Case No: HCO100644

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Neutral Citation Number [2003] EWHC 786 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th April 2003

Before :

THE HONOURABLE MR JUSTICE LINDSAY

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Between :

(1) MICHAEL DOUGLAS	**Claimants**
(2) CATHERINE ZETA-JONES	
(3) NORTHERN & SHELL PLC	
- and -	
(1) HELLO! LTD.	**Defendants**
(2) HOLA, S.A.	
(3) EDUARDO SANCHEZ JUNCO	
(4) THE MARQUESA DE VARELA	
(5) NENETA OVERSEAS LTD.	
(6) PHILIP RAMEY	

Mr M. Tugendhat Q.C. and Mr D. Sherborne (instructed by **Messrs Theodore Goddard**) for the Claimants
Mr J. Price Q.C. and Mr G. Fernando (instructed by **Messrs Charles Russell**) for the 1st to 3rd Defendants
Miss H.T.M. Mulcahy (Solicitor Advocate of **Messrs Reed Smith**) for the 4th and 5th Defendants

Hearing dates : 3rd –5th February 2003, 7th February 2003,
10th-14th February 2003, 17th-21st February 2003,
24th-26th February 2003, 3rd March -7th March 2003,
10th March -12th March 2003

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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 Lindsay

Mr Justice Lindsay:

An outline

1. The well-known film stars Mr Michael Douglas and Miss Zeta-Jones married at the Plaza Hotel in New York on the 18th November 2000. It was, said one witness, the event of the year. Extensive security arrangements had therefore been made, intended to ensure that access to the ceremony and reception would be denied to all but the family members and friends who had been invited and the attendant staff, who had been put on terms to keep the wedding confidential. The bride and groom hired their own selected photographers and it was made plain that other photography was not to be permitted. In making such arrangements the bride and groom were doing as they were bound by contract to do as they had sold exclusive photographic rights of the event to OK! magazine, although they had retained control over the selection of such pictures, taken by their own photographers, as they should choose to release to OK!. The security arrangements thus were intended to serve the three-fold purposes of confining the event to family and friends, of ensuring that only authorised photographs were taken and of preserving the exclusivity of the photographic rights for which OK! had paid £1m.

2. The wedding passed off as a great success, enjoyed by all present but, unknown to any as the events unfolded, it soon thereafter transpired that one intruder, a photographer, had eluded security and had surreptitiously taken relatively poor photographs which were then bought for publication in OK!'s rival magazine, Hello!. The Douglases and OK! , then, as now, represented by Mr Tugendhat Q.C. and Mr Sherborne, quickly moved in England for an injunction to restrain publication and they obtained that relief. However, the Court of Appeal acceded to Hello!'s arguments and lifted the injunction, leaving the Claimants to claim in damages.

3. In the result, Hello! published the unauthorised photographs on the same day as that on which OK!, having had to bring its arrangements forward, published parts of the full authorised portfolio of photographs covering the event, approved by the Douglases, for which it had paid.

4. As the litigation developed other parties were added as defendants and other causes of action beyond the initial claims were added. The parties to the action now, as Claimants, are, as they were from the outset, Mr Douglas and Miss Zeta-Jones (now Mrs Douglas) as 1st and 2nd Claimants and the publishers of OK!, Northern & Shell plc, as 3rd Claimant. It will be convenient to refer to the 3rd Claimant simply as "OK!".

5. On the Defendants' side, Hello! Limited, the 1st Defendant, is a subsidiary of the 2nd Defendant, Hola SA; the 2nd Defendant publishes Hello! magazine and the 1st Defendant distributes it in the United Kingdom. The 3rd defendant is Eduardo Sanchez Junco, a director of and controlling shareholder in Hola SA and Editor-in-Chief of Hello! magazine. I will call the first three Defendants "the Hello! Defendants". They appear by Mr James Price Q.C. and Mr Fernando. The 4th defendant, the Marquesa de Varela, is a person who has frequently supplied features for use in Hello! magazine and in Hola, its Spanish sister publication. The 5th defendant is a company owned by the Marquesa de Varela. They appear by Miss Mulcahy. The 6th defendant, Philip Ramey, is a paparazzo photographer who also has a photographic agency in California. He was not the photographer of the unauthorised photographs but it was he who sold them to the Hello! Defendants. He has not been represented and has taken no part before me. The Claimants propose to move against him later and do not seek relief against him at this stage.

6. A split trial was ordered so at this stage I am concerned only with whether there is liability in one or more of the first five defendants to one or more of the Claimants. If I find there to be such a liability I shall not be concerned with attempting to ascribe some monetary figure to that liability or even with determining how that should be done.

The procedural history

7. The procedural history is more complicated than one might expect as, quite apart from collateral skirmishes, there have been, as I shall relate below, two interlocutory hearings at first instance followed by one abortive appeal to a two man Court of Appeal and then a successful appeal to a three man Court of Appeal. Then, a good deal later and only shortly before the trial began, there was an unsuccessful application to the Vice-Chancellor for the striking out of the defences of the Hello! defendants, an application on which Senor Sanchez Junco and three witnesses for the Hello! Defendants were cross-examined.

Paparazzi

8. As I shall explain in the course of the narrative, the photographer who took the unauthorised photographs, a Mr Rupert Thorpe, was in some form of loose association, the details of which are not known, not only with the 6th defendant, Mr Ramey, but also with two others, Frank Griffin and Randy Bauer. All carry on business as paparazzi, a term especially used and which I shall use to include those photographers whose business it is to take photographs of events and celebrities where access to photographers generally to the event is forbidden or limited and where the consent of the celebrities to be photographed is known or likely to be refused and is thus dispensed with by the paparazzi concerned. In varying degrees, as may become necessary for them to obtain the photographs they seek, they turn to deception, to intrusion and, occasionally, to unlawful behaviour. Mr Ramey, in particular, has a reputation of being able to get in where others were unlikely to be able to.

Intrusion, in context

9. These proceedings have already attracted a good deal of public and press attention such that there are two points that I should mention as to be borne in mind. The first is the extent to which celebrities of the status of Mr Douglas and Miss Zeta-Jones, whilst, of course, welcoming much of the publicity that surrounds them, can also find their privacy or ordinary life severely curtailed. Thus the undisputed evidence before me includes, for example, that Miss Zeta-Jones has been frightened by a photographer jumping out of a doorway at night to photograph her, that on another occasion she swerved her car into a lamp-post trying to escape from a paparazzo and that the Press got hold of and published the fact of her pregnancy even before she had had all the medical tests she had wanted to take and before even she had told her close family of it, including her mother. When she was in hospital after the birth of her son, journalists tricked their way into the hospital by pretending to be members of her family. When she was wheeled from the delivery room back to her room in the hospital she was covered by a sheet to avoid being photographed by the photographers who had tricked their way in. In one remarkable incident when her son was only one week old he, with his nanny, was in a car driven in California by Miss Zeta-Jones. Photographers for a British tabloid newspaper deliberately ran into the car. Under Californian law Miss Zeta-Jones had to get out of the car to exchange details. Her evidence continues, of the photographers:-

> "They immediately jumped out of their car and took photographs of me looking furious at the side of the road. They then published them in an article about me being consumed by road rage."

Hardly surprisingly, her evidence continued:-

> "This incident made me very angry."

It is easy to see, against such a background, how celebrities may become especially defensive, though I add that this case is nothing to do with photography of either Mr Douglas or Miss Zeta-Jones in public.

10. The other point I make is that whilst the Claimants' case is now chiefly for money it was not always so and it was not by their choice that it became so. What all Claimants first moved for was an injunction to restrain publication. The case only became chiefly for monetary compensation after the three-man Court of Appeal had ruled that the existing injunction was to be undone and that the Claimants would have to be satisfied with claims in damages.

The Magazines

11. Hola has been published in Spain for over 50 years and the three versions, "Hola" in Spanish, "Hello!" in English and "Oh La" in French are sold in almost 60 countries. Hello! has been circulated weekly in the United Kingdom for some 12 years and is bought by an average of some 456,000 people per week, leading, it is said, to a readership of some 2.2 million people per week. It is sold through about 55,000 outlets in the United Kingdom, going on sale on Tuesdays in London and on Wednesdays in the rest of the country. It is printed in Spain and published by Hola SA. The cover price in 2000 was £1.55.

12. OK! is printed in England and published weekly by the 3rd Claimant. It is a more-recently-established magazine than Hello!, that being broadly reflected in the issue numbers at the time of the Douglas wedding, namely number 639 for Hello! and No. 241 for OK!. Its cover price in 2000 was £1.85. It normally comes out on Thursdays in London and on Fridays throughout the rest of the United Kingdom. In November 2000 OK! sold about 455,000 copies per issue on average.

13. Whilst, no doubt, each magazine has especial characteristics which commend it to particular prospective customers, less discerning readers will find much that is common to both. Indeed, there is some strong feeling amongst London staff at Hello! that OK! is a copycat. Both magazines are of similar size and shape and provide a regular diet of photographs and text of and about Royal but, more usually, entertainment, sporting and social celebrities, with photographs taking precedence over text. Many of the main features are in the highest degree posed and show, for example, the celebrity's yacht or home or show his or her engagement or wedding. Many such features will have been commissioned by arrangement with the subjects and paid for by the magazine in question, the more celebrated or newsworthy celebrities being able to command, should they wish, higher fees than the less celebrated. Other photographs, whilst such that the subjects can be seen to be very aware of and, as it would seem, content with the camera, are far less formal and record, for example, arrivals at a party or at the opening of a film. Each magazine includes from time-to-time photographs taken, so far as one can judge, without the subject's knowledge or consent but they represent a minority overall.

14. There are brief passages about travel, cooking, "lifestyle" and health advice and as to current television programming. There are short features on particular celebrities in the news in the current week. The texts generally are, if not unquestioning or flattering, at least warm as to the celebrities featured, no doubt for the practical reason that if that were not so the supply of willing celebrities might dry up.

15. The two magazines are plainly keen rivals in the same market and were so in 2000.

Evidence

16. On the Claimants' side I heard oral evidence from Miss Zeta-Jones, Mr Michael Douglas, Mr Allen Burry (Mr Douglas' Executive Assistant and Publicist), Miss Simone Martel Levinson (the Event Planner engaged by the Douglases to organise their wedding), Ms Cece Yorke (Miss Zeta-Jones' Publicist), Mr Martin Townsend (formerly Editor of OK! magazine, in office at the time of the wedding) and Mr Paul Anderson (Picture Editor of OK! magazine). The evidence of Miss Levinson and Ms Yorke was given by video link to and from the United States.

17. So far as the Claimants' expert evidence was concerned, I heard oral evidence as to New York law by video link from Professor Arthur J. Jacobson, Max Freund Professor of Litigation and Advocacy at the Benjamin N. Cardozo School of Law in New York City. The claimants' evidence as to Spanish law was given orally by Senor Enric Enrich, Senior Partner of the Barcelona firm of Advocates, Enrich Amat I. Vidal-Quedras, former co-Chairman of the Committee of Intellectual Property of the International Bar Association and currently the Chairman of the Copyright and Image Rights' section of the Barcelona Bar Association.

18. All of the above-described witnesses were cross-examined, each having supplied one or more witness statements or reports.

19. On the Defendants' side the main body of evidence came from the Hello! Defendants. Senor Eduardo Sanchez Junco gave his oral evidence by way of an interpreter as he speaks little or no English. Senor Javier Riera, Managing Director of Hola SA, did the same; he has sufficient command of written English to comprehend untechnical and straightforward documents. His Personal Assistant, Senora Elisa Sanchez-Ferragut Arnau (conveniently and, as I hope, without offence, usually referred to during the hearing as "Senora Elisa") gave her oral evidence through the interpreter. Mr Anthony Luke, co-Ordinating Editor of Hello! magazine, who works in Madrid and has fluent Spanish, spoke in English. Hello!'s Publishing Director, Sally Amanda Cartwright, who also has good Spanish, gave oral evidence, as did Maria José Doughty, a native Spanish speaker but whose English is impeccable. She is Administration and Financial Controller at Hello! Limited in London. Mr Christopher Mark Hutchings, solicitor, a partner in Charles Russell, solicitors to the Hello! Defendants, also gave oral evidence, as did Margaret Koumi, the Editor of Hello! in 2000. All of these witnesses had supplied one or more witness statements and all were cross-examined.

20. The Hello! Defendants' expert evidence consisted of the evidence of Professor Diane L. Zimmerman on New York law and of Senor Miguel Engel Rodriguez on Spanish law. Professor Zimmerman, Professor of law at New York University, gave oral evidence by video link and Senor Rodriguez, a member of the Madrid Bar and until recently associate professor of constitutional law at Universidad Autonomia at Madrid, gave his oral evidence here in London through an interpreter. Both had put in one or more written reports.

21. Oral evidence on behalf of the 4th and 5th Defendants consisted of the evidence of the 4th defendant herself, Maria J. Marin, also known as the Marquesa de Varela, and her personal assistant, Pirjetta Mildh, both of whom had a complete command of English despite its being the mother tongue of neither. No expert evidence was put in on behalf of the 4th and 5th Defendants. Each of the Marquesa and Miss Mildh put in one witness statement; a second was prepared for the Marquesa but did not find its way into evidence.

22. In a category of her own amongst those who gave oral evidence was Sue Neal, no longer an employee of Hello! or Hola SA but formerly a Picture Editor working in London for Hello!. She had prepared two witness statements; one was prepared by the solicitors for the 4th and 5th defendants, one by the solicitors to the Claimants. Neither the 4th and 5th Defendants nor the Claimants chose either to call Miss Neal or to put in either or both of her witness statements but at a late stage in his case Mr Price Q.C. chose to put in her witness statements as hearsay evidence under CPR 32.5 (5). That led Mr Tugendhat Q.C. to apply to cross-examine on her statements under CPR 33.4 (1). I ruled that he could do so and the Court of Appeal, in an interlocutory ruling, upheld that decision. Accordingly Miss Sue Neal was cross-examined by Mr Tugendhat and re-examined by Mr Price.

23. Mr Phillip Ramey, the 6th Defendant, a photographer well known as a paparazzo and who also conducts a photographic agency, has put in a defence (with a statement as to its truth) and a witness statement but otherwise, as I have mentioned, has taken no part in the proceedings. Much of his witness statement is uncontroversial or is confirmed by other evidence but in the absence of his having submitted himself for cross-examination I do not feel able to attach weight to his assertions that he

offered European rights to the unauthorised pictures to the Marquesa or that she bought them from him, either on arms' length commercial terms or at all.

24. There have been several other witness statements by or on behalf of individuals who have not given oral evidence, some on topics which do not yet need to be pursued, and notice as to hearsay evidence has been given in respect of some but I have not felt that any either displaces or adds significantly to conclusions formed on the basis of the other documentary evidence and the evidence given by witnesses whose evidence has been tested by cross-examination.

The Narrative begins

25. A chronological order will occasionally have to be departed from but I shall attempt, as far as practicable, to set out the facts I find in that order.

26. Miss Zeta-Jones and Mr Douglas met in September 1998. A relationship developed. Later they had a holiday together. Articles began to appear in the Press about them as a couple. That they might become engaged and marry began to occur to OK! as, doubtless, it did to Hello!. Such events would be exactly the kind each would want to cover. On the 6th September 1999, before any engagement had been announced, OK! offered £1m "subject to contract" for exclusive photographic rights for the engagement, wedding, honeymoon and for Miss Zeta-Jones' 30th birthday party.

27. In September 1999 OK! acquired exclusive photographic rights by contract to the wedding in California and honeymoon of the television presenter Jenny McCarthy and John Asher for $100,000. A term of the contract was that the bride and groom should, at their own expense, provide such reasonable security at the wedding as was reasonably necessary to ensure that unauthorised photographers, journalists and members of the public would be unable to gain access to the grounds and premises so as to minimise the risk of photographs of the wedding being made available to the media. OK! was to make a full feature of the events. Nonetheless, Hello! acquired and published photographs of the wedding, one at least of which has the appearance of being an out-of-focus shot, surreptitiously taken from a low level by a camera of which the bride and groom appear ignorant. Invoices sent to Hello! in respect of the pictures it used were from, respectively, Messrs Ramey, Griffin, Bauer and Thorpe, all photographers to whose names I shall need to return. The invoices bear words, added in handwriting at Hello!'s office, such as "Ordered by Marquesa and Eduardo" and "Commissioned by Marquesa and Eduardo". Mr Ramey makes reference to a "Day Rate" in his invoice and does not identify the event photographed, referring instead to a "Special Project". The others openly refer to the McCarthy wedding. Mr Bauer's invoice refers to " 2 days". The invoices bear marks indicating that they were processed in London. These details came to light only in the course of the trial, after the Marquesa's evidence was concluded. There was no application for her recall. That she had (with Senor Sanchez Junco) an involvement in the arrangements made for the unauthorised photographs is plain not only from the superscriptions on the invoices but also from the fact that Hello! paid her a "fee for Jenny McCarthy wedding" of £5,000. Although such photographs of paparazzi type were not her usual style, that she could and would take a hand in arrangements for them is plain. OK!'s big feature on the wedding in their issue of 24th September 1999 had some, at least, of its exclusiveness diminished by the unauthorised photographs in Hello!'s Issue 579. The Marquesa was able to crow to Anthony Luke, the co-ordinating Editor in Madrid, that:

> "My paparazzi spoiled OK!'s Jenny McCarthy wedding."

In respect of aspects of the handling of the Douglas wedding, both sides made reference back to the McCarthy wedding, to emphasise similarities (as did the Claimants) or differences (as did the Hello! Defendants).

December 1999

28. In December 1999 Miss Zeta-Jones became pregnant with Mr Douglas' child. At a millennium party they agreed they would marry. They started to plan their wedding. They picked New York as a venue roughly central between the United Kingdom to the east and California to the west. The Plaza Hotel was chosen as it had a proven track record for hosting large-scale events which required security. It was also a place where guests could stay and, as Miss Zeta-Jones planned to stay there, she could procure that her arrival at the wedding would not (as she put it) be turned into a media circus.

29. Miss Zeta-Jones did not want to be forced to have her wedding in secret. She had always wanted it, she said, to be a very special day and it was important to her that her family, in particular, would be there to share it with her. There was concern that media intrusion might destroy the intimacy and joy of the event. Miss Simone Martel (Levinson) was brought in, an experienced event planner. She was told that the bride and groom wanted the wedding to be personal, romantic, intimate and unforgettable.

30. Miss Zeta-Jones's pregnancy was thought to be a closely guarded secret but in January 2000, only some 7-8 weeks into the pregnancy and, as I have touched on already, before Miss Zeta-Jones had either had all of the medical tests which she wished to have or had told her close family, she found that the Sun newspaper had learned of the pregnancy and was going to publish the story. She was forced into announcing the pregnancy to her family before she was ready to do so. As this was to be her first child she had particularly wanted to have every possible test before giving the news to her family. Her enquiries suggested that paparazzi had obtained the information from an assistant in the office of the lawyers then acting for her. Her pregnancy became public knowledge.

31. OK!'s offer for an exclusive was accordingly modified to include a sum for photographs of both parents and the baby. From about March 2000 Hello! was also in contact with Mr Allen Burry, Mr Douglas' Publicist, but Mr Burry had not found it easy to deal with Senor Sanchez Junco's calls because of the language difficulties. The prospective bride and groom had not yet decided whether to permit a feature to be published either of the baby or of the wedding.

April 2000

32. The Marquesa entered the lists in April 2000. Her personal assistant, Pirjetta Mildh, was in contact with Mr Burry, from whom she heard of his dissatisfaction with his dealings with Madrid. Mr Burry was not averse, though, to dealing with the Marquesa, who made contact with him. The Madrid office of Hello! and Senor Sanchez Junco continued to approach Mr Burry but to no effect save that Mr Burry's displeasure with Madrid grew. The Marquesa felt strongly that Senor Sanchez Junco was mishandling matters, that Hello!'s bid would be far better conducted by her and that, left to itself, Madrid was likely to drive any "exclusive" into the hands of OK!. The thing that Mr Burry had not been able to get Madrid to grasp, as he put it to Miss Mildh and as she related to the Marquesa, was:-

> "Money is not the point! The point is doing it with the magazine they like and trust and have a good working relationship with so they can have a lovely wedding without any worries."

Both OK! and Hello! continued to make offers but Miss Zeta-Jones and Mr Douglas remained undecided not only as between those offerors but as to coverage of the prospective events at all, the events, by May, being, of course, not only the wedding but the earlier birth of Miss Zeta-Jones' first child, expected in August 2000.

33. On the 3rd May 2000 the Marquesa, for Hello!, wrote to Mr Burry to say that Senor Sanchez Junco offered $500,000 for exclusive pictures of the mother and father with their baby and £1m for the wedding. Mr Burry, though, had wanted clear written proposals from Hello!. That elicited a further

offer from Senor Sanchez Junco, now put at $1½m for the wedding alone. His proposals, which he described as "The biggest investment ever made by our magazine", included that Hello!'s own photographers should cover the event as well as those selected by the bride and groom. He was also keen to ensure that the one approved picture, which the couple were going to release generally and gratis to the media on the day, should not be released until Hello! had appeared on the market. He also wanted that free picture to be "a medium shot" rather than a close-up or full-length photograph. Neither of those provisions was likely to commend itself to the couple.

34. At Hello! it was felt, rightly as it transpired, that negotiations were going OK!'s way. The Marquesa felt that if the exclusive for the baby was lost to Hello!, it would be likely to lose the wedding as well. Hello!, by way of the Marquesa, on the 21st July increased its offer to $600,000 for the baby pictures and £1m for the wedding but to no avail.

