in [the former].” (at p 12)

He went on to hold that commercial, as well as aesthetic, considerations came into play in that consideration. Mummery LJ (at p 15) observed that

“incidental is an ordinary descriptive English word ... The range of circumstances in which the word ‘incidental’ is commonly used to describe a state of affairs is sufficiently clear to enable the courts to apply it to the ascertainable objective context of the particular infringing act in question.”

83. Accordingly, my task is to review the use of the photograph in its context and consider whether it was incidental (which must mean incidental to some other

purpose) in the ordinary sense of that word.

84. The programme contains many shots of newspaper pages containing photographs, headlines and text. In most cases the camera zooms in or occasionally out, or it pans across its subject matter. It may well be that very often an image of a still subject will move in order to make it more interesting – a series of static images appearing for seconds at a time in a TV programme will not be as visually interesting or stimulating as a moving image. However, I have come to the conclusion that in many if not most of the cases of movement there is a further purpose – to provide or demonstrate the context of part of the image. I certainly consider that there is a similar purpose in the treatment of the third occurrence of Beckham 12. I have described its appearance above. The camera starts by including most of the newspaper rendition of the photograph in its shot. A small part at the bottom is obscured by some sort of shadow, to which I will return. It ends by concentrating on the headline, having zoomed in on it. The inclusion of the photograph in the newspaper was obviously deliberate – a picture of the potential victim of the kidnap plot holding her young baby. This was a programme about the newspaper treatment of celebrity stories about the Beckhams, including the kidnap story. The juxtaposition of photograph and headline (and copy) is part of that treatment. When that treatment is considered by the programme it is that combination that makes the display of the photograph something that occurs for the purpose of criticism and review. But that same factor means that the photograph cannot have been incidentally included. The producers of the programme were not interested in the headline alone. They were interested in the headline in the context of the Beckham celebrity treatment, which included the use of sympathetic photography. I am satisfied that the broad picture of the page, including the photograph, followed by the zooming in, was not merely a production technique in order to show the page in an interesting form or of producing a moving image which is more interesting than a still one; it was a deliberate way of placing the page in the context of the overall story and then focusing on the aspect then being considered (the kidnap plot). In that context the inclusion of Beckham 12 was not incidental.
85. I consider that this conclusion is strengthened by the shadow to which I have referred. At first sight it looks like a casual introduction, or even an accident, but in fact I think it is something else. It obscures the bottom part of the photograph, but leaves Romeo's appearance intact, and it also obscures most of what is probably an advertisement in the box below. Its effect is to concentrate the eye on the upper three-quarters of the photograph, and on that part of the page which shows the newspaper story. There are three significant features of this shading. First, there is a similar darkening effect to the left of the newspaper page, suggesting a deliberate framing. Second, the framing effect of such shading is apparent on earlier portrayals of newspaper articles, where it is obviously used to frame a headline or photograph, or to obscure other non-Beckham material on the same page, or both. Third, those first two points indicate that the shading is deliberate, in order to focus attention. That being the case, it is significant that the shading was not applied to the whole of the photograph. If the real point was the headline, I would have expected the programme makers to have done that. But the photograph was left unshaded,

and within the frame. That suggests that the photograph was significant in the eyes of the programme makers, which in turn suggests that its inclusion was not incidental.

86. I have reached a different conclusion in relation to Beckham 14. This is the small photograph appearing within a newspaper headline. The focus of the filmed shot in the programme is on the headline. It zooms in slightly during the 4 seconds it is shown, but that is obviously to create a little drama or visual interest. In the run up to this shot the story was introduced by Mr Morgan, and there were three separate shots of headlines appearing in the News of the World, followed by a brief clip from a BBC News broadcast of the item. Then the relevant headline and Beckham 14 appear. I am satisfied that the headline appears as an example of another sensational headline; that is why it is there. In that context the small photograph of Mrs Beckham is incidental – it is there because it happened to be there in the original. While it might have been there to lend interest to the original headline, its appearance in the programme shot was, in everyday terms, incidental. In *Panini* the publishers of the photographs would not have wanted to publish photographs without the relevant logos. The logos were important to the photographs. That is not true of Beckham 14. As far as I can judge, the headline was chosen as a headline, not because it also contained a photograph of Mrs Beckham. That conclusion is fortified by the fact that at least one of the reproductions of the News of World headlines is without any photographic accompaniment – it is there for the drama of the headline, and that is true of the headline accompanying the appearance of Beckham 14.
87. In the circumstances I find that there was no infringement in relation to the appearance of Beckham 14 because its inclusion in the programme was incidental.