August 2000

35. On the 8th August 2000 Senor Sanchez Junco, disappointed and feeling that Hello! would not get the exclusive, telephoned the Marquesa, who was in New York trying to encourage Mr Burry to deal with Hello!. She told Senor Sanchez Junco that if the couple would not deal with Hello! then the only option was to contact, and buy pictures from, paparazzi. There was nothing new about that as a possibility to Senor Sanchez Junco; he has bought pictures from paparazzi including the two I shall next mention, for years. Senor Sanchez Junco told her that Sue Neal, the Hello! Pictures Editor in London, was already in contact with two paparazzi, Phil Ramey and Frank Griffin. In so holding I have preferred the evidence of the Marquesa to that of Senor Sanchez Junco. Of the two photographers, both had wide reputations as paparazzi. Mr Ramey, in particular, a difficult man to deal with, was renowned as an aggressive photographer; as the Marquesa put it:-

> "You know, he can get into anyone's house and do the pictures."

Sue Neal described him as a confident gatecrasher. Senor Sanchez Junco knew of his reputation. The Marquesa volunteered to get in touch with the paparazzi and did so. It suited both Senor Sanchez Junco and the Marquesa that it should be the Marquesa who should contact the paparazzi. Senor Sanchez Junco might well have felt disappointed at his own handling so far of the Douglas wedding and would in any event have been willing to pass it to the Marquesa but more probable was it that he, in this respect a cautious or even fearful man, saw it to be unwise to be seen to be in direct contact with paparazzi whose means of obtaining photographs, certainly any inside the wedding, might well be at best dubious or at worst unlawful. The Marquesa, whose star had been waning at Hello!, was not unwilling to have the chance of emerging as the "fixer" who could come up with some solution where all others had failed, thus hoping to restore herself more fully to Senor Sanchez Junco's favour.

36. The Marquesa told each of Ramey and Griffin that Senor Sanchez Junco was keen to get first refusal on any pictures that might be obtained of the Douglas wedding. Each said that he already dealt with Sue Neal and that the wedding had already been discussed with her.

The $10,000

37. Mr Ramey asked the Marquesa whether Senor Sanchez Junco would be prepared to pay $10,000 as a sign of goodwill, because expenses would be incurred. In her witness statement the Marquesa says:-

> "I assured Mr Ramey that I did not think this would be a problem but I would ask Eduardo if he was willing to accept Phil Ramey's request."

38. It has since suited Mr Ramey to describe that conversation to Hello!, including to Sue Neal, as a promise of $10,000 in any event and it is likely that the Marquesa did express herself to him with some assurance as to the $10,000 being paid. In an e-mail much later, of the 17th December 2000, she wrote, of the $10,000, "That I could assure him of that". But I accept also that when she spoke to Senor Sanchez Junco on the point he told her it would not be paid and that she passed the message on to Mr Ramey, but coupled with the encouraging addition that Senor Sanchez Junco would pay (meaning pay well) for good pictures. If there had been a clear promise of $10,000 in advance either for pictures or for a right of first refusal it was, I hold, soon supplanted by Mr Ramey being left in no doubt, instead, that Hello! was very keen to acquire pictures, however they might be taken, and, as the Marquesa put it, "there's nobody who has paid like Mr Sanchez".

39. On the 16th August 2000 the Marquesa sent a draft contract to Mr Burry under which the deal would not be with Hello! but with a company of hers, Marquesa Productions Limited of the British Virgin Islands. She had not appreciated that Mr Burry would not recommend any contract other than directly with a magazine-publisher .

40. Hello! further harmed its cause when it bought paparazzo pictures of the mother, father and baby after the birth of Dylan Douglas to the couple in August 2000. OK! had succeeded in obtaining exclusive picture rights to photographs of the parents with their new baby. The "shoot" went well and the parents developed a trust in Martin Townsend, OK!'s Editor. The money for the photographs was put into a trust for the infant Dylan Douglas.

41. By contrast, as the couple, the three week old baby and their nurse left the hospital, paparazzi managed to take photographs without the parents' consent nor, so far as one can tell, with their even being aware that they were being photographed. Similar photographs were taken of the mother, father and baby without the nurse. Hello! bought those pictures and published them. When the Marquesa pressed Hello!'s case by referring to how vulgar, she said, had been OK!'s coverage of another celebrity wedding, Mr Burry's response was:-

> "At least OK! was smart enough to turn down the hospital departure pictures when they were offered to them."

42. Hello! was not prepared to give up. It attempted to make fresh contact by other intermediaries; desperation was setting in, with Senor Sanchez Junco not only having in mind, of course, payment to the bride and groom but even payment of substantial sums to an intermediary who might restore contact with them. It was to no avail; on the 6th November Mr Burry indicated that the couple had decided that they would offer the wedding for publication, but to OK!. Mr Burry turned to giving Mr Townsend details of the event.

Autumn 2000

43. The plan, in outline, was for a wedding in New York at the Plaza Hotel with a dinner the night before at the Russian Tea Room for the guests from out of town. The ceremony itself was to be conducted by a judge and was to be non-denominational. There were to be some 360 or so guests, of whom 84 were to be the bride's relatives and friends flying in from the UK and the rest were the groom's family and mutual friends of bride and groom.

44. That was the plan but, for the moment, it lay in the future. In the meantime, Sue Neal, in London had almost daily contact with Phil Ramey and Frank Griffin, part of a clique which included Rupert Thorpe and Randy Bauer. Sometime around August 2000 Mr Ramey told Miss Neal that "Your Marquesa" had told him that Senor Sanchez Junco had asked her to see if it was possible to get photographs of the Douglas wedding. Mr Ramey told Miss Neal that he preferred to deal with someone he knew. By that he meant Miss Neal. Miss Neal got the impression that the Marquesa had had only one or two conversations with Mr Ramey.

Mr Luke told Miss Neal that Senor Sanchez Junco was seeking to obtain pictures of the wedding from *any* source. Miss Neal told Mr Ramey that if he wanted to send pictures of the wedding to Hello! that that was up to him but she did tell him that Senor Sanchez Junco was extremely interested in obtaining them. She left it on the basis that Mr Ramey was not obliged to supply any, nor was Hello! to accept any. Her understanding was that Senor Sanchez Junco was dealing with the Douglas wedding himself instead of the Marquesa.

45. In his frequent calls to Miss Neal on other subjects Mr Ramey would try to find out whether Hello! had managed to get exclusive rights to the wedding. He wanted to know so as to target whichever magazine had not got the exclusive. Sue Neal at that stage knew nothing and told him nothing; it was left as a subject to be reverted to nearer the time of the wedding.

46. Miss Martel Levinson did her best in the course of her arrangements for the wedding, to ensure that the venue of the wedding was kept secret. Suppliers or prospective suppliers of goods and services were asked to sign confidentiality agreements. Many are in the evidence. After the wedding it was found that a few people had not signed such agreements but her evidence, which I accept, was that:-

> "… Everyone whom I hired to deal with some aspects of the wedding knew from my discussions with them that the plans for the wedding were confidential and were not to reach the public arena."

47. Unfortunately one of the florists who had tendered for the work, albeit unsuccessfully, told the New York Post, who then published, that the wedding was going to be held at the Plaza Hotel. The original plan had been to tell invitees only that the wedding was to be in New York City on November the 18th 2000, the precise venue and time then to be given only at the last minute. The florist's breach required a change of plan. The invitations went out in their original form but on acceptance a second notice was sent indicating that the wedding was to be at the Plaza at 7.0 p.m., coupled with a request from the bride and groom that no photographic equipment should be brought. The message – "We would appreciate no photography or video devices at the ceremony or reception" – whilst not an outright prohibition, was as nearly so as one might reasonably address to family and friends. An entry card was required to be produced at the entrance to the Rose Room on the evening of the wedding. Entrance to the Hotel was to be by way of the Rose Room.

A strategy for the wedding

48. Whilst reflecting on their possible arrangements for the wedding, Miss Zeta-Jones and Mr Douglas looked back on the successful event that had been the presentation to the public of their baby, Dylan. The exclusive rights sold to OK! had led to excellent photographs being published without any real media intrusion. Miss Zeta-Jones' witness statement says, and I accept, as follows:-

> "When considering how to deal with the inevitable media interest in our wedding we ultimately decided to go down the same route that we had chosen in respect of Dylan's birth. We decided that, with a view to reducing the media frenzy for photographs of the wedding and protecting our wedding day from the inevitable media intrusion, we would reach an agreement with a magazine which we would allow to publish a limited number of our wedding photographs. We hoped that once the rest of the media found out that we had entered into such an arrangement they would be less interested in trying to infiltrate our wedding. This would leave us and our guests free to enjoy the day without worrying about the media. Both Michael and I also accept that as celebrities we have an obligation not to ignore those people who make us celebrities, the people who pay money to watch our movies. One of the reasons that we decided to reach a deal with a magazine was to make contact with our fans and to avoid the accusation that we had shunned them or were too aloof. We wanted to do

> so in a context where the choice was ours as to what was and was not published about our wedding, not left to a media free-for-all."

49. Mr Douglas' evidence in the same area was to similar effect though more emphasising control. He said:-

> "Eventually, we decided that the best way to control the media and to protect our privacy would be to reach an agreement with a single magazine or newspaper who would have the rights to publish photographs of, and text about, our child and our wedding, and to syndicate the photographs and text to specified and pre-agreed publications around the world."

50. Miss Cece Yorke, Miss Zeta-Jones's Publicist, thought the strategy a good one. She said:-

> "I really felt that if other publications knew that one magazine was going to have an exclusive story with beautiful photographs and access to Michael and Catherine they would think there was no point in publishing poor quality photographs with no quotes from the bride and groom or the family. It seemed to me that the public would want to see the beautiful photos and to hear the real story and that would be the calculation that the media would also make. I believed that the exclusive arrangement with OK! was the best option in the circumstances. We decided that we would also release one official photograph to everyone else on the actual day of the wedding (since the official photographs would not be published in OK! for a little while)."

51. An initial view, that there should be no press involvement at all and that the media would have to be satisfied with one released authorised photograph, was thought to be unrealistic. The media would try to get their own photographs. Other celebrity weddings had been spoilt by intrusions. Having the wedding at the Plaza eliminated the risk of helicopters that had intruded in other cases but Mr Burry said:-

> "….. Having seen the determination and lack of scruples of the media at earlier celebrity weddings, we became more and more convinced that we should provide, on an exclusive basis, official photographs of the wedding personally selected by the bride and groom to a single media organisation who would then syndicate those photographs to other publications of our choice. It was our hope that the rest of the world's media would be discouraged from trying to infiltrate the wedding as they would know that the official photographs would be published and syndicated exclusively elsewhere. We thought that by providing a limited number of "authorised" pictures of the wedding we would reduce the price that illicitly-obtained photographs of the wedding could command and therefore reduce the incentive of any photographer to take such photographs. In the past I have found that if you give an exclusive to one magazine its rivals tend to be philosophical, hoping that they will get the next exclusive. They will act accordingly, not wanting to damage their chances of an exclusive in the future. We all thought that this would be the best way for Catherine and Michael to retain their privacy and the intimate and private nature of the wedding."

52. Mr Price cross-examined as to this strategy, broadly suggesting that it was more for money than for privacy, could not be expected or be believed to work and was aimed at control of the media. That it involved control was plain. But, as to money, Mr Douglas pointed out that neither bride nor groom nor publicist approached the magazines but the magazines had approached them. Nor had the bride and groom or their agents negotiated about price. Indeed, they could very readily have organised

transactions so as to have received more than they did. As for the strategy, it worked (as will transpire) for all but one paparazzo and, as Mr Douglas said:-

> " …… it was not that we did not think that the public would not be interested, we thought that the paparazzi's desire would be lowered because they would not have very many outlets, and therefore they personally would not be able to make as much money selling them individually, so that they said, "Oh well, I don't think its worth it."

On the evidence I hold that the notion of an exclusive contract as a means of reducing the risk of intrusion by unauthorised members of the media and hence of preserving the privacy of a celebrity occasion is a notion that can reasonably be believed in as a potentially workable strategy to achieve such ends and was honestly believed in by Miss Zeta-Jones, Mr Douglas and their advisers. The fact that, because of one lapse, the strategy failed does not disprove its reasonableness, still less that it was believed in. Whilst I would not hold the £1m on offer to be other than a real blandishment even to a couple as rich as Mr Douglas and Miss Zeta-Jones, I see their expectation that an exclusive contract to one selected publisher offered the best strategy for obtaining a wedding of the kind they both wanted and offered also the certainty of fair coverage of it as their chief reasons for making such a contract.

The Contract with OK!; 10th November 2000

53. On the 10th November 2000 basic terms of a contract under Californian law between OK! and Mr Burry on behalf of the bride and groom were agreed in writing. £500,000 was to be paid to each of "MKD" and "CZJ" not later than a week before the wedding. OK! was given exclusive rights to publish photographs selected for the purpose by "MKD" and "CZJ".. Each of "MKD" and "CZJ" was given "copy caption and headline approval over any syndication of the photographs", such approval not to be unreasonably withheld. The photographs were to be in colour and were to be taken by photographers chosen and paid for by "MKD" and "CZJ", who were required (clause 6) to:-

> "… Use their best efforts to ensure that no other media … shall be permitted access to the wedding and that no guests or anyone else present at the wedding (including staff at the venues) shall be allowed to take photographs."

54. Copyright in the photographs was to be in "MKD" and "CZJ", who were to approve such photographs as they chose to release not later than 22nd November 2000. Text approval was also given to "MKD" and "CZJ". The Douglases could, had they wished, have chosen to release no photographs or too few to make a feature, but on pain of repayment to OK! (clause 9). If syndication brought in more than £1m the excess was to be split 50% to OK! and 25% each to "MKD" and "CZJ", but OK! was to have the first £1m. Clause 16 provided:-

> "MKD and CZJ will take all reasonable means to provide such security (approved by OK magazine) during the entirety of the wedding proceedings at the wedding venues as is necessary to ensure that third party media …. and/or members of the public and/or staff hired or employed for the wedding are unable to gain access to the relevant wedding grounds and the venues in order to minimise the risk of photographs and/or footage of the wedding (including but not limited to photographs/footage of the wedding dress, the ceremony and the party) may be made available to third party media. "

55. In the week beginning the 13th November, the week before the wedding, Hello! was alive to a prospect of getting photographs from inside the wedding. Mr Luke told Sue Neal that "We might be getting something". Senor Sanchez Junco said so to Mr Luke, as did Maggie Koumi, the London Editor. Both Phil Ramey and Frank Griffin told Sue Neal "Don't forget the weekend". On Thursday the 16th or Friday the 17th Mr Ramey told Miss Neal that he was trying to get someone into the wedding to take

pictures. She told that to Mr Luke, who asked her to go into work over the weekend. That was so that technical incompatibility problems could be overcome by pictures from the USA going to Madrid via London. There was confidence that at the very least there would be pictures from *outside* the wedding, of the guests arriving.

The Russian Tea Room; 17th November 2000

56. As planned, a dinner was held the night before the wedding at the Russian Tea Room. The photographs of this event, later spread over some 8 or 9 pages in Hello!'s Issue 639, show the Press to have been there in massive strength. Mr Douglas and Miss Zeta-Jones paused to pose frequently for photographs, as did members of the respective families and their friends.

Hello! makes arrangements

57. In the meantime, Hello! was planning the Issue (No. 639) of Hello! due to appear next after the wedding, on Saturday the 18th November 2000. It was scheduled to be distributed in London on Tuesday the 21st November and in the rest of the UK on Wednesday the 22nd. It was not unknown in 2000 and earlier for the greater part of the magazine to be printed (in Spain, as then was the case), section by section, over the Thursday and Friday of a given week but with the final centre pages and, if appropriate, the cover and back page to be either re-cast or left to the last convenient time, either so as to cover an unexpected event or some event likely to happen at the weekend concerned. Late changes to the magazine shortly before or even after first going to print had been made on occasions such as the deaths of Jackie Kennedy Onassis and Princess Diana and upon John Kennedy Jr. and his wife going missing. A late special edition added photographs of Madonna's wedding and her baby's christening.

The Tuesday distribution date could not be postponed. Hello! had begun to plan for an Issue 639 which would have on its cover Mr Douglas and Miss Zeta-Jones outside the Russian Tea Room in New York on the Friday evening of the 17th November. Neither OK! nor anyone else had exclusive rights as to that and it could be expected that there would be ample opportunity for photographs of the couple, their family and friends, as they arrived and left. At least photographs for the cover showing the couple could be expected to be obtained (leaving the centre to be filled with a different feature) but even that would leave a tight timetable because of the time difference between Madrid and New York and the time necessarily taken up with processing, selection, printing and movement to London for distribution by the Tuesday. Such movement was, in ordinary course, by lorry.

58. The photographs of the Russian Tea Room event arrived in Spain on Saturday the 18th November. Mr Luke said at first that they arrived on Saturday morning but he settled into saying that they arrived late on Saturday. On that basis, printing of the cover and final section (leaving aside any prospect of later paparazzo photographs taken at the wedding itself) would probably not have started until Sunday the 19th. On the question of whether, on that basis, lorries could not be used but recourse would have had to have been made to aircraft, Mr Luke said:-

> "Yes it would have to have flown I think at that stage, because we were getting really late, and being in direct competition with OK! we could not lose any days on the [news] stand."

On that basis (which I accept) special arrangements would have needed to be made for airfreight even if only the Russian Tearooms photographs had been awaited.

59. Airfreight was arranged, additional copies of Hello! were ordered to be printed and staff were called-in, both in London and Madrid, to deal with the preparation of the magazine over the weekend. Mr Tugendhat argues that all this shows that Hello! was anticipating a high-selling issue and that it points to Hello!'s having commissioned in advance a breach of OK!'s exclusivity and an intrusion upon the

Douglases' privacy. He argued that Hello! had been assured of obtaining unauthorised photographs of the wedding.

There is, I would accept, some documentary support for such a view. The Hello! print records show that the print order was greatly increased; an invoice shows that a freight aircraft was chartered on the 17th November for 173,950 Euros (part of which sum had to be paid whether the plane transpired to be used or not) and there is no doubt but that staff had been called in or retained to work at the weekend. There is, though, a good deal of contrary evidence indicating that there had been no assurance that paparazzo photographs would be available from inside the wedding or even that a right of first refusal had been given to Hello!. Senor Sanchez Junco in cross-examination was emphatic that there had been no prior commitment to any paparazzi to buy any photographs. I have already indicated that there was no unsupplanted agreement even that Hello! should have a right of first refusal (though it would be an obvious course for a paparazzo to approach Hello! first). Mr Luke's evidence was that Senor Sanchez Junco was "a very visual man"; he would not pay anything, he said, for a picture before he had seen it and never paid paparazzi advance fees. Mr Luke also described the Douglas wedding as "an amazing event" for people who read magazines such as Hello! and OK!. It was, he said, the event of the year. Even if no photographs had been obtained from inside the wedding itself and Hello! had had to rely on the Russian Tea Room pictures or ones of guests arriving at the wedding, the publishers could thus be expected to arrange for greater sales than usual.

Moreover, as I have indicated, an aircraft and weekend working would have been necessary even if only the Russian Tearoom photographs had been used. Nor have I any evidence that even an aggressive paparazzo such as Mr Ramey could be *sure* that the elaborate security surrounding the wedding could be overridden and that photographs within the wedding would assuredly become available. These events do not, in my judgment, indicate that Hello! had commissioned the breach and intrusion which I shall come on to describe. The fact that a second freight aircraft was chartered on the Monday the 20th November, only after the unauthorised pictures had arrived, does nothing to support a view that even before they arrived it was known that they would.

60. To the same end a comparison was made with the material relating to the McCarthy wedding. That material, not put to the Marquesa for an explanation, seems to show the Marquesa in a closer relationship with the very same paparazzi as were used in the Douglas case than her own evidence suggested. It also shows creditors' descriptions and the debtor's written additions on the McCarthy invoices to be in some respects like those found on one invoice in the Douglas case. But there are differences; the McCarthy invoices include daily rates payable to the photographers, a system more likely to be indicative of a true pre-commissioning of the paparazzi than is shown on the invoices as to the Douglas wedding, which have no daily rates. Indeed, so little was said in evidence about the rôle of the paparazzi or of the Marquesa in the McCarthy case that I cannot hold that in that case the paparazzi were commissioned in advance and, in turn, cannot hold that, because of the similarities in the two cases, the paparazzi were therefore also so commissioned in the Douglas case.

Arrangements for security at the Plaza Hotel

61. On the 17th November 2000, the day before the wedding, entry cards were hand-delivered to all guests staying in New York and were sent by courier to guests out of town, to arrive on the 17th. This late delivery was to reduce the risk of their being copied. Miss Martel Levinson had marked each card with a code that indicated to her (but only to her) the identity of the guest related to that card and with an invisible ink design on the back which only she knew. The entry cards indicated whether they were for one or two guests.

62. There was a fear that the Plaza's fire alarm system might be tampered with (driving everyone into the street, where they then could be photographed at will) so a specialist fire firm that worked in conjunction with the New York Fire Department was brought in and a technician monitored the fire alarm system of the Hotel throughout the wedding.

63. Three private security companies were employed and there was consultation with the New York Police Department and the Fire Department. The Plaza's own security staff had the task of ensuring that other guests staying at the hotel did not stray from the public areas of the Hotel into those reserved for the wedding. The rooms used for the wedding were regularly "swept" until an hour before the ceremony to ensure there were no hidden sound or video devices. Special arrangements were made for exclusive use of the lifts in the hotel. Guests arriving by car were required to enter a special car tent where the invisible ink on the entry card could be inspected. The car tent was secured at all access points by police. Barriers were erected so that the Press could take photographs of guests entering the hotel but could not get too near the entrance.

64. Guests had to enter the Rose Room of the hotel. There was a sign there reminding them that photography was not permitted. Entry cards were then checked against the code to ensure that appearances corresponded with the invitation. If all was well, on the entry card being handed in a gold wedding pin was given to the guests, the design of which had been commissioned by the bride and groom and had, so far as practical, been kept secret.

65. Arrangements were made so that if it was found at entry that any guest had brought a camera, it would be required to be checked-in at the cloakroom and the guest would be reminded that there was to be no photography. If the camera was discovered inside the wedding, security staff were to remove the film, develop it at the Douglases' expense and return all photographs save for any of the wedding. A computer was on hand so that digital films could be processed so as to obliterate any shots of the wedding but not any other pictures on the film. In some 6 or 8 cases a guest or other person present, without having tried to conceal it, had been found to have a camera or video with him or her and the arrangements I have described were then implemented. In one of the cases the camera had been held quite openly by a member of the Welsh Choir which was to entertain the guests and that led to the whole Choir being "frisked". No other camera was found on them. Comprehensive arrangements were also made to ensure that the copyright in the photographs taken by the official photographers (selected and paid for by the Douglases) belonged to the bride and groom and that no unauthorised copies could be made from their films, which were taken off for processing and processed under the eyes of security staff.

66. Miss Martel Levinson gave oral evidence of how every corridor on the relevant floor in the hotel was, as she put it, "locked down"; to ensure that other hotel guests could not stray into the wedding she blocked off some 30 to 40 rooms and put security staff in for the entire weekend beginning on the Friday night, even in stairwells. It was arranged that only one bank of elevators would serve the floor in question and that was reserved for the bride and groom to move from the suite which they were occupying to the ceremony and, after it, to the reception in the ballroom immediately above. Her evidence in her cross-examination by Mr Price included:-

> "… Everyone felt confident that it would be as locked down as we could and that with the presence of security people at all of these posts, it was very clear that this was a private function."

To which Mr Price replied:-

> "Oh, I am sure it was."

She had been careful to look at all possible situations, she said, having had security teams and meetings looking at every possible situation and scenario. To Mr Tugendhat's question as to whether Mr Thorpe (the one paparazzo who got in and took photographs, as I shall come on to describe) could have got in to any of the rooms where the wedding or reception was taking place without his realising that he was forbidden to be there, she replied "Absolutely not". I accept her evidence. To the extent that privacy consists of the inclusion only of the invited and the exclusion of all others, the wedding was as private as was possible consistent with its being a socially pleasant event. Equally, the arrangements made to ensure that only authorised photographs could emerge, after their approval by

the bride and groom, of the ceremony and reception, were as comprehensive in design and execution as could be made in relation to such an event. The security bill alone was for $66,006.

Mr Thorpe, it transpires, was not the only person to have succeeded in making some unauthorised visual or sound recording of the events on the day but no one else's record has led, as it would seem, to any form of publication and, perhaps for that reason, little was said about these other forms of record and I do not hold their existence to be indicative of the security arrangements not having been reasonable.

The Wedding; the evening of the 18th November 2000

67. There are undoubtedly some events not otherwise of interest to the public that become of such interest by reason of the celebrities who attend. Minor celebrities may thus aggrandise their events by inviting major ones. When that is done an intrinsically private event might come to be regarded and be intended to be regarded as a public one. But the Douglas wedding was not such an event. The guest list, which was not publicised at the time, has been made available and there, amongst or alongside the 120 or so members of either the bride's or groom's family, are many names that anyone would recognise as famous or celebrated. However, it was not successfully shown to me that anyone who was not truly family or friend was invited (although, inevitably, there were some cases, where a guest and his or her partner were invited, in which only the guest could be truly described as a direct friend). In that sense the wedding was not a celebrity event and I accept Miss Zeta-Jones' evidence that it was not intended to be one.

68. Further, the Douglases had no need to and did not themselves take any steps to stir up publicity for the event. Even without any "hype" it was going to be, as Hello! later described it, "the showbiz wedding of the year". I accept Mr Douglas' evidence that:-

> "We issued absolutely no press releases at all concerning the wedding and none of the pre-wedding press coverage was initiated by us."

69. In the Court of Appeal, Brooke L.J., after referring – page 984 c-d – to the wedding as a private occasion, later said – page 995 a-b – of the bride and groom that:-

> "They did not choose to have a private wedding attended by a few members of their family and a few friends in the normal sense of the words "private wedding"."

I would be uneasy at characterising a wedding as not private simply on the basis of numbers, especially where the means of the parties were so ample that even a lavish wedding for 350-360 would not make real inroads, where the couple was popular enough to have many friends and where elaborate security arrangements were in place. But, amongst the evidence which I have had but which was not available before the Court of Appeal, is not only Miss Martel Levinson's as to security arrangements and the guest list itself but also Mr Douglas' which includes:-

> "Out of our guest list, approximately 125 of our guests were family members. Both Catherine and I have very extensive families. My mother, for instance, has six brothers and sisters. My father has six sisters. It was therefore impossible for us to invite all the members of my family that I would have liked to have invited. If we had invited all the members of our families that we had wanted to then we would have needed a considerably larger venue or would not have been able to invite any of our friends."

It was, in my judgment, a private wedding.

70. The wedding, a "black tie" event, began on the 18th at around 7.30-8.0 p.m. New York time. It was a great success. It went off, as it seemed, without a hitch. The cake was cut at about midnight and the reception ran on until 5.0 or 6.0 a.m. in the morning of Sunday the 19th. Miss Zeta-Jones' evidence is that:-

> "It was exactly the wedding I wanted - a homely wedding not withstanding the fact that it was on a large scale. We had managed to have a private wedding for our family and friends without suffering the intrusion of the media into our special day. We spent the first day of our "honeymoon" reminiscing about what a wonderful time we and our guests had had."

There had been speeches, entertainers, music and dancing. The bride, as one might expect, danced with the groom. Mr Douglas' evidence is that:-

> "The wedding was a great success. I believe that all of our guests had a wonderful time and the atmosphere was tremendously warm and family-oriented. We could not have asked for a more wonderful wedding. "

A paparazzo got in

71. Although this was not known at the time, a paparazzo photographer, Rupert Thorpe, had infiltrated the wedding and, without anyone's consent or knowledge, had surreptitiously taken photographs that included the bride, the groom, the wedding dress and the cake. Whilst, as will appear, it soon became apparent that unauthorised pictures had been taken, Thorpe's identity was not discovered until shortly before trial. When all the *authorised* pictures were duly examined, a man standing in a dinner jacket was seen in one photograph holding a small camera cupped in his hands, below waist level. The camera is tilted, presumably in the hope (as no viewfinder could be used) that it was pointed in the intended direction. The photograph of him does not reliably show whether or not he was wearing one of the small identifying gold pins, if only because the photographs of guests who would undoubtedly have had pins do not invariably show that the pin has caught the light and so had shown up on the photographs. The man in the photograph was later identified as Rupert Thorpe, who is normally based in California. Later still enquiries have suggested that he attended with his then fiancée, Michelle Day, and that both had stayed at the Plaza. How he got into the wedding has not been established. As I shall show, he seems to have been working in some loose association with Phil Ramey and others but whether some others tried to get in but failed or got in but failed to be able to take any photographs is unknown. The trial has proceeded on the tacit assumption that Mr Thorpe was the only paparazzo intruder and that the unauthorised photographs were taken by him.

The unauthorised photographs are purchased

72. At about 11.0 p.m., London time, on the 18th November photographs connected with the Douglas wedding began to arrive by ISDN Line from the USA to Sue Neal in London. Some were from agencies but, later, some were from paparazzi including Frank Griffin, who had received them in Los Angeles in digital form from New York. Sue Neal called them up on her screen in London and then forwarded them by ISDN Line to Mr Luke in Madrid for him to show them to Senor Sanchez Junco. Mr Luke had spoken to Mr Ramey to be sure the latter had the appropriate address for Hello! so that he would be able to send the photographs in electronic form. Some of these photographs were presumably of guests arriving *outside* the wedding, as to which no complaint is made, but these first photographs to arrive could not yet have included the cutting of the cake at midnight New York time.

73. At some stage photographs on the *inside* of the wedding, so to speak, of the bride walking down the aisle to the ceremony and then at the reception must have begun to come through. Sue Neal called them up on her screen in London and Mr Luke printed them out in Spain to show them to Senor Sanchez Junco. Mr Ramey telephoned Sue Neal to ask whether she had received the photographs. Running into the early hours of Sunday the 19th she had as many as some 10 to 15 telephone calls. At

some point, I assume when as many of the "inside" photographs had been passed to Madrid as there were likely to be, the telephone calls turned to how much would be paid for them. Mr Ramey in California was on one line to Sue Neal in London; she was at the same time on another telephone to Mr Luke on his mobile in Madrid and, standing alongside Mr Luke, only a couple of feet or so away, was Senor Sanchez Junco, who could speak and understand little English. Ramey spoke to Neal, Neal spoke to Luke, Luke translated into Spanish for Sanchez Junco. The process was then reversed.

74. Ramey began by demanding £200,000 but after a number of calls Senor Sanchez Junco, by the means I have described, agreed to pay Ramey £125,000, the Dollar equivalent of which was then $188,000. By now it was well into Sunday the 19th. Sue Neal had been able to hear Luke speaking to Sanchez Junco and he speaking to Luke. In the last of the calls Ramey asked Sue Neal to confirm the fee in writing, which she did by fax to Ramey Photograph Agency from "Sue Neal – Picture Editor" on Hello! writing paper. Her fax records agreement at £125,000 for exclusive rights "to the above pictures" (not otherwise identified) "For Hello! UK, Hola Spain and Oh La France; it is agreed that you will invoice in US Dollars for US $188,000". Sue Neal signed the fax. She expected to receive an invoice for $188,000, an expectation which confirms that the invoice was to be directed to Hello! and that Hello! and not the Marquesa was the purchaser.

75. There is no suggestion in the evidence that the Marquesa knew of, took any part in or even had her name mentioned in these dealings with Ramey, nor could anyone party to the dealings have thought that she was any part of them. She was asleep in Sotogrande.

76. The photographs received, of the order of some fifteen in all, included the 6 whose publication is complained of. The composition is generally poor and two are well out of focus. None shows any awareness on the part of the subject that a photograph was being taken and it can be assumed none used flash. The photograph of the bride going down the aisle towards the wedding ceremony on the arm of her father cuts off all of him but his arm. Two show the bride eating, one of which has the groom holding a fork down into her mouth. In one she playfully holds up a cake knife at her husband. In one taken from a very low level she dances, but not with the groom. Another, hopelessly out of focus, shows the bride and groom kissing. The bride's dress is shown to a greater or lesser extent in all six and parts of the very elaborate wedding cake are visible in three. In one the foreground seems to consist of the arm of, and lighting held by, an authorised photographer.

77. Having received the photographs Senor Sanchez Junco set about arranging a layout, his usual task. The ISDN Line at Hello!'s office in Madrid had been installed prior to 1998. In Madrid some thin lines appearing on the unauthorised photographs as they had arrived were processed out by the printers, using a computer program. The photographs had been sent to the printers in Spain from Hello!'s Madrid office in electronic form. Senor Sanchez Junco telephoned the Marquesa at about 4.0 a.m. Spanish time on the Sunday morning to tell her that he had got some wedding pictures after all. He was very pleased. He mentioned that Mr Ramey had taken them. She had incurred telephone call charges in connection with her earlier unsuccessful efforts on Hello!'s behalf and she took the opportunity to raise with him whether she could raise an invoice for them. He said she could.

78. Senor Sanchez Junco completed the layout; the front cover was changed to include an amalgam of one of the unauthorised pictures and an insert of a Russian Tea Room picture; parts of an earlier layout were discarded and the revised format was sent to the printers some time on Sunday morning.

79. As he set about arranging the unauthorised photographs into a lay-out for an issue of Hello!, Senor Sanchez Junco well knew that OK! had obtained an exclusive contract for coverage of the Douglas wedding. He knew of Ramey's reputation and the kind of work that Ramey handled and the intrusive systems which paparazzi such as Ramey employed. It was a kind of journalism he and Hello! did not like, he said, and usually tried to avoid. At least a part of the reasons for Senor Sanchez Junco's insistence that Ramey should not be commissioned in advance, was in my judgment, that he, as a cautious man, was uncomfortable in being seen, as a commission would involve, to be procuring the sort of unpredictable and possibly unlawful activity that a paparazzo of Ramey's reputation might get

up to. Whilst he would not have known of the specific language used, Sr Sanchez Junco knew that a feature of OK!'s "exclusive" would have been that security arrangements were required by contract so far as was reasonable to ensure that only those invited or duly employed would be present at the wedding and that no photographs were to be taken other than the authorised ones. For example, Hello!'s own pleaded exclusive contract for coverage of the wedding of Gloria Hunniford required reasonable security to be enforced. Such arrangements had to be contemplated by those in the trade as an inevitable concomitant of an "exclusive", certainly where as much as £1m was at stake.

80. It was obvious to him that the photographs were unauthorised. He said in cross-examination that he had no doubt but that the person who did the photographs was trying to hide himself. He was then asked:-

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

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

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

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

The Claimants learn of the unauthorised phtotographs

82. At some time on Monday morning (London time), 20th November, OK!'s editor, Mr Martin Townsend, and picture editor, Mr Paul Anderson, learned, in London, that unauthorised photographs of the wedding were on the market. Nine low resolution photographs, understood at that time to have been taken by Mr Ramey, were faxed to OK! by an agency in Holland. Mr Anderson telephoned Mr Ramey who called back in the afternoon. Mr Ramey said that he was merely Eduardo Sanchez's agent for selling the photographs in the United States. Mr Anderson had been told to buy the photographs if he could so as to take them off the market. Later still – evening, London time – Mr Ramey telephoned Mr Anderson to say that he was withdrawing the photographs from all the United States magazines to which he had distributed them. He said it was not worth his sticking his neck out for Eduardo Sanchez. Mr Anderson was left with a clear impression that Senor Sanchez Junco owned the unauthorised pictures taken inside the Douglas wedding. Mr Townsend telephoned Mr Allen Burry to tell him all this, only to find that he was with Michael Douglas and Catherine Zeta-Jones and all four then had a conversation on a speaker telephone. Michael Douglas and Catherine Zeta-Jones were, said Mr Townsend, devastated by the news. Miss Zeta-Jones uses the same word; she says:-

> "It was an appalling and very upsetting shock to discover that our wedding had been invaded in that way. Our peace and happiness evaporated. I felt violated and that something precious had been stolen from me. Our distress and anger at what Hello! did to us continues to this day."

83. Mr Douglas says:-

> "We were devastated and shocked by the news. We felt as if our home had been ransacked and everything taken out of it and spread in the street. It was a truly gut-wrenching and very disturbing experience which left both of us deeply upset."

84. It is easy to regard such language as exaggerated but it has to be remembered that the Douglases were speaking of a time when their joy at how successful their wedding plans had proved to be was at its height. They crashed down from a relatively euphoric height. Mr Price cross-examined Mr Douglas to the effect that, in comparison with, say, the loss of a limb, their distress was minor and Mr Douglas accepted, against such a comparison, that that was so but he also said:-

> "When we spent as much time as we had preparing this wedding, and making all the efforts that we had, one of which was deciding between the two publications that are here today, and when that wedding turned out as wonderful as we ever could have anticipated, it was a magical, magical night, and it was great, so when you go from that euphoric high of having such a special, special event turn out as well as it did for all of our family and friends, and then to find that somehow somebody, either one of the members of our wedding party or, as it turned out, a spy, a paparazzi person snuck into to take pictures which were going to be released, we thought it was one of the most vindictive and mean-spirited acts we could have imagined and were deeply deeply offended. Again I think it has to do with the diametrics of coming so soon after our wedding."

I have no doubt but that Mr Douglas and Miss Zeta-Jones both suffered real distress, though it is no present task of mine to attempt to put some compensatory cash value upon it. An aspect of their distress, which led Miss Zeta-Jones to tears, was their wondering, if it was a guest, which of their guests it was that had betrayed them.

85. On the same day, the 20th November, the Marquesa's assistant at the Marquesa's request sent an invoice to Hello! in London for £1,000 plus VAT described as "invoice for telephone expenses for arranging photographs of Douglas/Zeta-Jones wedding". This was the claim which the Marquesa had cleared with Senor Sanchez Junco in their 4 a.m. telephone call. At that stage, before any problems had arisen, the Marquesa was only too happy to enlarge her rôle in the apparently successful use of paparazzi which she had suggested back in August but it is not possible to infer from this invoice, modest in amount relative to the Marquesa's usual operations, that she had played any greater rôle so far than as already described. It is, though, possible that the invoice, addressed to Mrs Doughty, did later conduce to acceptance in London that the unauthorised photographs (and, perhaps, the accompanying text) represented a Marquesa feature, perhaps with the main invoices being intended to follow this opening one.

86. The printing of the centre section of Hello!'s Issue 639, now featuring the unauthorised photographs, as did the cover, was completed and the magazines, in greater numbers than usual to cope with the expected unusually heavy demand, were bundled, loaded into the specially chartered aircraft and flown on Monday the 20th to England for distribution in the usual way on the Tuesday and the Wednesday.

87. Until the news arrived of Hello!'s acquisition of unauthorised pictures OK! had planned not to put wedding pictures in Issue 241, due to go on general sale on Friday the 24th November, but to spread

Douglas wedding items over to later issues, number 242 for publication on the 30th November (London) and 1st December (the rest of the United Kingdom) and number 243 a week later. Now, simultaneously, two decisions were made; one was to bring forward *some* wedding coverage into Issue 241. That meant that the Douglases would have to select which photographs they approved for publication very quickly.

88. The Douglases set about that task. It had been thought that it would be a leisurely unhurried and pleasant process; now it had to take place in priority to everything else and in some haste. They spent hours and hours sitting on the floor going through photographs in a mad rush, said Miss Zeta-Jones. Eventually the agreed photographs were taken by Mr Burry to London. Expenses were incurred by reason of the need for expedition, expenses that would not have been incurred otherwise.

An injunction is granted; 20th November 2000

89. The other decision was to move the Court in England for an injunction. On the evening of Monday the 20th November Mr Justice Buckley, the Queen's Bench Duty Judge, was moved ex parte and (despite attempts to tell Hello!) without notice, by telephone. At that stage there were already all three claimants but only Hello! Ltd was a defendant. The relief sought was an injunction to restrain publication by Hello! of any photographs of the wedding and reception. Buckley J. granted relief over the following day with a view to there then being an inter partes hearing on short notice on the 21st November.

20th-21st November 2000

90. It was about midnight on the night of the 20th-21st November that Mrs Cartwright, Hello!'s Publishing Director in London, learned of the injunction. She rang Mrs Doughty, Administration and Financial Controller of Hello! in London, to get the number of Mr Christopher Hutchings, solicitor, of Charles Russell, and then told him what she knew. She speaks Spanish and hence was able to speak to Senor Sanchez Junco after getting his number from Javier Riera. It was agreed that an attempt should be made to get the injunction lifted. The following day, Tuesday the 21st November, she made a written note which read:-

> "I rang our owner, Eduardo Sanchez in Spain and alerted him to what had happened. He told me we had bought 10 or 11 photos of ceremony and reception through normal channels in which the Press work, and photographer who took them did not wish his name revealed. Hola SA who bought the pix, bought them for three countries, UK, Spain and France. It is our understanding that they will be sold throughout the world ….. I rang Phil Ramey in LA. Sue Neal involved. Ramey very cagey, said dealt with Marquesa. Did not want to be involved."

91. Although the note speaks of acquisition of the photos "through normal channels in which the Press work" and although Senor Sanchez Junco may at first have used some such expression, the note only makes sense if he had gone on to mention Mr Ramey by name and to ask her to phone Mr Ramey as otherwise Mrs Cartwright would have had no reason to telephone him, as she did. Indeed, in her oral evidence Mrs Cartwright said that Senor Sanchez Junco had told her to ring Ramey "as the supplier of the pictures" as opposed to his being the photographer. When she spoke to Ramey he was guarded; he did not know Mrs Cartwright and wanted to be sure to whom he was speaking. He suggested that Sue Neal, whom he well knew, should identify Mrs Cartwright to him. Sue Neal was awakened in the middle of the night. A three-way telephone conference call ensued during which Sue Neal could hear what was being said and in which she first identified Mrs Cartwright to Mr Ramey. Mrs Cartwright's evidence was that Ramey said "I dealt with the Marquesa", as her note recorded. Quite why Ramey was to be telephoned and what he was to be told is unclear. Miss Neal, who heard the conversation, was able to give no reason why Ramey, who was agitated, should have been phoned. She did not think there had been any speaking about the Marquesa during the conversation. However, in her

supplementary evidence in chief Mrs Cartwright said that Ramey had said "I dealt with the Marquesa" and, continuing the quotation from her evidence, she went on to say:-

> "And I just assumed, which if one had been in the company for some time, was a very reasonable assumption, that it was a Marquesa feature, which she had done the fixing."

It is possible that Sue Neal was not on the line or within earshot for the whole of the conversation and may have been drowsy as she was broken from her sleep. I accept Mrs Cartwright's evidence that Ramey had said that he had dealt with the Marquesa. I accept also that she "just assumed" that the Douglas wedding photographs amounted to "a Marquesa feature".

92. By that time it would already have become apparent that it might not be inconvenient to put some distance between Hello! and Ramey, who was himself exhibiting signs that some distance between himself and the photographs would not be unwelcome. If Mrs Cartwright had thought about what "a Marquesa feature" usually consisted of and if she had raised direct questions with either Senor Sanchez Junco, Mr Ramey or the Marquesa she would soon have had to accept that the wedding had not been "a Marquesa feature". However, Ramey's description that he had dealt with the Marquesa gave her a peg just sufficient to support the assumption she then made and upon which she thereafter acted.

93. On Tuesday the 21st November Mr Tugendhat and Mr Sherborne (as they had on the 20th November) represented the Claimants as they sought an extension of the injunction from Hunt J.. The single defendant was represented by Mr Silverleaf Q.C. and Mr Fernando. Hunt J., after a short hearing, extended the injunction over trial or earlier further order.