Additional damages – flagrancy

88. I was asked to make findings in relation to additional damages within the meaning of section 97(2) of the Act. Since I have found no breach of copyright the question of damages does not arise, and strictly speaking it could be said I need not make any findings under this head. However, I heard evidence and argument on this point, and in case it should matter in the future I will express my conclusions on it briefly.
89. If my conclusions are wrong as to infringement, I do not think that there is any basis at all for seeking additional damages. Miss Michalos's opening skeleton focused on the flagrancy of the alleged breaches, but her closing arguments were broader than that and focused on other factors. Dealing first with flagrancy, so far as Miss Williamson's evidence bore on the point it contained no positive evidence pointing that way, and nothing implicit or unsaid could be taken to point that way either. There was evidence that she took advice on fair dealing generally, which demonstrates conscientiousness, not a desire to

try to evade in a manner which would make the breach flagrant. The matter was, on the evidence, considered carefully. The suggestion that she did not follow the advice of Mr Bonnington is in my view completely misplaced. Nor is there any material in the evidence of Mrs Mitchinson, or in the documents, which would support the allegation of flagrancy. This is not a case where it can be said that the breach was flagrant.

90. So far as other factors are concerned, I have not identified any which would give rise to a right to additional damages. Miss Michalos submitted to me that the defendants knew that they were running a risk, and it is right that if that risk eventuates then the breach should be considered to be sufficiently serious as to attract additional damages. In this context she relied on a passage from *Sillitoe v McGraw-Hill Book Company (UK) Ltd* at page 557, where HH Judge Mervyn Davies QC said:

“What the defendants have done here and knowing of the plaintiffs’ comments and the facts on which the complaints were based, was to take the risk of finding their legal advice wrong. If a person takes a deliberate risk as to whether what he is doing is wrong in law, I do not see that he can say later that he did not, at the time, know that what he was doing was wrong, if in the event his actions are held to be wrong.”

91. That passage concerned a different point, namely whether the defendant should be treated as having knowledge of an infringement for the purposes of the then importation provisions in section 5(3) of the Copyright Act 1956. That is not the same point that arises in relation to a claim for additional damages. It does not follow that knowing there was a risk automatically translates a breach into a more serious one for the purposes of additional damages. Miss Williamson strongly denied that they knew there was a serious risk in what they were doing and did, and I accept that evidence. I also find that no other relevant person thought there was a serious risk of infringement in broadcasting what was ultimately broadcast. The decision to use the material was taken as a result of an honest belief of entitlement to do so. Even if that belief was wrong, it was not so wrong, or so dishonest, or so reckless, or so calculating, or even so negligent (assuming that one or more of those factors is relevant to additional damages) as to attract a claim to additional damages. Miss Michalos also relied on the way Mr Fraser had been treated – his consent was asked for and refused, and then he was asked to appear (and did appear) in the programme. Since I have found that the initial request for use is not established this point is weakened on the facts. The other request or requests (for general display of his shots during his interview) and his subsequent participation is not such as lead to, or contribute to, a claim for additional damages. The defendants honestly thought they were entitled in law to make use of the material that they used in the manner in which they used it, and the fact that a contributor participated on a false assumption does not mean that if their belief was wrong then additional damages should follow. It does not materially increase the seriousness of the breach. I would have reached the same conclusion even if I had found for Mr Fraser in relation to

the original request.

92. It follows that, had I been required to do so, I would have found against any claim for additional damages.

Conclusion

93. Accordingly I shall dismiss this claim.