94. Hello! immediately appealed and the hearing of the appeal began on the afternoon of the 21st November before Ward and Walker L.J.J.. Mr Silverleaf and Mr Fernando again represented the (then) sole defendant, Hello! Ltd... At the close of argument the Court indicated that its members could not agree and arrangements were made for a hearing before a three man Court the very next day, Wednesday the 22nd November.

95. Hello!, having learned of the injunction of the 20th November, took immediate and largely successful steps to ensure that the injunction was not breached. Only a relatively few copies – some 15,750 out of a total print run of 755,900 – were put on sale. How many were sold to members of the public is not known. The rest were embargoed to await the outcome of the litigation.

The 3-man Court of Appeal; Mrs Cartwright's 2nd Witness Statement

96. Mr Silverleaf had been unable to represent the defendant at the hearing on 22nd November and its representation was by Mr Henry Carr Q.C. and Mr Fernando. On the Hello! side evidence was collected for the appeal hearing. That included a draft second witness statement of Mrs Cartwright. After dealing with evidence as to attempts by OK! earlier to spoil Hello!'s "exclusives" (a subject referred to during the trial as for tit-for-tat evidence) Mrs Cartwright continued, in the unsigned draft faxed to the claimants' Solicitors at 13.57 on 22nd November during the short adjournment on the first day of the three-man appeal hearing as follows:-

> "10. On a separate matter it has been alleged that Hello! knew well in advance that the pictures complained of would be available for publication in the issue of the magazine subject to this injunction. In fact they were offered on the open market around the world on Sunday the 19th November and that is when Hello! purchased them and we were able to fit them in the magazine which was by then substantially ready.

> 11. Hello! had no previous knowledge whatsoever that these pictures were going to be taken or offered. I believe that the facts stated in this witness statement are true."

97. A signed but undated version of this witness statement exists, still containing the paragraphs 10 and 11, but the last page of it, which bears Mrs Cartwright's signature, says nothing save that she believed the facts in the statement to be true. Mrs Cartwright was unable to shed any light on how, in the circumstances I next describe, the page had come to be signed.

98. An unsigned version of that witness statement containing those paragraphs 10 and 11 was handed in to the three-man Court of Appeal. When that version of her draft second witness statement had been put to Mrs Cartwright for her signature she says that she had indicated that she could not sign as it was not true. Whilst it was literally true that it was not known in advance that the very pictures complained of would become available and that those particular pictures ("these pictures") would be taken or offered, Mrs Cartwright had rightly felt that to assert the truth of paragraphs 10 and 11 would mislead. Accordingly the draft was at her request, she said, amended to take out the paragraphs 10 and 11 to which she felt unable to subscribe. She signed but did not date the last page of a version from which the offending paragraphs had been omitted. Unfortunately, as I have mentioned, that did not stop a signed version still containing paragraphs 10 and 11 from being used in Court. Paragraphs 10 and 11 were later referred to in the judgments of the Court of Appeal, which had plainly relied on them.

99. The Hello! Defendants waived privilege in connection with the preparation and service of Mrs Cartwright's second witness statement but despite that and despite intense study by Mr Tugendhat of word-processing and associated costing records and the availability of Mrs Cartwright and Mr Hutchings to give oral evidence, it was, through no fault of the claimants, never established in the evidence who had framed the words that became the paragraphs 10 and 11 of that unsigned second witness statement which I have cited above, Nor, apart from a somewhat desperate plea that all that been done at speed, was it ever explained how it came about that the incorrect version, including paragraphs 10 and 11, had come to be handed to the Court of Appeal rather than the corrected and signed version.

100. A particular difficulty in the way of the credibility of Mrs Cartwright's evidence (that she was not willing to sign the misleading version) is that no version of the corrected version exists which has, as its last page, only a statement as to truth. On the face of things her signature to a sheet merely having a statement of truth on it could therefore only be an acceptance of the misleading version. Unfortunately, though, the collection of evidence was not being carefully or properly handled and it is at least possible that Mrs Cartwright was asked to sign a backsheet whilst understanding that it would come to be affixed to the corrected front sheets and was then asked to sign afresh once it was found that the corrected version had more than a statement of truth on its last page.

101. It is, of course, possible to devise a scenario in which Mrs Cartwright paradoxically affected a strict regard for the truth in order to mask that she had lied, by creating the corrected version of her second witness statement to explain away the presentation to the Court of the uncorrected version. That, though, seems to me to be improbable. Anyone devious enough to do that would surely have ensured that the corrected version was edited so as to have had a last sheet that had nothing but a statement of truth on it and the plan would have depended on the Claimants not promptly spotting that there were two different versions despite their being sent both. Further, as to Mrs Cartwright's state of mind at the time, I have had no evidence that paragraphs 10 or 11 were read aloud to the Court of Appeal either at all or in Mrs Cartwright's hearing or that she had reason during the hearing to know that it was not the corrected version which was in the Court's hands.

102. Whatever else the incident shows it shows that whoever was given the task of collecting the views of the witness was content to *assume* what Mrs Cartwright would say rather than first questioning her to find out to what she could subscribe.

103. Mr Hutchings, speaking of the fact that the Court of Appeal had had before them a version of her evidence which included paragraphs Mrs Cartwright would not have wished to have laid before them, said:-

> "It certainly was very regrettable. I believe it was a terrible clerical error, but I think that obviously the first version should have been torn up, and it did not happen. There were obviously various versions floating around."

He described it as "very much an administrative blunder rather than anything else". On balance I accept that that was the case. Mr Hutchings, although the solicitor having the conduct of the case on behalf of the Hello! defendants, escapes direct personal blame as he was in court whilst the impugned document was being prepared but, whilst I accept, having heard and seen Mrs Cartwright giving her evidence, that there was, lying behind the production of the document, no intent to mislead the Court, the unfortunate incident reflects poorly on the broad class of Hello! Defendants and their advisers without my being able to pin blame more particularly within that broad class.

104. Nor, despite it being quite visible in the three judgments of the Court of Appeal that reliance had been put on the misleading paragraphs 10 and 11 and despite that the judgments were then read, no doubt with some care, by and on behalf of the Hello! Defendants, was it ever volunteered by them that something had gone wrong and that it might, at lowest, be prudent so to inform the claimants or the Court.

105. As to that, I would exculpate the lay individuals such as Mrs Cartwright and Mrs Doughty, who might well have not focused sufficiently on the mistake in evidence and, even if they had, might not have realised that, procedurally, the matter could be corrected. In particular Mrs Cartwright has grounds on which she is to be exonerated as there is evidence both from her and from Mr Hutchings that she raised the question with Mr Hutchings in the New Year. As to others, it was urged upon me that by the time the Hello! Defendants had put in their defence (paragraph 30) in May 2001, it was made plain by then that *some* degree of prior knowledge on the part of the Hello! Defendants had existed and that thereby the defence had undone whatever misrepresentation the witness statement had caused. That, though, fails to explain the inactivity on the issue on the Hello! Defendants' part between the giving of the judgment in the Court of Appeal in late December 2000 and the service of the defence in May 2001. The whole incident was lamentable, as also is the fact that, despite privilege having been waived, material questions remain incapable of answer.

The Marquesa is asked to help; 23rd November 2000

106. Also on the 22nd November 2000 Senor Sanchez Junco telephoned the Marquesa. He told her there was a problem with the magazine. He said something about an injunction. He told her he wanted her to help him but did not say how. She said:-

> "Well, you know, if I can help, I will be of help, and he answered: "Well thank you very much. I will not forget this one."."

I accept that things were left generally in that way; I do not hold that Senor Sanchez Junco indicated that a letter would be required of her or that she would be asked to compromise herself or lie. She held strong views, especially on the subject of how beneficial would be the tit-for-tat evidence which she would be able to give to assist in Hello!'s case for the lifting of the injunction. Nor was she averse to ingratiating herself with Senor Sanchez Junco as Hello!'s editor-in-chief, with whom her relations had been erratic and were not then as good as they had earlier been.

107. In his oral evidence Senor Sanchez Junco at first said that he could not remember asking the Marquesa for help; then he turned to avoiding a direct answer by questioning in what way she could in any event have helped him. Finally he became firmly of the view that he had not asked her to help him. I

prefer the Marquesa's evidence which, from her witness statement on, was constant on the point. "I will help you in any way that you need" said the Marquesa to Senor Sanchez Junco and she added "You can count on me always".

108. On the same day Mr Hutchings telephoned the Marquesa. He explained to her that he was asking for a statement from her which might help clarify what had taken place. He explained that he understood that she had arranged and purchased the Douglas wedding feature. That is a view which was consistent with the loose assumption of the wedding having been "a Marquesa feature" which Mrs Cartwright had made and which it is likely Mr Hutchings formed after speaking either to Mrs Cartwright or to Mrs Doughty, who was of the same view. Mr Hutchings said to the Marquesa that if it was case that she had arranged and purchased the feature it would be helpful to have this explained in a letter. His eleventh witness statement, not made until the 20th February 2003, continues:-

> "The Marquesa confirmed that this was correct and agreed to provide a letter to this effect. Had she said anything at all to cause me to question my understanding or raised any concerns whatsoever, I most certainly would have discussed these with her, until I was satisfied as to the actual position."

109. He was not cross-examined on that lately-given evidence.

110. Because that important evidence arrived so late it was never put to the Marquesa that she had confirmed to Mr Hutchings that she had arranged and purchased the feature but, given the lack of challenge to his evidence on the point, I accept that she did confirm as Mr Hutchings indicates. It was not asked of the Marquesa, either, again because of the lateness of the evidence that Mr Hutchings gave, whether she realised that his request was, unknown to Mr Hutchings and unmentioned by him, the first step in a working-through of her indication to Senor Sanchez Junco that she would give to him such help as she could. However, given her later behaviour, it is hard to see how her failure to deny that she had arranged and purchased the feature can otherwise be explained. Mr Hutchings was, innocently on his part, asking her to provide a letter which she would have known would be untrue. Consistently with her willingness to help, she would have not protested to him that she was being required to lie. She would not, I expect, have felt safe indicating to a solicitor that he was procuring false evidence.

111. The Marquesa then tried to telephone Senor Riera, Managing Director of Hola SA, with whom her relations were poor. Not getting through to him, she sent an e-mail. She described herself, in relation to the Douglas wedding, as "the one person who has been involved in the matter from the beginning". In the sense that she had long before tried to gain an "exclusive" for Hello! and, after Senor Sanchez Junco's intervention and upon that failing, had spoken to Senor Sanchez Junco about paparazzi, that description was true but it ignored the absence of any real active role of hers since August 2000 or thereabouts and that it was Senor Sanchez Junco who had bought the pictures on the 19th November. Her e-mail both criticised the past handling by Hello! of the Douglas wedding opportunity and suggested that she had a rôle to play for the future. She did not mention that Senor Sanchez Junco had asked for her help.

112. Senor Riera did not telephone the Marquesa but his secretary, Senora Elisa, began frequently to telephone the Marquesa or the latter's assistant, Miss Mildh, indicating what it was that was required from the Marquesa. The Marquesa's understanding of that and Miss Mildh's led to Miss Mildh typing out a letter which was never sent but which read:-

> "I confirm that this company [Marquesa's Production Limited] was offered the photographs relating to the wedding of Michael Douglas and Catherine Zeta-Jones. This company accepted the offer and payment was made accordingly for such photographs."

Miss Mildh was an impressive and intelligent witness and I do not doubt but that that draft letter was an accurate reflection of what Madrid, by way of Senora Elisa, had been indicating it required, namely a letter shewing that the Marquesa's company had bought and paid for the unauthorised photographs, a complete fiction. Miss Mildh knew that the function of the letter that was being requested was to help in a lifting of the injunction. As she knew that I do not doubt that the Marquesa knew that too.

113. The Marquesa felt she was in a difficult position. Miss Mildh's witness statement said:-

> "I remember a great deal of telephone traffic that day, back and forth. The Marquesa felt very strongly she could not decline to "help" Senor Sanchez Junco in this way if she wished to retain his good opinion of her and, more importantly, her job! I felt she was being unfairly pressurised. She was very upset."

The Marquesa, hoping that the position might resolve itself without her finally being obliged to lie, left her office early on the 22nd November, despite what were, said Miss Mildh, "frantic phone calls" from Madrid.

The Marquesa's letter

114. In the meantime, in London, Mr Hutchings discussed with Hello!'s Counsel, Mr Carr and Mr Fernando, as to what, in the light of the confirmation which the Marquesa had given to Mr Hutchings, a letter from the Marquesa should state. At one point it had seemed that Mr Fernando had been thought to have proposed a form of words but it was not written down on paper and quite how the form was finally arrived at was never resolved in the formal evidence. Leaving aside how the words came to be composed (another subject on which privilege was waived), Mr Hutchings then spoke to Mrs Cartwright, who put the words by telephone to Senor Riera with the intent that he should then write to the Marquesa. Why it was Senor Riera who was selected to play this part and who made the selection of him for the task has not been satisfactorily explained. The Marquesa could have been approached directly or by way of Senor Sanchez Junco. Instead the Managing Director, with whom her relations were poor, was invited to contact her. There is a very real suspicion that he was used as he, above others, represented in person the ability of Hello! to deny the Marquesa any work for the group in the future. He could not be charmed by her; unless he chose, he could not be contacted by telephone except by way of his secretary and the Marquesa could not negotiate with him or protest to him. He was the embodiment of the pressure that was put upon her.

115. The form of words proposed by London was then sent by Senor Riera to the Marquesa. The suggested form of words was in English, the rest in Spanish; putting the whole in English it read as follows:-

> "We need to receive by tomorrow at [10] a.m. at our Barrister's Mr. Giles Fernando fax number 0207 742 4282, a document signed by you in a headed paper with the name of your company with the following text:-
>
> > I confirm that my company sold exclusive UK rights in the photographs of the wedding of Michael Douglas and Catherine Zeta-Jones to Hola SA for use in Hello! magazine. The agreement was concluded on the telephone between me and Eduardo Sanchez, the proprietor of Hola SA, on Sunday November the 19th."

The letter was signed by Senor Riera. The letter went by fax late on the evening of the 22nd November. The reference to 11 a.m. was to ensure her letter could be produced at the hearing before the Court of Appeal.

116. On the next day, 23rd November, the second day of the hearing before the three-man Court of Appeal in London, the Marquesa saw for the first time the fax from Senor Riera. By the time Miss Mildh arrived late at her office she said:-

> "I found the Marquesa in high dudgeon as she had earlier found in her office a fax from Madrid, containing the exact proposed wording of this sought-after document. Furthermore, she told me that she had already received several semi-hysterical phone calls from Madrid, demanding that the document be written and faxed to the High Court before 10 a.m.. The Marquesa had by now resolved to sign this document."

Miss Mildh typed out the required form of words on the writing paper of Neneta Overseas Limited, another Marquesa company. The Marquesa, having fervently hoped overnight that the requirement that she should sign a letter would go away, had found that it had not; at the very last minute she signed it and it was faxed to the number that had been given by the Madrid office. Both the Marquesa and Miss Mildh recognised that no such transaction as the letter described had ever taken place.

117. Mr Hutchings exhibited the letter from Neneta Overseas Limited to a witness statement of his and it was produced to the Court of Appeal.

118. Also on the morning of the 23rd Mr Hutchings telephoned the Marquesa and asked her whether she had prepared a letter to confirm her involvement. By then the Marquesa would have had Senor Riera's draft before her. Mr Hutchings says:-

> "I recall very clearly that the Marquesa said absolutely nothing to the effect that the letter she was providing to us was in any way incorrect."

119. Senora Elisa's evidence was that in the course of the several telephone calls that were made between her and the Marquesa before, finally, the Marquesa faxed off to London, at the last possible moment, the letter which Senor Riera had asked for ("the Marquesa's letter"), the Marquesa had protested about her being asked to provide it but that she had never said the letter was untrue. The point is finely balanced as, given, as Senora Elisa accepted, the Marquesa did not protest about any of the component parts into which the letter could be broken, on her evidence the Marquesa would seem to have had nothing to protest about save for the untruth of the letter. However, in her oral evidence the Marquesa, after some hesitation, said that she had also told Mr Hutchings that what was being required of her was an untruth. Given that Mr Hutchings' evidence that she had said absolutely nothing to the effect that the letter was incorrect was not challenged, I prefer the evidence of Senora Elisa and Mr Hutchings on this issue to that of the Marquesa. I hold that she did not complain of the untruth of the Marquesa's letter either to Senora Elisa or to Mr Hutchings. It is, of course, not inconsistent with her willingness to help Senor Sanchez Junco and to help Hello! procure the lifting of the injunction that she should have kept from Senora Elisa and Mr Hutchings the fact that her letter was untrue.

120. I turn to Senor Riera's state of mind in respect of the Marquesa's letter. He knew it was very important. One might therefore have expected him to speak directly to the Marquesa about it. However, so far from doing so, and despite the Marquesa's having asked Senora Elisa to get him to telephone her, he did not do so. It is difficult to resist the conclusion that he had deliberately made himself unavailable to her. His evidence was that he had received the form of words from either Mrs Cartwright or Mrs Doughty in London and had no reason to believe it was untrue. On the other hand, he was the senior man in Madrid as to administrative matters. He was the person consulted, he said, on economic matters and commercial and legal ones. He was content to describe himself as a stickler for good order, a fairly rigorous sort of person. He knew that the Marquesa's letter was to be used in Court and that it had to be truthful and very accurate. Nonetheless, he did not enquire, in relation to the letter, as to which of her companies was being asked to say that it had sold the rights, nor what title it had to the rights, nor did he make any enquiry of the Marquesa or, he said, of Senor Sanchez Junco.

121. So far one would have to conclude that he was so incurious as to have been indifferent to the truth or falsity of the letter but had he spoken to Senor Sanchez Junco before sending it to the Marquesa for her signature he would inescapably have learned that it was false; the least discussion with Senor Sanchez Junco would have disclosed to him that it was not the Marquesa who had made any agreement with Senor Sanchez Junco on the 19th November. It is thus important to look into whether, despite his denial of this, he had in fact spoken to Senor Sanchez Junco in relation to the letter. I am driven to holding that he had. A good deal later, on the 18th September 2002, he sent a fax to the Marquesa that said:-

> "Following the instructions from Mr Sanchez Junco I sent you the fax dated 22nd November 2002 ….. ."

a reference to the Marquesa's letter. In oral supplementary evidence in chief he said that that passage was incorrect. When Mr Price asked him why, then, had he sent it he said:-

> "The Marquesa does not really pay any attention to me and, in any event, this is not true."

As an explanation that is quite hopeless. He had a further opportunity to explain himself on the point when Mr Tugendhat cross-examined him on it but his answer did not improve. When asked "Why did you write it if it was untrue?" he answered:-

> "If I'm sincere, I don't know. Probably it was possible to emphasise my own letter."

122. I am left with no reason to disbelieve what Senor Riera had said in his fax of the 18th September 2002; he had, indeed, spoken to Senor Sanchez Junco and it was on the latter's instructions that the request for the Marquesa's letter was made. Although they worked in different offices in Madrid, in ordinary course they spoke together nearly every day. Senor Riera knew, too, that, in relation to the letter, the Marquesa had been complaining to Senora Elisa. Moreover, as Mr Luke said, Senor Sanchez Junco was a "hands-on" proprietor; "he likes to get a grasp of everything". He was a strong figure; as Mr Luke said:-

> "…. I promise you, if you've been on the wrong side of Mr Eduardo Sanchez, its an experience you will never forget."

123. It was inherently likely, on the important questions that arose in relation to the Marquesa's assistance in the lifting of the injunction, that Senor Riera would have consulted Senor Sanchez Junco. Senor Riera's denial of having made contact with Senor Sanchez Junco is not true. In all the circumstances Senor Riera must have known that the letter being required of the Marquesa was untrue.

124. That conclusion invites me to look into Senor Sanchez Junco's position in relation to the Marquesa's letter. He said at the trial that he had not seen it before. He said Senor Riera had not spoken to him beforehand but he added "It may have happened". He thought Senor Riera had made a reasonable assumption that he, Senor Sanchez Junco, had come to an agreement with the Marquesa on the day of the wedding. He said of that that it was:-

> "… what Mr Riera believed was the reality of the matter."

In an attempt to explain how he knew what Senor Riera had believed he relied on the Marquesa having been known to have handled the feature from August 2000 on. But her role had not been akin to her normal role and she had had little or no contact with the Douglas wedding feature after August 2000. There were no grounds for a reasonable assumption by Senor Riera save, perhaps, one derived from the message that he had received through either Mrs Cartwright or Mrs Doughty in London, but those were grounds on which Senor Sanchez Junco, claiming to have had no discussion with Senor Riera on

the point, could not rely. Senor Sanchez Junco's answers provide no reason not to accept the truth of Senor Riera's own written assertion, albeit one that he later resiled from, that he had sent the request to the Marquesa for her to complete the Marquesa's letter on the instructions of Senor Sanchez Junco. I do not accept Senor Sanchez Junco's evidence that he had no prior knowledge of the Marquesa's letter and no knowledge that it was untrue. Still less was I impressed with his assertions, firstly, that the Marquesa's letter was not false and then, secondly, "It is closer to the truth than [to] an untruth".

Senor Sanchez Junco's statement

125. Another piece of evidence which was used by the Hello! Defendants before the Court of Appeal was a witness statement of Mrs Maria José Doughty, Hello!'s Administration and Financial Controller. Mr Anderson, Picture Editor for OK!, had put in a witness statement as to his telephone calls to Mr Ramey in which the paparazzo had left the impression on Mr Anderson that Senor Sanchez Junco owned the unauthorised pictures. Mrs Doughty, whose first language is Spanish, was given the task of getting Senor Sanchez Junco's observations on the point. She telephoned him and took down his reply which, in English, was:-

> "1. I have never commissioned the disputed photographs, nor have I financed them or agreed a price for them in advance. I have never had any contacts with the provider of these photographs except on Sunday the 19th November to agree a price for them once the photographs were delivered to me that day. This was done through one of my employees.
>
> 2. I do not have any agents representing me or my company in the United States or anywhere else and anyone pretending to do so does it under false pretences.
>
> 3. Neither I nor my company have ever owned the copyright in the photographs with the exception of the exclusive rights of publication in the United Kingdom, Spain or France."

126. In the light of the Marquesa's letter, also produced to the Court, "the provider of these photographs" would have been read, by anyone reading both it and Senor Sanchez Junco's statement, as intended to refer to the Marquesa but whilst the claimants would have known that it was nonsense to suggest that Senor Sanchez Junco had not had previous contact with the Marquesa, the Court of Appeal would not have known that and the claimants had no immediate proof to the contrary. After hearing cross-examination of Senor Sanchez Junco on the issue, as I shall explain, in January 2003 the Vice-Chancellor concluded that Senor Sanchez Junco's statement was false and misleading. He said:-

> "First, it is clear that he had contact with Mr Ramey on a regular basis through members of the staff of his companies, notably Ms Neal. Second, he had contacts specifically with regard to the wedding photographs through the Marquesa and Ms Neal. In each case the contact was indirect. But contact does not have to be direct. The third sentence of paragraph 2 of his statement suggests that his reference to contact included indirect reference. If he sought to confine the preceding sentence of his statement to direct and personal contact then he should have said so. Third, his statement was misleading in implying in the context of the statement of Mr Anderson, that Mr Ramey was not the provider of the photographs. In my judgment Senor Sanchez Junco knew that his statement was false and misleading in these respects. "

127. I have had a good deal more evidence than had the Vice-Chancellor. I am unable to find fault with the first sentence of paragraph 1 of Senor Sanchez Junco's statement. As for contacts with Mr Ramey, the Vice-Chancellor pointed out that the third sentence suggested that Senor Sanchez Junco's reference to contact included indirect contact. For what it is worth, the Vice-Chancellor had had different evidence as to the telephone calls during which the price was agreed with Mr Ramey; he was told of a three-

person call involving Mr Ramey on the line to Mr Luke with Mr Luke then translating to Senor Sanchez Junco. The evidence I have heard and which I have accepted is of a four-person call, Ramey to Sue Neal on one line, and Neal to Luke's mobile, with Luke translating to Sanchez Junco only a couple of feet away. In the context of the four-person call it is, in my view, a not unfair reading of Senor Sanchez Junco's statement that the phrase "this was done through one of my employees" was intended to refer not to vicarious contact through an employee of the usual kind of which a director or manager of a company might have no direct personal knowledge but was, in effect, saying that even such contact as he had had with Mr Ramey on the 19th November was, albeit by way of another, nonetheless direct, within his personal knowledge, by way of the four-person dealings which he had through Sue Neal and Mr Luke. In evidence before me Senor Sanchez Junco said (with my emphasis):-

> "I imagine that at that time, because what I was being accused of was having bought photographs from Senor Ramey as a commission, I wanted to give the clear impression that I have never had any contact with Mr Ramey <u>in that sense</u>."

128. It is with diffidence that I come to a different conclusion than the Vice-Chancellor but I acquit Senor Sanchez Junco of knowing that his statement was false and misleading *as to contact*. By the use of the word "contact" he was, I hold, intending to refer only to such contact with Mr Ramey relating to the Douglas wedding of a kind of which he was able to speak to from his own personal knowledge. He was intending to say that *such* contact occurred only the once, on 19th November. So limited, both his first and second sentences in his paragraph 1 were not, I hold, known by him to be misleading. However, given that I have held that he had spoken to Senor Riera about the Marquesa's letter and had instructed him to request it of her, and given that he knew both were for production to the Court in England, I cannot acquit Senor Sanchez Junco of intentionally misleading the Court by his reference to "the provider of these photographs" rather than, if he meant Mr Ramey, saying so. There was no sufficient reason for not identifying Mr Ramey, certainly once Mr Anderson had done so. On this issue, the Vice-Chancellor's third count, I hold that Senor Sanchez Junco did know that his statement was misleading.

129. Given that Mrs Cartwright's paragraphs 10 and 11 did not represent what she wished to have as any part of her evidence and were misleading, that the Marquesa's letter was untrue and that Senor Sanchez Junco's statement to Mrs Doughty as put before the Court of Appeal was, as to part, misleading, I can only echo the Vice-Chancellor's conclusion that the case advanced by Hello! to that Court was a false one.

The injunction is lifted; 23rd November 2000

130. After argument had concluded before the Court of Appeal on Thursday the 23rd November the Court indicated that the appeal would be allowed and the injunction lifted. Although the evidence before the Court had included that Mr Douglas and Miss Zeta-Jones had been upset to learn of the possible publication of the unauthorised photographs, Hello! elected to go forward and publish. It informed the distributors that the embargo was lifted and its Issue 639 went on full sale to the public on Friday the 24th November without any further changes to text or photographs.

Issue 639 of Hello!

131. The text in Issue 639 relating to the wedding itself, as opposed to the Russian Tea Room event the night before and to descriptions of arrivals before the wedding, has been said to have been composed by way of brief interviews with guests as they left the wedding. It was inaccurate in many respects as, indeed, had been the description of the Russian Tea Room event and the arrivals there but Mr and Mrs Douglas complain, in particular, of a reference to Mr Douglas having given Miss Zeta-Jones a £1m yacht as a wedding present and to a caption to a photograph of Miss Zeta-Jones dancing which read:-

> "The vivacious bride took to the dance floor but not, at any time, with her groom."

132. There had been no gift of a £1m yacht and the bride and groom had not only led the dance but had danced several times. As Mr Douglas, whom Hello! described as a rich man with a fortune to protect, was marrying a woman less rich and some 25 years younger, the combination of Hello!'s untruthful comments was hurtful to the Douglases. Exactly who had arranged with whom and when as to the text and by whom the various passages of it were written were questions only partly and unsatisfactorily explored in evidence but when Mr Luke was questioned as to innuendi in the text he sought to explain them away by reference to the sub-editors, called in at the weekend and required to work long hours, having been overtired. I cannot accept that evidence; I see no likely link between tiredness and the mean-spiritedness of Hello!'s comments. If anything, one would expect tiredness to lead to an adoption of Hello!'s familiar eulogistic and flattering tone, the usual nature of which served only to mark a contrast with the comments I have described. However, the evidence, whilst giving rise to real doubt, has not, in my view, been sufficient to amount to proof of an instruction having gone out that snide or hurtful comment would, unusually, be welcomed in the text in order to repay the Douglases for having given the exclusive to OK!.

Hello! and OK! both publish

133. OK! had successfully striven to bring forward Douglas wedding coverage into its Issue 241 (bearing date 1st December 2000) and it went on public sale on the very same day as Hello!'s Issue 639. Issue 241, with a full family wedding group on the cover and boasting that OK! was first for celebrity weddings, bore the banner "the first *real* wedding pictures". Issue 242 (dated December 2nd), with a close up of bride and groom on the cover, came out later and together issues 241 and 242 completed the whole coverage of the wedding by OK!. The authorised photographs of the wedding were very widely syndicated by OK! and some or all appeared in many publications at many points throughout the world.

134. As she left Court on the 23rd November Mrs Cartwright telephoned Hello!'s London Editor, Maggie Koumi, to tell her that the injunction had been lifted. She said that, following a common practice, the national and daily press could be authorised to use the whole of the cover of Issue 639 but not pictures from its inside pages. News of the overturning of the injunctions spread fast and within 15 minutes or so Ms Koumi was telephoned on behalf of the Daily Mirror, the Daily Mail, the Mail on Sunday and the Daily Telegraph. Ms Koumi told them that it was alright for them to use the cover of 639 but not the pictures inside. The Editor of the Sun also telephoned her. He had earlier asked whether, if the injunction were to be lifted, he could use pictures from the inside of number 639. She had earlier said that that <u>might</u> be possible. Now she told him that the lawyers had advised that it was not to be done. He said:-

> "But I've already laid out four pages."

She reiterated that inside pictures were not to be used but only the cover and then in its entirety (thus, of course, advertising Hello!). It was not then too late for the Sun to have withdrawn from its print run any pictures from the inside of Hello! which the Sun had proposed to use.

135. By the time Mrs Cartwright and Mrs Doughty arrived, after Court, at Hello!'s offices, the legal advice had changed; not even the cover was now to be authorised. Ms Koumi rang to tell those to whom she had earlier spoken that not even the cover could be used. At some stage between 6.0-8.0 p.m. she tried to ring the Sun's Editor. She was told he was in a meeting. She made clear that the cover was not to be used and insisted that the message should be taken to him immediately. A "picture kill" had been circulated by the Press Association and Hello!'s Solicitors had circulated newspapers to like effect.

136. At about 10.45 p.m. on Thursday the 23rd November Ms Koumi was telephoned on behalf of the picture desk at the Daily Mirror. She was asked if Hello! had made a deal with the Sun. She said that that was not the case. She was told that she had better get a copy of tomorrow's Sun. The man at the Mirror by then had a copy of the following day's issue of the Sun in front of him and told her that the whole of the front page barring one column featured photographs published in Hello!.

137. Mrs Koumi bought a copy of the Sun on the following morning, Friday 24th November. She says in her witness statement:-

> "I then realised why the Mirror had assumed we had made a deal with the Sun. This was because of the following phrasing used by them: "But yesterday a judge overturned the ruling, allowing Hello! – and the Sun – to show the sensational snaps.""

138. She telephoned Mr Hutchings of Charles Russell. Ms Koumi's evidence, which I accept, was that it was totally untrue that permission had been given to the Sun to re-publish the Douglas wedding pictures.

Others publish the unauthorised photographs

139. The issue of the Sun published on the 24th November contained five of the unauthorised pictures. It included also, but compressed into a very small size, a reproduction of the cover of Hello!, including the magazine's name. The unauthorised pictures of Miss Zeta-Jones eating or being fed wedding cake had attracted the headline "Catherine Eater Jones". The Daily Mail on the same day published a formal authorised picture of the couple and also reproduced Hello!'s cover in legible form. That picture of the couple had been the picture that the couple had released to the Press generally. The Daily Mail also published four of the unauthorised photographs on Saturday 25th November.

140. After a hesitant start Hello! had, in my judgment, acted with reasonable speed to stop publication by others either of the cover or of the inside of Hello!. I hold that the publication that I have described in the Sun and the Daily Mail had not been authorised by Hello!. It has not been shewn, either, that the newspapers ever paid Hello! for any right to publish as they had.

Invoices arrive

141. On or about the 28th November 2000 Sue Neal, as Hello!'s Picture Editor, received four invoices addressed to her. They were respectively from Mr Ramey for $75,200 and marked "Agreed Fee Special Project Eduardo Sanchez", from Rupert Thorpe marked "Agreed Fee – Royals on holiday" for $56,400, from Frank Griffin Photography marked "Photo Sales – November 2000" for $29,000 and from Randy Bauer Photo marked "Special Project – New York (as per Frank) $29,000". All, despite anonymous and false descriptions, were for the unauthorised photographs or work in connection therewith but they totalled $189,600 and not the $188,000 which had been agreed. Consistently with the only agreement made with respect to the unauthorised photographs, it was to Hello! and not to the Marquesa that they were addressed. Sue Neal had no reason not to approve them for payment and thus, as she had been asked by Mrs Doughty to do, she quickly passed them to Mrs Doughty, which was the ordinary course of dealings with invoices. Mrs Doughty spotted that they did not add up to the $188,000 and Sue Neal, after speaking to Mr Ramey, with his agreement adjusted his down to $73,600.

142. At the same time as the four invoices I have described above there also arrived an invoice for $10,000 addressed to "Hello! Magazine Picture Desk, Marquessa De Varella" (sic) from Mr Ramey. It was for "Story – Agreed Fee Special Project $10,000". Sue Neal wrote upon it "Zeta/Douglas Wedding Guarantee Fee Issue 639". Mr Ramey had told her that that was what it represented. Her evidence is

difficult to understand on this issue. At one stage she agreed that Mr Ramey had said words to the effect "The 10,000 is what the Marquesa promised me". Her witness statement had also asserted that the sum had been promised. However, in oral evidence there was the following exchange:-

> "Mr Tugendhat: Did he say that the Marquesa had agreed to pay it?
>
> Ms Neal: No, he did not say that. He did not say the Marquesa had agreed to pay it.
>
> Mr Tugendhat: What did he say, then, to justify the invoice?
>
> Ms Neal: He said that he had said to the Marquesa that he wanted a fee of $10,000.
>
> Mr Tugendhat: [Correctly] But in your statement you say he said he had been promised the $10,000 …. by the Marquesa.
>
> Ms Neal: That is what he said.
>
> Mr Tugendhat: Yes and that is right, is it?
>
> Ms Neal: Yes."

143. Ms Neal was in my judgment a truthful witness despite such internal contradictions and I hold the case to have been that on occasions both before and after the wedding Mr Ramey had asserted to her that a guarantee fee had been indicated by the Marquesa to be payable, as Ms Neal put it:-

> "… if they had not taken as good a photograph as they were hoping to take, and did not come up with material which would warrant a higher sales figure. A guarantee would be to offset some of their expenses."

Even that was, in my judgment, a more firm indication of prospective payment than the Marquesa had actually given to Mr Ramey (see paragraph 38 above) but it was in such terms that Ms Neal understood the position from Mr Ramey. Of course, by this time, Mr Ramey had "come up with material" that had fetched a good price so the $10,000 on such a contingency would not have been payable. Ms Neal said that she had suggested to Mr Ramey that he should "Just forget about the invoice" and that he had accepted that. As far as it goes, his accepting that supports a conclusion that the $10,000 was never promised or at any rate never promised unconditionally as the evidence about Mr Ramey has not suggested that he would easily give up $10,000 to which he was entitled.

144. I accept Ms Neal's evidence that she handed all five invoices to Mrs Doughty, who asked her to ask the photographers to readdress them to the Marquesa's company, Neneta Overseas Limited. That she did.

145. When all five invoices were passed to Mrs Doughty (and not the four only, as she asserted), her understanding was that they were not payable by Hello!. She faxed copies of them to Senor Riera and he rang her back to say that she was right and that they should be readdressed to the Marquesa, which, as I have just mentioned, Mrs Doughty then asked Sue Neal to set about.

146. Mrs Doughty is susceptible to an attack on the lines that she knew full well that the Marquesa had had only little to do with the unauthorised photographs, that they could not be described as a typical Marquesa feature or indeed any Marquesa feature but that in asking, as she did, for the invoices to be readdressed, she was attempting to bolster the untruthful tale, that the Marquesa had sold the pictures to Hello!, that Hello! was now asserting.

147. However, at that time, whilst she did know of the Marquesa's letter, she had no certain reason to believe that it was untrue or that the Marquesa would have put her name to it if it had been. As invoices were in ordinary course passed to her she would probably have had the Marquesa's invoice of the 20th November, the heading of which suggested that the Marquesa had arranged photographs of the Douglas wedding. She would have spoken to Mrs Cartwright who was of the view that it was the Marquesa who had dealt with Mr Ramey. She may well have heard Counsel on the Hello! side asserting that in Court. She would have known from the McCarthy case that, although such work was outside her usual run, the Marquesa would quite gleefully stoop to paparazzi work to help Hello! against its rival. It was Mrs Doughty's habit to clear the Marquesa's and other large invoices with Madrid so a telephone call to Senor Riera was quite natural. She had taken down Senor Sanchez Junco's statement that he had not had any contact with "The provider of these photographs" save to agree a price once they had been delivered but she, in her mind, drew a distinction between the photographer and the provider of the unauthorised photographs. She did not understand an agreement between Senor Sanchez Junco and Mr Ramey, perhaps as photographer, as excluding that the photographs represented a Marquesa feature of which the Marquesa was provider. When she telephoned Senor Riera, with whom practically all her dealings with Madrid were conducted, he confirmed, as I have mentioned, that the invoices were for the Marquesa.

148. My impression is that she was and is a loyal employee. "If I am to believe somebody, I believe my own company" she said. She was content to act on what Senor Riera told her to do without testing her belief as to the Marquesa's involvement by, say, telephoning the Marquesa or Miss Mildh. There was in any event little love lost between the senior figures at Hello!'s London office and the Marquesa. I have heard and seen her give evidence and, on balance I do not hold Mrs Doughty to have knowingly embarked upon a course intended to put false and extra distance between Hello! and the paparazzo incursion in New York.

149. On the 15th December 2000 Senor Riera sent a fax to the Marquesa. He told her that Hello! had received invoices for a total of $188,000 from the four photographers. The fax continued:-

> "For us there is no intermediary other than you, as it was your company who offered to us and managed this matter. Therefore, we are puzzled by these invoices and I would be grateful if you take control of them as we are not going to pay them.
>
> In this regard either you get in touch with them or we will ask them to contact your company, whose name I would ask you to let me know. You will, of course, invoice us for your fees. "

150. Senor Riera's own evidence was that on the 14th December he had been told by Senor Sanchez Junco that the agreement to acquire the unauthorised photographs had been with Mr Ramey and had been made by Senor Sanchez Junco. He sought to say that nonetheless it was for the Marquesa to pay the photographers. He also said that on the 14th December he had told Senor Sanchez Junco that he was going to bill the Marquesa but that Senor Sanchez Junco had said "No, the agreement was with Mr Ramey". Despite that and, as he put it, to stick to the rules, it was, he thought, for the Marquesa to pay the photographers. Hence the fax of the 15th December. Except as part of a conscious and false pretence on his part as to a deeper involvement of the Marquesa in the unauthorised photographs than had been the case, the fax is inexplicable. The word translated as "intermediary" had, in Spanish, been "interlocutor".

151. The Marquesa, still willing at that stage to help, faxed back twice the same day to Senor Riera saying, ruefully, "I am obviously a "todo terreno", an all-terrain vehicle, meaning that she was being called upon to do anything demanded of her. But she gave him the name and address of her company and enquired what invoice was it that she had to pay, hardly a question that would have been likely to have needed to be asked had her company been the person who had contracted to buy the photographs. She also asked Mrs Doughty at Hello! to send her copies of the invoices. Mrs Doughty did fax the Hello! invoices to the Marquesa who, on seeing that they were addressed to Hello!, telephoned Mrs Doughty

to ask for it to be arranged that fresh invoices should be prepared addressed to Neneta Overseas Limited.

152. The Marquesa was puzzled by the fact that there were as many as 5 invoices, including ones other than from Mr Ramey, but she telephoned Senor Sanchez Junco on the evening of the 15th December and he told her that the whole $188,000 should be paid to Mr Ramey. She did not care for that advice and said that she would pay each invoice separately.

153. On the 17th December the Marquesa faxed Senor Riera and in the course of a long and rather meandering fax made, in effect, 5 points. Firstly, that Senor Sanchez Junco had told her to pay the whole sum to Mr Ramey; secondly, that that was not possible as he would be unlikely to share the money with the other three photographers who had sent her invoices but who needed to be dealt with; thirdly:-

> "It is true that Phil Ramey asked me to assure $10,000 for the photographs that might be taken at the Douglas wedding and I told him that I could assure him that"

and, fourthly, that that had not been compromising because the photographs she had referred to could equally have been photographs outside the wedding and that she had been careful to tell him to do as he wanted. Ramey had sent her an invoice for the $10,000, she said, presumably a reference to the one addressed to her at "Hello! Magazine Desk Marquessa De Varella" at Hello!'s London office. Fifthly, she said she would like to pay that invoice.

154. The next day her assistant Miss Mildh, pointing out that the Marquesa was about to leave for Uruguay, e-mailed Mr Luke saying that she must speak to him, adding, in reference to Hello! and the photographers:-

> "They are now sending invoices to us re: the photographers – stuff we never had anything to do with, things that were actually arranged by Sue Neal."

No-one called back. On the 21st December Miss Mildh faxed Senor Sanchez Junco's secretary asking her to get in touch with the Marquesa, saying:-

> "…. You cannot just drop the lawyers onto her and then leave her with it as in fact she never had anything to do with these pictures in the first place."

There was no answer.

Fresh Invoices

155. Around this time, in December 2000 or early January 2001, the photographers submitted fresh invoices, now addressed to Neneta Overseas Limited at its address in the British Virgin Islands. They had adjusted the respective sums so that the aggregate was $188,000 but had done so in a different way than had Sue Neal when they had been received by Hello!. Amongst the invoices addressed to Neneta Overseas Limited was a fresh one from Mr Ramey for $10,000, still bearing the description "Agreed Fee Special Project of the Marquesa De Varela", now with her title correctly spelt.

The Court of Appeal's reasoned judgments

156. On the 21st December 2000 the Court of Appeal gave the reasons for its earlier decision to lift the injunction. I shall be citing passages from the decision later but, in outline, the Court held that despite there being sound arguments for confidence or even for a case in privacy, the balance of convenience tipped the matter in favour of there being no prior restraint.

The $10,000 again

157. On the 29th December the Marquesa e-mailed Senora Elisa saying that Phil Ramey wanted to be paid the $10,000 "… which we promised no matter what happened". She was asking that so that when Hello! came to pay her in order that she, in turn, could pay the photographers, the invoice for $10,000 from Phil Ramey should be added "…. otherwise he is going to continue pestering with the subject.".

158. It might be thought that the contemporary indications from the Marquesa that the $10,000 had been promised "No matter what happened" and that she "Could assure him of that" are reliable indications that that had, indeed, been the case. However, on balance I am unpersuaded that that is so; it suited the Marquesa to say so to Hello! in order that she would be put in funds to pay the $10,000 so that she would not be "pestered" by Mr Ramey on that score. But when she spoke of her dealings in August 2000, when were given whatever promises or indications as were given, she had told Mr Ramey that he could be sure that if he got good pictures Senor Sanchez Junco would pay him more than the $10,000 so that expenses he had incurred would be covered. She had said:-

> "You will have your expenses back because probably if you get the pictures it would be more valuable than $10,000."

159. Senor Sanchez Junco had said to her, as to $10,000 being paid in advance or in any event, "Absolutely not. I am not going to fund anyone going to New York. I don't want to know.". The Marquesa had had no authority to offer the $10,000 from Hello! and had retracted such assurances that she had given but had added the consolation that, if pictures were obtained, Hello! would pay well.

160. Still the photographers had not been paid. Hello! had passed the subject of their payment to the Marquesa and the Marquesa had not been put in funds to pay them. The photographers were in frequent contact with Sue Neal. She pressed the case for their payment upon Mrs Doughty. They had, she said, done a good job under difficult circumstances and if a squabble developed regarding their payment it would damage the very good relationship which the Hello! picture department had with them.

161. The Marquesa, in the meantime, was getting cold feet. She got in touch with the lawyers who administered her British Virgin Islands company and told them that she had had to declare that the unauthorised photographs had been bought by Neneta Overseas Limited and that that company therefore had to issue an invoice to Hola in Madrid. She asked for advice. On a practical level, Miss Mildh told Senora Elisa on the 10th January that the Marquesa could not pay the photographers until Hello! had paid her and that an invoice to Hello! from Neneta Overseas Limited was being prepared. She indicated that the Marquesa would be adding $5,000 to it to cover expenses and asked for clarification as to the amount of the larger Ramey invoice.

Invoices and the Marquesa are paid

162. On the same day Neneta Overseas Limited sent to Senor Riera at Hola, an invoice headed "Douglas/Zeta-Jones Project New York; $205,000". The photographers' invoices sent to the

Marquesa had totalled either $189,600 (uncorrected down to $188,000) or $188,000, to which could be added the disputable $10,000 "Guarantee Fee" and the $5,000 indicated as the Marquesa's expenses. The total thus would either have been $204,600 or $203,000. On either footing the Marquesa's request for $205,000 was including the $10,000 "Guarantee Fee" and was rounding up her expenses. Yet Hello! paid the full $205,000 to Neneta Overseas Limited without further ado on the 15th January 2001 under the signature of Senor Sanchez Junco.

163. The $205,000 paid was in addition to the £1,175 paid to the Marquesa for telephone expenses on the 27th November. Senor Riera never accepted that a $10,000 "Guarantee" had ever been paid; he said he had no knowledge of that $10,000. Senora Elisa told him that the sums did not tally but nonetheless he passed a bank transfer for the full $205,000 to Senor Sanchez Junco for him to sign it, as he did. Senor Riera claimed that the difference or inclusion of the $10,000, was commission for the Marquesa but there is no hint that that was ever suggested or agreed. The Marquesa, having been put in funds, promptly paid Mr Thorpe, Mr Griffin and Randy Bauer but a difficulty arose as to the payment to Mr Ramey. He asked for his amount to be paid into a bank account not in his own name but in the name of someone else. Miss Mildh sensibly insisted that a letter should be received from Mr Ramey authorising the payment of the amount to the other account. She explained that to Senora Elisa. Senora Elisa's response was that it was for the Marquesa to get in touch with Mr Ramey and that Senor Riera had insisted that it was the Marquesa that must pay him. Miss Mildh found a way out; she spoke with Sue Neal and Sue Neal had said that she would talk to Mr Ramey on the subject. By this time it would seem that the Hello! Defendants were almost paranoid (Sue Neal apart) about avoiding being seen to be in contact with Mr Ramey. But when Mr Ramey telephoned Sue Neal he indicated that he did not want to cause any trouble, he just wanted his money. He made an extraordinary suggestion.

164. It was that Hello! should create a fictitious job for him, paying him a retainer of, say, $5,000 a month until the sum he was claiming, $75,200, should be paid. From the sale of them on 19th November onwards, Mr Ramey had been anxious to conceal or not to reveal his connection with the unauthorised photographs and his willingness to be paid over so long a time again illustrates his defensive, if not guilty, state of mind. The proposal for the retainer was, said Sue Neal, Mr Ramey's idea; he did not wish to be identified with the unauthorised pictures in any way. Miss Mildh, after speaking to Sue Neal, reported the proposal to the Marquesa although describing the plan (mistakenly, as I hold) as Sue Neal's idea. Sue Neal told Mr Ramey she would consult the new Editor on his idea but did so in a tone that suggested that it was doubtful that Mr Hall, the incoming Editor of Hello!, would adopt it. Nothing further came of the proposal but the Marquesa, without in terms saying that the Marquesa's letter had been a lie, began to warn Senora Elisa of the difficulties inherent in Hello!'s position, plainly intending the message to be passed on to Senor Riera. Mr Ramey had told her (and she had believed) that he had taped his conversation with Senor Sanchez Junco. She warned Senora Elisa:-

> "I do not think it will be a good idea to go to Court to lie. The truth will prevail."

165. On the 7th March 2001 there was received from Mr Ramey a note authorising payment of his invoices that had been sent to the Marquesa to the account of "John Phillipp". The Marquesa or her company paid $75,200 USD to Mr Ramey in that indirect way on or about the 30th March 2001. She did not pay the $10,000 USD invoice, nor repay it to Hello!, nor was she asked to refund the $10,000.

The proceedings develop

166. In the meantime the Claimants had served Particulars of Claim on the 22nd February 2001 and a Defence was then served on the 16th May 2001. Paragraph 30 of the Defence asserted that Senor Sanchez Junco had bought the unauthorised pictures from Mr Ramey in the early hours of the 20th November 2000. Differences between Charles Russell for Hello! and Theodore Goddard for the Claimants began to appear in relation to the adequacy or otherwise of disclosure. Mr Hutchings turned to the Marquesa for help in the production of the invoice for $188,000. Senor Riera faxed her to say that he would be grateful if she would comply with the request. The Marquesa, again without

in terms saying that the Marquesa's letter had been a lie or that Mr Hutchings knew that it was, warned Mr Hutchings that it would be useless to deny that a conversation between Senor Sanchez Junco and Mr Ramey had taken place. She did not identify, either, which particular conversation between them she had in mind.

167. On the 2nd May 2002 Jacob J. gave leave for an amendment to the Claim Form to add Senor Sanchez Junco, the Marquesa, Neneta Overseas Limited and Philip Ramey as Defendants. At first it was contemplated, at least by the Marquesa, that Charles Russell would act for the Marquesa and they went on the Record in that regard but instructions were given from Madrid that brought to an end any further representation of the Marquesa by Charles Russell and such papers as she had given that firm were returned. Mr Hutchings warned her on the 22nd May that time for her Defence was close to expiring. On the 18th July the Marquesa, using her nickname Neneta, faxed Senor Sanchez Junco saying:-

> "Thanks to the mess that Riera has put me into I am spending the whole day from lawyer to another one!! And on top of it nobody pays them?? This is too much …. I hope everybody will say the truth of how Hello! bought the M. Douglas pictures. I am fed up of problems and of nastiness."

168. In paragraph 13.9 of her Defence of 22nd July 2002 she admitted and averred, for the avoidance of doubt, that the contents of the Marquesa's letter were untrue. By the 23rd August 2002 she was faxing Senor Riera saying:-

> "The jam you have put me in with the Zeta-Jones/Douglas trial when you asked me to sign a letter knowing that I could not possibly have bought these photographs, is something that is akin to evil. Anthony Luke knows the truth, like Eduardo Sanchez knows the truth, like Sue knows the truth, like the photographers know the truth. I did not buy those pictures. I just spoke a few times in August 2000 with Mr Ramey and once with F. Griffin and then, in December, I spoke to the writer who lives in New York about the text which was not even published in the end. If the case goes to Court the truth will come out and it will be damaging to Hello!'s reputation. One day the truth will be known and it will come out that in all these years I have been the victim of several injustices and of a continuous persecution."

A little later she adds:-

> "I cannot continue telling lies, I am sorry."

169. It was in answer to that fax that Senor Riera made the important response, to which I have earlier referred, that it was "Following instructions from Senor Sanchez Junco" that he had sent the fax of the 22nd November 2000 to her. Senor Riera in this fax continued in a self-serving way. He said, of the Marquesa's participation in the purchase of the photographs of the Douglas wedding that:-

> "This participation was to a lesser or greater degree the same as your other collaborations with Hello! for more than 15 years. Meaning that you offered to Mr Sanchez Junco the possibility of a story, you negotiated its execution with the means you consider appropriate, you choose the photographer and the journalist that will execute it and in most of the cases you take responsibility for their expenses in order to later invoice Hello! for all your services, including the total of the story itself. As far as all of us in this company, including myself and all our lawyers, understand this was your involvement, the same as in all other features, and that's the reason for your note, even though we later came to know the photographer, in this case Mr Ramey, chosen by you to co-ordinate the delivery of the feature, contacted Mr Sanchez Junco in the last moments, who with Mr Anthony

> Luke acting as translator, agreed on a final fee for this story. Fee that was told to you later via phone."

170. I cannot accept that Mr Riera thought that was the truth. It is impossible to see the agreement of the price for the unauthorised pictures between Mr Ramey and Senor Sanchez Junco, Sue Neal's acknowledgement of the price of $188,000 and the photographer's invoices sent direct to Hello! in the first instance, coupled with the absence of any fee for the feature payable to the Marquesa as even "to a lesser ….. degree" the same as her usual collaborations with Hello! over 15 years or so. Moreover to speak of Mr Ramey's contact and agreement with Senor Sanchez Junco as merely being something which "We later came to know" is absurd. Further, Senor Riera's assertion later in the fax that "When we asked you to certify your actions regarding this feature … you gave freely your help" is not possible to square with his oral evidence that he knew that the Marquesa had been complaining about being required to sign the Marquesa's letter. The Marquesa in a fax of the 20th September 2002 told Senor Riera that:-

> "I had nothing to do with the relationship between Phil Ramey and Griffin and Hello! or the purchase of the photographs or their publication. Hola and Hello! have published their pictures for so long that it is childish to believe that I was the one to discover them or that I dealt with the matter. Phil Ramey has been selling his features for over 15 years through agencies like Keystone Nemes. The night of the wedding all the photographs were sent electronically to Hello!. How could I buy something if I was in Sotogrande, where I do not even have a fax. Why was Eduardo going to allow me to buy these pictures? It is ridiculous and it is not true."

171. A little later she said:-

> "I would love to be able to continue helping Hello! (but now I know that the truth has to be told). I only signed that letter you sent me to help Hello! and I cannot go on lying. I signed in such a hurry that I had no time to realise what I was signing. Elisa hurried me because they had to send it in order to lift the injunction."

I do not accept that she did not realise that what she was signing was untrue but I do accept that she had little to do with the unauthorised photographs and nothing to do with their purchase.

172. Her fax continued:-

> "I felt coerced into signing something that was not true and now I can be in contempt of Court for having lied. A few days ago Eduardo asked me "And why did you sign it?". I told him "I signed it because otherwise Riera would have told you that I failed you when you most needed me"."

Before the Vice-Chancellor; January 2003

173. As the proceedings unfolded (Hola S.A. having been added and then, in May 2002, Defendants 3, 4 and 5) the Claimants became increasingly concerned at what they regarded as the inadequacy of disclosure on the part of the Hello! defendants, which had been given on the 18th February, the 19th March, the 30th May and the 29th October 2002. They also had very real doubts about Mrs Cartwright's second witness statement, Senor Sanchez Junco's statement as given to Mrs Doughty and the Marquesa's letter as evidence handed to the Court of Appeal. On the 13th December 2002 they applied for an order that the Defences of the Hello! defendants should be struck out. That application came on, with others, before Sir Andrew Morritt, Vice-Chancellor, on the 16th January 2003. He heard oral evidence from Senor Sanchez Junco, Senor Riera, Mrs Cartwright and Mrs Doughty.

174. That hearing concluded on the 21st January 2003 and the Vice-Chancellor gave judgment on the 27th January. He held that Senor Sanchez Junco's statement was false and misleading and that he had known that it was (paragraph 25), that it was admitted that the Marquesa's letter was false (paragraph 26) and that on her own admission, Mrs Cartwright's second witness statement was false as to the paragraphs 10 and 11 included within it. As I have already noted, the learned Vice-Chancellor concluded (his paragraph 34) that the case advanced by Hello! before the Court of Appeal, based, as it was, on those false statements, was itself false. Of the three makers of the false documents the Vice-Chancellor said:-

> "Each of them knew that his or her statement was false or misleading in the respects I have mentioned."

I accept that Mrs Cartwright knew that the paragraphs 10 and 11 in her 2nd witness statement were likely to mislead but I am not satisfied that she knew before the Court gave its judgment that a form of her witness statement with those paragraphs in it was going to be used or had been used.

175. The Vice-Chancellor also dealt with an allegation of inadequate disclosure. In his paragraphs 36 and 37 he gave details of documents missing from the Hello! Defendants disclosure or destroyed by them – see also paragraphs 38, 39, 41 and 42. The Hello! Defendants did not dispute the Claimants' table of the respects in which, the Claimants said, the disclosure had been defective (paragraph 43). The Vice-Chancellor held that he had no evidence that any pre-action documents had been destroyed in an attempt to pervert the course of justice (paragraph 37). In his paragraphs 96, 97 and 98 he said respectively:-

> "96. Thus the material disposals or destructions are those made after the effective commencement of proceedings on the 20th November 2000. These comprise the photographs sent by Mr Ramey in electronic form, all the documents later disclosed by the Marquesa and the transmission data relating to the faxed memorandum from Miss Neal to Mr Ramey sent on the 19th November 2000 and referred to in paragraph 16 above. Such destruction was plainly deliberate in the sense that it is not suggested to have been accidental. But was it more than that?
>
> 97 … What is not available are the originals or copies of the documents destroyed which had been in the possession of the Hello! Defendants. Such documents may or may not have had notes on them made by the recipient or sender respectively. Equally, there is not now available any other document destroyed or disposed of. But what evidence is there that there were any?
>
> 98. This is the conundrum. I have given anxious consideration to whether I should on, a balance of probability, infer from the conduct of the Hello! defendants to which I have referred that there were further material undisclosed documents. I consider that I should."

176. However, the Vice-Chancellor continued at paragraph 101:-

> "I do not consider that there is a real risk that there cannot be a fair trial on those issues, given the documentary evidence and the ability of the Judge to draw inferences."

He held, notwithstanding conduct attributable to the Hello! Defendants which had left a very great deal to be desired with regard to the veracity of their evidence and the adequacy of their disclosure, that he was not persuaded that a fair trial was no longer possible. Re-amendment was at the same time permitted of the Particulars of Claim.

177. A draft Defence was put in on behalf of the 6th Defendant, Mr Ramey, and, as I have mentioned, a witness statement was received from him but he has taken no further part in the action. As between the claimants and the Hello! Defendants, after further amendments, the hearing proceeded on the basis of re-re-amended Particulars of Claim from the claimants and a re-amended Defence on the part of the Hello! Defendants.

Se Og Hør

178. At a very late stage Mr Price produced, but not by way of formal evidence verified by anyone, a copy of a Danish magazine, Se Og Hør of the 14th-18th December 2000, which included a number of the authorised pictures of the wedding. It was an unseemly attempt, by reference to the unedifying surroundings in which the wedding photographs were to be found in Se Og Hør, to lower any estimation of the quality of the publicity for the wedding which the Claimants were willing to authorise. As it was not put into evidence and was produced so late, there was no opportunity to the Claimants to enquire into whether Se Og Hør had duly acquired photographic rights from OK! or whether, if they had, that had been done in compliance with OK!'s obligations to Mr and Mrs Douglas. In the circumstances I pay no attention to Se Og Hør; it should not have been produced as and when it was.

179. Whilst there have been several procedural skirmishes and many allegations of fact which I have not found it necessary to deal with, that suffices as the factual background against which the claimants raise their several causes of action.

The Particulars of Claim

180. Although the re-re-amended Particulars of Claim are at points, unclear as to whether a claim already mentioned is being repeated or a fresh claim is being made, in broad outline the Particulars of Claim appear to me to raise claims of the following kind:-

(i) On the basis that the wedding ceremony and reception was private, Mr and Mrs Douglas claim in confidence, a duty, in that circumstance, owed only to them (paragraph 6, paragraph 15, paragraph 18 and paragraph 19 of the re-re-amended Particulars of Claim);

(ii) Further, or alternatively, on the basis that the wedding had become an event which was exploited for gain, then all three Claimants raise claims in confidence, the case being that photographic representation of the events was, in effect, a commercial or trade secret (paragraph 6 (a) and paragraph 30);

(iii) Breaches of the Data Protection Act by which Mr and Mrs Douglas suffered damage (paragraph 27);

(iv) A claim under the laws as to privacy, a claim available only to Mr and Mrs Douglas (paragraph 28);

(v) Infringement of Mr and Mrs Douglas's rights under Spanish law (paragraph 29 (a));

(vi) Deliberate interference by all Defendants with the rights or businesses of all three Claimants, by unlawful means;

(vii) Conspiracy by all defendants save Mr Ramey to injure all the Claimants by unlawful means;

(viii) Conspiracy by the Hello! Defendants to injure all Claimants by unlawful means;

(ix) Conspiracy by the Hello! Defendants with the predominant purpose of injuring all Claimants (paragraph 32 (b);

(x) That the judgment of the Court of Appeal should be set aside as having been procured by false evidence;

(xi) Exemplary damages for all Claimants (paragraph 33 (a));

(xii) Aggravated damages for the distress caused to Mr and Mrs Douglas (paragraph 35);

(xiii) Injunctive and ancillary relief (paragraph 37).

I shall deal first with the law of confidence.

The Law of Confidence

181. At the broadest level of generality it can be said that equity offers remedies where a breach of an appropriate confidence, personal or commercial, is threatened or has occurred. There is nothing new about the availability of remedies in either type of confidence – see, for example, *Prince Albert –v- Strange (1849) 1 H & T 1*, a case as to personal confidence but in which authorities on commercial confidence are cited. The jurisdiction in confidence:-

> "… is based not so much on property or on contract as on a duty to be of good faith."

per Lord Denning M.R. in *Fraser –v- Evans [1969] 1 Q.B. 349 C.A. at 361*. It is based:-

> "… on the moral principles of loyalty and fair dealing"

per Lord Griffiths in *A-G. –v- Guardian Newspaper (No 2) [1990] 1 A.C. 109 at 269*. There is a public interest in the maintenance of confidences – per Lord Goff in the *Guardian* case *supra at 281* where he said:-

> "I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I, of course, understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious."

and see the passage from the judgment of Bingham L.J. in *Guardian supra* at *pages 215-216* emphasising, upon a wide basis of citation, that the law of confidence rests on an obligation of conscience – see also *R –v- Dept of Health ex p. Source Informatics [2001] Q.B. 424 C.A.* at *paragraphs 24-31*.

Lord Griffiths, in relation to the case where not the confidant but a third party is the defendant said, in *Guardian* at *p.268* that:-

> "The duty of confidence is, as a general rule, also imposed on the third party who is in possession of information which he knows is subject to an obligation of confidence: see *Prince Albert –v- Strange (1840) 1 Mac & G 25* and *Duchess of Argyll –v- Duke of Argyll [1967] Ch 302*. If this was not the law the right would be of little practical value: there would be no point in imposing a duty of confidence in respect of the secrets of the marital bed if newspapers were free to publish those secrets when betrayed to them by the unfaithful partner in the marriage. When trade secrets are betrayed by a confidant to a third party it is usually the third party who is to exploit the information and it is the activity of the third party that must be stopped in order to protect the owner of the trade secret."

and, at *p. 272*:-

> "In a case of commercial secrets which with the development of the law of confidence has been mostly concerned, a third party who knowingly receives the confidential information directly from the confidant, which is the usual case, is tainted and identified with the confidant's breach of duty and will be restrained from making use of the information."

182. The necessary components of a successful claim in confidence were conveniently collected by Megarry J. in *Coco –v- A.N. Clark (Engineers) Ltd [1969] RPC 41*in a passage which has been repeatedly used ever since although occasionally refined in the light of particular considerations, see *Smith Kline and French Laboratories –v- Dept of Health [1990] FSR 617* per Gummow J. in the Federal Court of Australia at *pages 15 and 16 of 41*. After tracing the origins of equity's concern with confidence back to a couplet attributed to Sir Thomas More, Megarry J. continued, at *page 47*, to say:-

> "In my judgment three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, M.R. in the *Saltman* case on *page 215*, must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

It is important to note, though, that the citation from Lord Greene M.R. as to the information having to have "the necessary quality of confidence about it" is a citation that stops mid-sentence. Lord Greene M.R.'s sentence in full read (with emphasis added):-

> "The information, to be confidential must, I apprehend, apart from contract, have the necessary quality of confidence about it, *namely, it must not be something which is public property and public knowledge*."

183. The "necessary quality of confidence which Megarry J. contemplated, by his adoption of Lord Greene M.R.'s dictum, was and was only therefore a quality of that particular kind – see also Lord Griffiths in *Guardian supra at page 268*. I mention this as there is a suspicion that in some later cases the phrase the "necessary quality of confidence" has been regarded as including factors other than such as Lord

Greene M.R. had had in mind. Instead, at the point at which Megarry J. was considering it, in the first of his three requirements, the question, to adopt the neat phrase from *Gurry on Breach of Confidence (1984) page 70* which attracted the notice of Bingham L.J. in the *Guardian* case *supra* in the Court of Appeal at *p. 215*, is whether the information has "the basic attribute of inaccessibility".

184. As for the second component, that the information must have been imparted in circumstances importing an obligation of confidence, Megarry J. in *Coco supra at page 48* said:-

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

Included within that description are cases in which a third party defendant has received information with notice that he received it by way of a breach of confidence by the confidant to whom it was given and includes also cases where that third party has deliberately closed his eyes to the obvious – see Lord Goff in *Guardian supra at page 281*; Lord Griffiths at *pages 268 and 272* in the passages cited supra; and see also *Campbell infra* at *paragraph 66*.

185. As for the third element, detriment, I need say nothing further on it at this stage before turning to four recent cases, three in the Court of Appeal, which have all included significant consideration of the modern law of confidence in relation to personal confidence. The cases are the interlocutory stage in this case in the Court of Appeal, namely *Douglas and others –v- Hello! Ltd [2001] Q.B 967 C.A.*, a judgment delivered on the 21st December 2000; *Venables and another –v- News Group Newspapers Ltd and others [2001] 1 All E.R. 908*, a judgment delivered on the 8th January 2001 by Dame Elizabeth Butler-Sloss P.; *A –v- B [2002] 3 W.L.R. 542 C.A*, a judgment delivered on the 11th March 2002 and *Campbell-v- MGN [2002] E.W.C.A. Civ1373*; a judgment delivered on the 14th October 2002.

186. These cases, as it seems to me, represent a fusion between the pre-existing law of confidence and rights and duties arising under the Human Rights Act. The relevant general principles which I derive, chiefly from these recent cases, are as follows:

(i) Breach of confidence is an established cause of action but its scope now needs to be evaluated in the light of obligations falling upon the Court under Section 6 (1) of the *Human Rights Act*; see *Douglas* per Keene L.J. at *paragraph 166.* That can be achieved by regarding the often opposed rights conferred respectively by Articles 8 and 10 of the European Convention on Human Rights as absorbed into the action for breach of confidence and as thereby to some extent giving it new strength and breadth – *A –v- B* at *paragraphs 4 and 6*. The Human Rights Convention thus comes into play even in private law cases – see *Venables* at *paragraph 25*. It will be necessary for the Courts to identify, on a case by case basis, the principles by which the law of confidentiality must accommodate *Articles 8 and 10 – Campbell paragraph 43*. The weaker the claim for privacy, the more likely it will be outweighed by a claim based on freedom of expression – *A –v- B paragraph 11 (vii).* A balance between the conflicting interests has to be struck – *A –v- B paragraph 12*.

(ii) The right to freedom of expression described in *Article 10 (1) of the Convention* is, by *Article 10 (2)*, "subject to such conditions … as are prescribed by law and are necessary in a democratic society … for the protection of the … rights of others [and] for preventing the disclosure of information received in confidence …". The *Article 10 (1)* right to freedom of expression is thus expressly made subject not only to the *Article 8* right for respect to private and family life but also to rights recognised by the law as to confidence, even where those latter rights are not themselves Convention rights. In consequence, privacy rights under *Article 8* may not, as such, require to be considered in a particular case but nonetheless there can be an internal conflict within *Article 10* between the *Article 10 (1)* freedom and the *Article 10 (2)* rights under the law of confidence to which *Article 10 (1)* is made subject.

(iii) The Council of Europe Resolution 1165 of 1998 gives some guidance which includes a recognition that information about some people's lives has become a highly lucrative commodity for certain sections of the media and that protection is to be given against interference by the media – *A –v- B paragraph 11 (xii)*. Thus even a public figure, which includes those in the arts, is entitled to a private life although he or she may expect and accept that his or her circumstances will be more carefully scrutinised by the media; *A –v- B paragraph 11 (xii)*. That is not to say, though, that the fact that an individual has achieved prominence on the public stage means that his private life can be laid bare by the media – *Campbell paragraph 41*.

(iv) If public attention has been courted by a claimant then that may lead that claimant to have less ground upon which to object to intrusion – *A –v- B paragraph 11 (xii)*.

(v) Freedom of expression on the media's part, as a counter-force to, for example, privacy is not invariably the ace of trumps but it is a powerful card to which the Court must always pay appropriate respect – *Douglas supra paragraph 49* per Brooke L.J.. Put another way, there is no "presumptive priority" given to such freedom of expression when it is in conflict with another Convention right – *Douglas supra* per Sedley L.J. at *paragraphs 135 and 136*. Nor, as it seems to me, is there any such presumptive priority where the conflict is with rights under the law of confidence; it would be pointless of *Article 10 (2)* to make freedom of expression subject to such rights if it invariably overrode them.

(vi) Where the Court is considering whether to grant *any* relief which, if granted, might affect the exercise of the Convention right to freedom of expression, then the Court, where the proceedings relate to material which is claimed or appears to be journalistic, *must* have particular regard, inter alia, to any relevant privacy code – see *Section 12 (1) and (4)* of the *Human Rights Act 1998* and *Douglas supra* at *paragraph 92*; *A –v- B paragraph 11 (v)*.

(vii) There is such a code in place, that of the Press Complaints Commission, the relevant edition of which is that last modified in December 1999. Under the heading "Privacy" one finds:-

> "3. (i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusion into any individual's private life without consent.
>
> (ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable.
>
> Note – Private places are public or private property where there is a reasonable expectation of privacy."

Under the heading "Misrepresentation" one finds:-

> "11. (i) Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge.
>
> (ii) ……
>
> (iii) Subterfuge can be justified only in the public interest and only when material cannot be obtained by any other means."

Under the heading "The Public Interest" the Code provides that there may be exceptions to, inter alia, the provisions as to privacy and as to misrepresentation where they can be demonstrated to be in the public interest. The public interest is defined to include:

> "(i) Detecting or exposing crime or a serious misdemeanour;
>
> (ii) Protecting public health and safety;
>
> (iii) Preventing the public from being misled by some statement or action of an individual or organisation."

Under the same heading at (iii) one finds:-

> "There is a public interest in freedom of expression itself. The Commission will therefore have regard to the extent to which material has, or is about to, become available to the public."

It has not been said by Mr Price that, for the purposes of that Code, any material public interest existed in relation to the publication of the unauthorised pictures by Hello! and, no doubt, in not contending for any such public interest he is likely to have had in mind that in any event even fuller coverage of the wedding was intended to be published by OK! within a matter of days. In the absence of any public interest the Court is especially bound to pay particular regard to the Code and a newspaper which flouts the Code may have its claim to freedom of expression trumped by *Article 10 (2)* considerations of privacy – *Douglas at paragraph 94* per Brooke L.J. and *A -v- B at paragraph 11 (xiv).* Given the shape of *Article 10 (2)* I take the relevant considerations to include also such as are protected by the law of confidence although I recognise that a right of confidence on a subject not protected as a Convention right is likely to have less weight than a Convention right.

(viii) The regard which the Code requires to be had to whether the material is about to become available to the public is an echo of *section 12 (4) (a) (ii)* of the *Human Rights Act 1998,* where that is a feature to which the Court, in a journalistic matter, is to pay particular regard. However, that someone else – for example a complainant – is about to publish is not to be taken as necessarily justifying publication by the defendant; that authorised publication is due in a moment may, on the contrary, make it harder for the unauthorised publisher to justify his breach – see e.g. *Times Newspapers Ltd –v- MGN Ltd [1993] EMLR 443* (where authorised publication of the full Thatcher memoirs was due in ten days time).

(ix) If there is an intrusion in a situation in which a person can reasonably expect his privacy to be respected then that intrusion will be capable of giving rise to liability in an action for breach of confidence unless the intrusion can be justified – *A –v- B* at *paragraph 11 (x).*

(x) It is still the case that a duty of confidence arises whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected – *A –v- B paragraph 11 (ix).*

(xi) The existence of a relation such as may create a duty of confidence may, and in personal confidence cases commonly will, have to be inferred from the facts – *A –v- B paragraph 11 (ix) and (x).*

(xii) The fact that the information at issue is obtained by unlawful activity does not mean that its publication will necessarily be restrained but that unlawful means have been used to obtain the information may be a compelling factor when a discretion comes to be exercised – *A –v- B paragraph 11 (x)*.

(xiii) It can be right to regard unauthorised photographs as "information" for the purposes of the law of confidence. In the case before me the unauthorised photographs have been said to convey the information "This is what the wedding and the happy couple looked like" – *Douglas supra* at *paragraph 138* per Sedley L.J.. The law of confidence can well encompass photographs of such an event and no less so because the event could have been described in words or by drawings. The photographs:-

> "… conveyed to the public information not truly otherwise obtainable, that is to say, what the event and its participants looked like. It is said that a picture is worth a thousand words. Were that not so, there would not be a market for magazines like Hello! and OK!. The result is not obtainable through the medium of words alone, nor by recollected drawings with their inevitable inaccuracy. There is no reason why these photographs inherently should not be the subject of a breach of confidence."

– per Keene L.J. in *Douglas supra* at *paragraph 165*.

(xiv) It is a familiar course for Chancery Judges to grant injunctions to restrain the publication of photographs taken surreptitiously in circumstances such that the photographer is to be taken to have known that the occasion was a private one and that the taking of photographs by outsiders was not permitted – *Douglas supra* at *paragraph 68* citing *Creation Records Ltd –v- News Group Newspapers Ltd [1997] E.M.L.R. 444* and *Shelley Films Ltd –v- Rex Features Ltd [1994] E.M.L.R. 134.*

(xv) It is well settled that equity may intervene to prevent a publication of photographic images taken in breach of confidence. If, on some private occasion, the prospective claimant makes it clear, expressly or impliedly, that no photographic images are to be taken of them, then all those present will be bound by the obligation of confidence created by their knowledge (or imputed knowledge) of that restriction – *Douglas supra* at *paragraph 71* per Brooke L.J..

187. So far, the general principles I have been concerned to set out have mainly related to cases of personal or individual confidence but as I shall need to consider also commercial confidence I need to add some further matters. Thus:-

(i) The Hello! Defendants accept, of course, that trade secrets can be sold and it is common enough in commercial confidence cases for the benefit of the confidentiality to pass to be shared with others. The confidentiality of a trade secret, for example, may be shared between, and be enforceable by, the inventor and the manufacturer to whom he had granted licence for the secret to be turned to account. Thus in *Gilbert -v- The Star Newspaper Co. Ltd. (1894) 11 T.L.R.. 3*, W.S. Gilbert had found that, in breach of the implied obligation upon cast members and theatre employees not to disclose the plot of the play in respect of which they were engaged, the plot of his comic opera "His Excellency" had been disclosed to the newspaper. Without proof, as it seems, of any particular document of assignment or as to joint ownership but simply relying upon the factual situation Chitty J. required the joinder of the theatre manager as a co-plaintiff and granted an appropriate injunction in favour of both Plaintiffs.

(ii) So also in *O. Mustad & Son –v- Dosen and Anor*, a case of 1928 not reported until *[1964] 1 W.L.R* at *109* and then only as a note. There the confidence had originally been owed by Dosen to his employer, Thoring & Co., which went into liquidation. The benefit of that company's trade secrets was bought by the plaintiffs, O. Mustad & Son. The report is not entirely clear as it sometimes speaks of Dosen having acquired information whilst in "their service", i.e. that of Mustad, yet speaks also of

what Dosen had learned in the service of his "former Master", a reference Thoring & Co.. The better view, as it seems to me, is that Dosen was never in Mustad's employ and never acquired the relevant knowledge whilst in Mustad's employ. On that footing the case shows that the benefit of a confidence can pass, in that case by purchase from the liquidator of Thoring, and, if that is so, then it is hard to see why it should not be shared between and be enforceable by co-owners or by a successor in title, at any rate where the defendant knew or could be taken to have known of the co-ownership or sharing before acting in breach and where all entitled to the confidence assert it. It remains the case, of course, that it is only the person or persons to whom confidence is owed that can assert the confidence – see e.g. *Fraser –v- Evans supra* per Lord Denning at *page 361 c-d* Despite the Hello! Defendants' argument, I find nothing in *Rickless & Ors -v- United Artists Corpn & Ors [1988] Q.B. 450 C.A.* that suggests that, while surrounding circumstances can create the enforceability of a confidence by the original confider, they cannot also create an enforceability shared between more than one, the original confider and another or others, where the facts require that such others should be protected.

188. In my approach to the law I have had to consider a passage from the judgment of Gleeson C.J. in *Australian Broadcasting Corporation –v- Lenah Game Meats Pty Ltd [2001] H.C.A. 63*; *[2001] 185 A.L.R.*, a passage cited by the Court of Appeal both in *A –v- B* and in *Campbell*. The passage reads:-

> "There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibility is in many circumstances a useful practical test of what is private."

189. In *Campbell* at first instance Morland J. had turned to this dictum whilst considering (for the purposes of the first limb of the three-part test suggested by *Coco supra*) whether the details published about the model Naomi Campbell had "the necessary quality of confidence about them" – see *Campbell* in the Court of Appeal at *paragraphs 19 and 20*. She was claiming only in confidence – *paragraph 7* in the Court of Appeal. Morland J. held, in the light of Gleeson C.J.'s dictum, that that test was satisfied. It is not clear to me whether the Court of Appeal in *Campbell* also used the dictum as a yardstick appropriate for judging whether the first *Coco* test was satisfied – consider *Campbell* at *paragraphs 48 and 51* – but when one looks at the matter more closely it seems to me that cannot have been intended. The first limb in *Coco* as to the necessary quality of confidence is to do and to do only, as the full citation from *Saltman Engineering supra* shows – see paragraph 182 above, with whether the information is already public property and public knowledge. It is not concerned with whether or not the information is "private" in the sense that its disclosure would be significantly harmful. The law at that first stage of the *Coco* test does not, for example, in a trade secret case, raise what would be corresponding issues such as whether the trade secret in question is truly such as might be turned to great commercial advantage or with whether its disclosure would be thoroughly damaging to the claimant's trade. It is not, as I see it, appropriate in a case of personal or individual confidence to look into any corresponding question *at this first stage*. Nor, on looking in more detail at the Australian case, does one find that the dictum was intended for any such use.

190. The case did not concern personal or individual confidence or, indeed, in Gleeson C.J.'s view of the facts, the law of confidence at all – *paragraph 55*. The case concerned the surreptitious filming for television of the respondent's brush-tailed possum processing operations, in particular the stunning and killing of such possums at its licensed abattoir. It was not suggested that the operations filmed were

secret or that the requirements of confidentiality had been imposed upon those who might see the operations. The fact that the operations were and had to be licensed by a public authority suggested that information about the nature of the operations was not confidential – per Gleeson C.J. at *paragraph 25*. It was, indeed, conceded that information about the nature of the processing was not confidential and not imparted in confidence – *paragraph 30*. The activities filmed were carried out on private property but were not private in any other sense – *paragraph 35*. It was against that background that the respondent and the Attorney-General of the Commonwealth, intervening, asserted not confidence but a very broad kind of unconscionability and privacy – *paragraphs 31 and 38*. But the learned Chief Justice was cautious about "declaring a new tort of the kind for which the respondent contends" – *paragraph 41*.

191. It was in the context of difficulties in constructing such a tort that the passage cited above appeared, at *paragraph 42*, the difficulties including a reflection by the Chief Justice on whether notions of privacy deriving from the concept of human dignity could, under Australian law, in any event be invoked by a corporation. The last sentence of the citation was concerned with what might be regarded as *private* for a possible law of privacy or unconscionability; it did not purport to be a description of what may be confidential for the purposes of the law of confidence, still less was it addressing the first limb of the three-part test in *Coco supra*. Moreover the dictum does not even purport to be an exclusive definition of what is private; that matters the disclosure of which would be highly offensive to a reasonable person of ordinary sensibilities may, on that account, be regarded as private does not, of itself, suggest that no other matters can be so regarded.

192. On this basis I do not feel it necessary, whilst considering the law of confidence, to subject the unauthorised photographs to any test such as whether a reasonable person of ordinary sensibilities would, in the circumstances of the Douglases, have regarded them or their publication by Hello! as highly offensive. However, had I been required to apply that test, I would not have held the photographs themselves to be highly offensive or offensive at all but that their taking and their publication, in all the surrounding circumstances, was likely to offend the Douglases.

193. It is not the case, where all three components of the *Coco* test are satisfied, that substantive relief necessarily follows. That would be to confuse the fundamental nature of the legal right with the question of whether equity affords a remedy in the particular case – see S*tephens -v- Avery [1988] I Ch 449* at *454 d-f* per Sir Nicholas Browne-Wilkinson V-C. It is thus, for example, that no confidence "in iniquity" will be protected, nor does equity extend itself to protect mere trivial tittle-tattle, however confidential it might be. It is also, as it seems to me, that it is at the remedy or relief stage that equity can and should take into account such features as whether, on conducting a balance between confidentiality and freedom of expression, substantive relief (e.g. an injunction or damages or equitable compensation beyond the nominal) should be granted – see Lord Griffiths in *Guardian supra* at *pages 268-269* as to the Court refusing, in appropriate cases, to uphold the right to confidence and as to Judges being required to balance the public interest in upholding a right to confidence against some other public interest, an approach only the more appropriate now that the Human Rights Act and the recent authorities to which I have referred require conflicting issues such as confidentiality on the one hand and freedom of expression on the other to be weighed and a balance struck. It is at this stage that the degree of offensiveness of the activity complained of and its propensity to injure may be put in the scale.

A provisional application of the law to the facts

194. Before I examine the Hello! Defendants' arguments on the law of confidence I shall attempt to apply the law, as I have described it so far, to the facts, those I have already found and those I shall describe as I proceed.

195. I shall first look to see whether it can be right to regard the Douglas wedding generally, and, in particular, the reception coupled with rights to the photography of the event, as a commercial entity attracting such aspects of the law of confidence as can be deployed to protect trade secrets. I have

already noted the Council of Europe's Resolution and the recognition in *A –v- B supra* - see paragraph 186 (iii) - that information about private lives has become a lucrative commodity for certain sections of the media. Here it is difficult to deny the title of commodity to that which the two rival magazines each bid a £1m or more to obtain. Moreover, to bride and groom, actor and actress, the public representation of their respective appearances was and is an important part of a successful career and business. Thus in evidence that was not disputed Miss Zeta-Jones said:-

> "Both Michael and I are in the business of 'name and likeness'. Any photographs of us that are published are important to us, not just personally but professionally as well. People go to see movies specifically because either Michael or I are in them and they have expectations, amongst other things, of the way we will look. Those expectations are created to a significant degree by the images they see of us in the media. Directors take into account the public's perception of actors and actresses when casting for films. The hard reality of the film industry is that preserving my image, particularly as a woman, is vital to my career. I had a lesson in Britain of the way in which poor publicity can stunt your career prospects. I have always been determined not to allow this to happen to me in the United States where I do virtually all my work. For this reason, there is a clause in every performance contract I sign giving me full photo approval. This means that no still photographs of the movie may be published or distributed without my prior consent. This is not a right that all actors manage to obtain and is only granted to those with sufficient 'star' power. It is a right that I have had to work hard to obtain and I work hard to enforced and control it. I spend a great deal of time sifting through the hundreds of photographs that are taken of me during a film shoot and selecting those which I know will benefit my career. "

Mr Douglas says:-

> "On a professional level, because my name and likeness is a valuable asset to me, it has always been important for me, professionally, to protect my name and likeness and to prevent unauthorised use of either and I have taken steps to do so."

196. Given that and given also the lengths to which Miss Zeta-Jones and Mr Douglas went to ensure the privacy of their wedding, I see it as appropriate to examine the applicability of the law of confidence on the basis that the Claimants had here a valuable trade asset, a commodity the value of which depended, in part at least, upon its content at first being kept secret and then of its being made public in ways controlled by Miss Zeta-Jones and Mr Douglas for the benefit of them and of the 3rd Claimant. I quite see that such an approach may lead to a distinction between the circumstances in which equity affords protection to those who seek to manage their publicity as part of their trade or profession and whose private life is a valuable commodity and those whose is not but I am untroubled by that; the law which protects individual confidences and a law of privacy may protect the latter class and provide no reason to diminish protection for the former. So far as concerns OK!, the right to exclusivity of photographic coverage of the wedding was, in contrast with nature of the confidence as to the 1st and 2nd Claimants, even more plainly a right in the nature of a trade secret.

197. I thus regard photographic representation of the wedding reception as having had the quality of confidence about it. Of course, the general appearance of both Mr Douglas and Miss Zeta-Jones was no secret; what they looked like was well known to the public. But that does not deny the quality of commercial confidentiality to what they looked like on the exceptional occasion of their wedding. As I have said, the very facts that Hello! and OK! competed for exclusivity as they did and that each was ready to pay so much for it points to the commercial confidentiality of coverage of the event. The event was private in character and the elaborate steps to exclude the uninvited, to include only the invited, to preclude unauthorised photography, to control the authorised photography and to have had the Claimants' intentions in that regard made clear all conduce to that conclusion. Such images as were, so to speak, radiated by the event were imparted to those present, including Mr Thorpe and his

camera, in circumstances importing an obligation of confidence. Everyone there knew that was so. In the circumstances as I have held them to be, Mr Thorpe knew (or at the very least ought to have known) that the Claimants reasonably expected the private character of the event and photographic representation of it to be protected.

198. As for the Hello! Defendants, their consciences were, in my view, tainted; they were not acting in good faith nor by way of fair dealing. Whilst their position might have been worse had I held that the taking of unauthorised pictures for use by them had been truly commissioned in advance, even without that there is in my view enough to afflict their conscience. They knew that OK! had an exclusive contract; as persons long engaged in the relevant trade, they knew what sort of provisions any such contract would include and that it would include provisions intended to preclude intrusion and unauthorised photography. Particularly would that be so where, as they knew, a very considerable sum would have had to have been paid for the exclusive rights which had been obtained. As to their knowledge of steps taken to protect the secrecy of the event, their own written text in their Issue 639 spoke of "elaborate security procedures". The surrounding facts were such that a duty of confidence should be inferred from them. The Hello! Defendants had indicated to paparazzi in advance that they would pay well for photographs and they knew the reputation of the paparazzi for being able to intrude. The unauthorised pictures themselves plainly indicated they were taken surreptitiously. Yet these Defendants firmly kept their eyes shut lest they might see what they undeniably knew would have become apparent to them. Breach of confidence apart, had the Hello! Defendants opened their eyes they would have seen that the taking of the photographs which they bought had involved at least a trespass. The fact, as I have held it to be, that they did not in advance and in terms require or authorise on their behalf trespass and surreptitious photography by Thorpe or by any other paparazzo does not disprove the unconscionability, as I hold it to be, under English law, of their publication of the unauthorised photographs in England and Wales.

199. It cannot be doubted but that the Claimants suffered detriment from the publication by the Hello! Defendants. Distress was caused to Mr and Mrs Douglas who also had to re-arrange their plans for approval of the authorised photographs. They incurred expenses that would otherwise have been unnecessary. They may also have suffered financial loss if it transpires that syndication receipts that would otherwise have become payable to them were lost upon syndication being either less extensive or less profitable than it would have been had not wedding photographs being published by Hello!.

200. As for OK!, it not only had costs in the re-arranging of its schedule so as to get out some of the authorised images as soon as possible to mitigate loss but it lost also the kudos of being and being seen to be the only one of the two leading rivals to be able to offer authorised coverage of the "showbiz wedding of the year". They may well have sold fewer copies of their magazine and have received less in respect of syndication rights than would have been the case had Hello! not published the unauthorised pictures.

201. A wedding is an exceptional event to any bride and groom and I do not hold that Mr and Mrs Douglas' position as public figures or as persons who had, as to other events, no doubt been tolerant of or even welcoming to publicity, as lessening their right, as any might have, to complain of intrusion at their wedding or of the consequences of that intrusion. It was an intrusion against which elaborate steps had been taken. I have in mind, too, that the steps taken by the Douglases were not taken solely for reward or as "hype" but were taken in a genuine and reasonable belief that thereby an offensive media frenzy would be avoided.

202. However, it does not follow from the mere presence of all the elements of a successful case in breach of confidence that substantive relief will follow. The Hello! defendants' right to freedom of expression and provisions of *section 12* of the *Human Rights Act 1998* here come into play, as I have indicated. *Subsection (1)* of *section 12* provides:-

> "This section applies if a Court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression."

203. *Section 12 (5)* makes it clear that "relief" includes any remedy or order. The term thus includes an award of damages or of equitable compensation. Whilst any award of damages against the Hello! Defendants and in favour of the Claimants does not, in one sense, affect the Hello! Defendants' right to freedom of expression as to the unauthorised photographs because they have already been published, any conclusion of mine that conduces to awards of damages generally can be said to affect the exercise of the Convention right to freedom of expression because a possible exposure to a substantial monetary award can deter or inhibit expression almost as completely as would an injunction. I thus proceed on the basis that *section 12* applies to the case before me.

204. Striking a balance between freedom of expression and confidentiality as directed by *section 12* and the authorities to which I have referred, I have in mind that no public interest is claimed for the unauthorised pictures, either within the understanding of the phrase in the general law or within the terms of "the relevant privacy code", the Press Complaints Commission Code to which I earlier referred. I have in mind that photographic representation of the wedding (though not by way of the unauthorised photographs) was, in November 2000, about to become available to the public by way of the intended editions of OK! and that the unauthorised photographs, journalistic material but of poor quality, did become available to the public at the same time as the authorised pictures. I do not regard these features as sufficiently persuasive to exclude a grant of relief to the Claimants. More significant, in my view, are the terms of the PCC Code.

205. Looking at that Code, there was an intrusion into individuals' private lives without consent; that intrusion was known or must be taken to have been known to the Hello! Defendants, as was also that it amounted to a failure to respect the Douglases' private and family lives. I have not understood any justification for the intrusion to have been advanced except Hello!'s wish to include as early as practicable some coverage of the event, an event which they were confident their readers would wish it to cover. I do not hold the intrusion to have been justified. The very same principle in the Code that provides that the use of long lenses to take pictures of people in private places without their consent was unacceptable must, as I read it, inescapably also make the surreptitious use of short lenses to take pictures of people in private places without their consent at least equally unacceptable. Moreover, on the day and in the surrounding circumstances, the parts of the Plaza Hotel in New York where the wedding ceremony and reception took place were private places in the sense, used by the Code, that they were places in respect of which there was a reasonable expectation of privacy. Given that Mr Thorpe, not an invitee, managed to effect an entry and took the trouble to wear a "tuxedo" in order to hold himself out as if a guest at the wedding, I hold also that the unauthorised photographs were obtained by misrepresentation or subterfuge. The PCC's Code was broken and the Hello! defendants either knew or, had they not closed their eyes to the truth, would have known and hence must be taken to have known, that that was the case.

206. So far, then, and without yet having looked at the particular arguments on the law which the Hello! Defendants press upon me, I provisionally see the rights to freedom of expression of the Hello! defendants to have been subject to and, in the circumstances, to have been overborne by the rights of all the claimants respectively under the law of confidence.

The Hello! Defendants' defences under the law of confidence

207. In response to the Claimants' claims under the law of confidence Mr Price and Mr Fernando raise a formidable battery of arguments. They say that the information as to which confidence is claimed is not sufficiently identified and that the protection of equity is to be denied because events of the wedding day could have been made public other than photography by, for example, a verbal description or by drawings. That argument is denied force by the observations in the Court of Appeal to which I have referred in paragraph 186 (xiii) and which I adopt. In any event, where the relevant principles are broad ones operating in conscience I doubt the wisdom of attempting to split hairs.

208. Next it is said that it was generally understood that the unauthorised pictures, once taken, could be fairly sold, bought and published. That is true in the sense only that there *could* have come about a

situation in which someone whose conscience was wholly untainted by notice or knowledge of the circumstances that gave rise to the claim in confidence could have acquired the pictures, a person who would, on that account, have been able to publish them without risk of restraint from, or of having to provide compensation to, the Claimants. The point, however, has nothing whatsoever to do with the factual position of the Hello! Defendants.

209. Next it is said that as the unauthorised pictures and Hello!'s authorised ones, as it transpired, on the Court of Appeal's lifting of the injunction, both came out on the same day, any rights of the Claimants were thereby lost; I cannot see that the giving or withholding of the protection of equity is to be denied by reason only of a defendant, otherwise liable, having been able to rush into print. It would be extraordinary if, by accelerating his otherwise unconscionable publication, a defendant could say that he had done no wrong.

210. Next the Hello! Defendants say that any confidence that otherwise would or might have existed evaporated upon the contract being made by the Douglases for sale of authorised pictures of the same event. No authority is given for the proposition save for *section 12 (4)* of the *Human Rights Act* which, as I read it, does not support the proposition even as to a personal or individual confidence. But, of course, when the claim is regarded as one of commercial confidence, so far from its sale being destructive of confidence, it is a common form whereby the protected information should be turned to account, as, for example, might be the plot of an opera or of a proposed television series – see *Gilbert supra* and *Fraser and Ors –v- Thames Television [1984] 1 Q.B. 44*.

211. Next it is said that the Hello! Defendants bought the information, the unauthorised photographs, rather than taking them themselves. That, of itself, is no defence where the successor in title, so to speak, to the original breaker of confidence has or is taken to have a conscience which is tainted. Were it otherwise, as Lord Griffiths pointed out – see paragraph 181 above - the protection of the law of confidence would be entirely worthless.

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

212. Then these Defendants say, rightly in my view, that their rights under Article 10 are engaged. But that is no trump card; a balance has to be struck and, as I have attempted to do by reference to the relevant Code, the balance falls against the Hello! Defendants' Article 10's rights. These Defendants also assert, again rightly, that the countervailing rights of confidence can only overcome an Article 10 (1) right to freedom of expression if they are "prescribed by law". In my judgment they are; I am not conscious of having extended but merely of having applied the law.

213. Next, as I have understood the argument, it is said that a right to confidence that would otherwise have existed is lost upon a claimant himself making the information public. I accept that that may in some cases be so but I do not see that the argument denies relief at trial to a claimant on the ground that he had *intended* to make the information public. If it were otherwise then whenever an injunction were to be declined and where, therefore, the defendant was free to and did publish ahead of or at the same time as the claimant, the refusal of the injunction would, in effect, be a denial of all relief. Damages could never be an adequate remedy, yet here the Court of Appeal has held that they can be.

214. Then these Defendants say that the information contained in the unauthorised pictures was so generally available as that it could not be regarded as confidential. That, in my view, flies in the face of the facts as to the considerable lengths gone to in order to keep the appearance of the dress and the cake and of the bride and groom on the day all secret, to keep the event to invitees to the exclusion of others and to ensure that only approved photographs were to be able to be both taken and published.

215. Next it is said that what the Claimants are truly claiming is a non-existent intellectual property right corresponding to copyright in the visual aspect of the wedding. That the rights claimed by the Claimants are in some respects capable of being likened to or to overlap with a claim in copyright does not, in my judgment , deny the claims validity. There are crucial differences, of which the fact that the claim in confidence operates by reference to the conscience of the defendant is perhaps the most significant. That there may be an overlap does not disable a claimant from the ability to assert the separate right, not in copyright, which the Claimants here assert.

216. A recurring theme on the part of these Defendants is that what the Douglases, in particular, were seeking was not privacy or confidentiality but control. They wanted to be sure that the only visual representations of the wedding that were to be available to the media were such as had been approved by them. In that way control over the media would be exercised. That, though, overlooks that control is not an improper objective of the law of confidence; that certain information should not be published or that copies of certain documents should be destroyed or returned or that abuse of a trade secret should be barred to a person are all both familiar aspects of the law confidentiality and aspects of control. I do not see the fact that control was sought to be exercised as of itself denying the attempt the characteristics of an application of the law of confidence; it is, rather another factor in the overall balance between confidence and freedom of expression.

217. Then it is said that by intending to make public *some* visual aspects of the wedding (namely photographs selected by them) the Douglases lost the right to claim in confidence as to <u>any</u> such representations (and therefore lost the right to complain of the unauthorised pictures). But I cannot see that that should follow, especially if one regards the confidence here as a commercial one. It is common, with respect to commercial confidences, that turning them to account involves making them public; the fact that there is an intention to make them public does not deny that rights of confidence can exist with respect to them. Moreover, though these may not be complete analogies, it would be absurd if, for example, a playwright, intending his play later to be performed in public, upon his disclosing to a prospective supporter in confidence only that his play was about, say, a Prince of Denmark or if a television screen-writer, intending his series to be put on television, upon his disclosure only that his idea was for a series about three girls sharing a flat in Kensington, should in either case thereby lose rights to the confidentiality of the play or of the idea for a series. Mr Tugendhat, as an example shewing that disclosure to the public of a chosen part can still leave rights in confidence in an unpublicised remainder, points to the Royal Family in the Nineteenth Century having permitted to be published engravings of an 1841 Landseer Oil. The painting showed Her Majesty Queen Victoria, H.R.H. Prince Albert, their eldest daughter, the Princess Royal, Victoria, their dogs and dead game and other birds in the green drawing room at Windsor. Mr Tugendhat asks rhetorically whether it could possibly be that by permitting that family scene to be made public the Royal Family thereby lost such rights as the law of confidence otherwise would have conferred on them to restrain publication of *other* representations of their private and family life. I see the force of the example. Indeed, if anything, the Claimants here are in a better position because at the very point at which the Hello! Defendants intended to publish, unless enjoined, the Claimants had allowed the publication of nothing but one close-up of the bride and groom showing neither the bride's dress nor the wedding cake.

218. Then Mr Price and Mr Fernando referred to me to *Pollard –v- Photographic Co. (1888) 40 Ch Div. 345.* Mrs Pollard had contracted with the defendant photographic company for photographs to be taken of herself for her own purposes. She found that the defendant was using the photograph for quite different purposes. The case was argued on the footing that, she having contracted for the photograph to be taken for one purpose, there was an implied term that it should not be used for any other. North J. held that such an implied term did exist. There was no citation of authorities upon or any examination of, the law of confidence. Before me Counsel argued that publication of a photograph of Mrs Pollard taken by a paparazzo outside the photographic company's premises would not have been a breach of confidence. That, as it seems to me, is very likely but it is nothing to do with this case. If the portrait photograph of Mrs Pollard had been taken for publication by her and was published then, say these defendants, there could, *apart from copyright and contract*, be no cause of action against the photographer were he separately to publish the photograph. That example supposes that the unauthorised publication took place after the authorised one. That is not the case before me.

219. Then these defendants comment on *Shelley Films supra* saying that it was important in that case to the producers' marketing and commercial strategy that the appearance of the latex Frankenstein creature mask in that case was kept secret pending the release of the film in which the mask was to be worn. I do not see that the comment assists these defendants; it was similarly important to the marketing and commercial strategy of all the Claimants that the appearance of the bride, groom wedding cake and other features of the wedding should be kept secret pending release of the approved photographs. In the *Shelley* case the learned Deputy High Court Judge said at *page 151*:-

> "I do not ignore, of course, that there will come a time, possibly before the action comes on for trial, which I am told by Counsel I should assume it will, when Shelley's right to the protection it now seeks will be lost because Shelley will by then have released its confidential information to the public in a manner of its own choosing."

220. There is nothing about that passage which suggests that a claimant loses any of his remedies when his release to the public is not earlier than that, by the defendant, of which he complains.

221. Next these Defendants are critical of the decision in *Creation Records supra* but the extensive citation from it by Brooke L.J. in the Court of Appeal hearing in *Douglas –v- Hello!* contains no criticism of the case and I do not accept that the case contains any relevant confusion between the scene itself which the observer saw and a photographic record of it. The law of confidence may there have been used to create an exclusive right to photography but I do not understand the Court of Appeal to have disapproved of that.

222. Then these Defendants rely upon *Sports & General Press Agency –v- "Our Dogs" Publishing Co. [1917] K.B. 125 C.A.*. The plaintiff there had sold the Press photographic rights to a dog show. An independent photographer took pictures and sold them to the defendant, who published them. The plaintiff sought to restrain further publication. An injunction was refused on the ground that the dog show organisers and the plaintiff could, by contract, have laid down, but had failed to lay down, conditions of entry or as to banning the use of unauthorised cameras. The authority does not assist in a case where (as before me) conditions of entry (albeit not by contract) were laid down and where there had been a well-understood ban on cameras. No questions as to confidentiality were argued.

223. These Defendants then referred to *Times Newspaper -v- MGN [1993] EMLR 443 C.A.*. Sir Thomas Bingham M.R. complained that the Court would have welcomed, but was denied, the opportunity of considering the plaintiffs' application for an injunction at greater length. Another difficulty in the case was that the plaintiffs (oddly, in my view) were not able satisfactorily to frame an injunction that did not go too far. However, the Master of the Rolls did say that the unauthorised extracts from Lady Thatcher's memoirs, acquired by the defendant "…. by means that are unknown" and parts of which the defendant had already published, were "Certainly not information which is confidential in a sense that the public is not intended to learn of it, because this is material which is intended to be published, no doubt, as widely as an efficient publisher can procure".

224. I respectfully doubt whether, even as to a wholly personal or individual confidence, an intention to publish should of itself invariably deny a claimant relief but it cannot sensibly deny relief in the case of a commercial secret. An inventor (to return to a point I have touched upon) might, for example, confide to a prospective manufacturer secret details of his invention which he hoped soon to make public by way of an application for a patent. So also in the case of the plot of a comic opera – see *Gilbert supra*, or the idea for a television series – *Fraser –v- Thames Television Ltd. [1984] 1 Q.B. 44*. In such cases it would be absurd, as I have already mentioned, if an intention to make the subject-matter of the confidence public should destroy confidentiality. It is to be noted, too, that in considering whether "to take the extreme step of restraining publication of material which a newspaper wishes to publish", the Court of Appeal in 1993 did not then have the guidance of *section 12 (4)* of the *Human Rights Act* and its reference to "any relevant privacy code". Had that been a relevant consideration in 1993 and had the circumstances of the defendants' acquisition of the material accordingly been investigated, questions might well, one would think, have arisen as to whether the

material had been acquired through misrepresentation, subterfuge or worse. I do not regard *Times Newspapers* as authoritative in the post Human Rights Act age.

225. Then these Defendants argue that *Woodward –v- Hutchins [1977] 1 W.L.R. 760 C.A.* illustrates that a claimant who has deliberately sought publicity loses the right to insist upon confidentiality in respect of publicity. That, as it seems to me, goes too far and I do not see the case as establishing that proposition; what the case does illustrate is that where a claimant has fostered an image which is not a true one, there can be a public interest in correcting it – see also *Campbell supra* (where the claimant could be described as a rôle model). The public, said Lord Denning, should not be misled – *page 764*. The defendant's case in *Woodward* was that the image which the plaintiffs had created was one of fallacies and half-truths – per Bridge L.J. at *page 765*. No such allegation is made against Mr and Mrs Douglas, nor is it even said that the unauthorised photographs were intended to correct a false image which the authorised ones were about to create. To hold that those who have sought *any* publicity lose all protection would be to repeal Article 8's application to very many of those who are likely most to need it. I would accept that a claimant who has himself publicised a certain area of his private life (for example his sexual proclivities and activity) might well lose the protection otherwise available to him *in that area* or, possibly, even more generally, but I have not seen how that argument could serve to diminish the protection to be afforded to the unique event, not "hyped" by them, of the Douglas wedding.

226. I hope I have now dealt with at least the principal submissions of the Hello! Defendants on the English law as to confidence. For the reasons I have given their arguments do not deflect me from the view I expressed earlier.

Conclusions as to confidence

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

228. Were I to be wrong in having regarded the 1st and 2nd Claimants' positions as akin to that of holders of a trade secret and had the confidence in question therefore to be regarded as wholly personal and individual, then, as I see it, the defence against them (but only them) that they intended by sale to release photographs of the event to the public, albeit ones selected by them, has greater force. Even so, I have difficulties. I do not understand Mr Price to say that there would have been no right under the law of confidence and in turn no right to injunctive or other relief if the bride and groom, having taken steps to keep the event private by way of security as they did, then made no agreement with any magazine and chose to allow no photographs at all to be published. If in such a case equity would have protected them, why should a sale of the photographic rights under which publication of photographs of the event were *intended* to be published itself deny that protection ahead of their actual publication? The Court of Appeal knew, of course, that the Douglases had sold exclusive photographic coverage of the wedding to OK! with the knowledge that authorised photographs would thus be published but no member of the Court held that the Douglases thereby lost <u>all</u> rights and had destroyed their whole causes of action. Instead, at most, the Court held that they had thereby confined their relief under their causes of action to damages. Even in a contest between, on the one hand, a claim to personal confidence weakened by sale and the intention to publish, and, on the other, the Hello! Defendants' rights to freedom of expression, I would still have been affected by the circumstances I have described, including Hello!'s breach of the PCC Code. I would have come to the same decision as that given in paragraph 227 above. I fail to see why the fact that publication of authorised photographs was *intended* makes it any less unconscionable on the part of the Hello! Defendants to seek, as they did, to anticipate that publication.

Privacy

229. It is notorious that, as our law was before the Human Rights Act, there was no effective law of privacy; there was nothing to fill such gaps as might exist when neither the law of confidence nor any other law protected a claimant. That other jurisdictions, in general terms no less free or democratic than this one, have apparently workable laws of privacy which neither oppress nor stifle is at least arguable; Mr Tugendhat refers me to examples in Germany, Canada and France. Senor Enrich in his clear and impressive evidence as to Spanish law showed how such a law operates in Spain. That a strong case can be made, by way of the Convention and the Human Rights Act coupled with decisions of the ECHR, that in some respects we do now have a law of privacy is apparent from the judgment of Sedley L.J. in *Douglas supra.* I am invited to hold that there is an existing law of privacy under which the 1st and 2nd Claimants are entitled to relief. I decline that invitation for five reasons.

(i) Whilst Sedley L.J.'s judgment provides a powerful case for the existence, already, of a law of privacy, that another view is tenable can be seen from the judgments in *Wainwright –v- Home Office [2002] 3 W.L.R. 405 C.A.*, judgments delivered on the 20th December 2001, after *Douglas*. There the events complained of occurred before the Human Rights Act came into effect and were such that no case in confidence could be made. The hearing before the judge below and, of course, in the Court of Appeal, was after the Human Rights Act had come into force. The Court of Appeal held there had been no general law of privacy before the Act and that the Act had had no retrospective effect. Thus even had the Court held either that there had been or that there had not been a law of privacy created by the Human Rights Act, it could only have been obiter. Nonetheless there was reference made to the decision in *Douglas*. Lord Woolf, beyond describing Sedley L.J.'s judgment as "most instructive" – *paragraph 20* - did nothing further to espouse it. Mummery L.J., looking to the future, foresaw difficulties in the judicial development of a comprehensive or "blockbuster" tort – *paragraph 60* and Buxton L.J. set out a strong case from *paragraph 97* on as to the difficulties in the way of creating any such broad tort.

(ii) Sedley L.J's case for a general tort depends, on my reading of his judgment, on our law otherwise being so inadequate in relation to the protection and enforcement of individual rights to private and family life as to fall short of compliance with the Convention, the Human Rights Act and the requirements of decisions of the ECHR. Even accepting the attractive argument so raised, it does not point to any need for the creation of new law in areas in which (for example, by way of reference to the law of confidence) protection and enforcement are already not only available in theory but in practice even in the particular case. As I have held Mr and Mrs Douglas to have been protected by the law of confidence, no relevant hole exists in English law such as, on the facts of the case before me, a due respect for the Convention requires should be filled.

(iii) So broad is the subject of privacy and such are the ramifications of any free-standing law in the area that the subject is better left to Parliament which can, of course, consult interests far more widely than can be taken into account in the course of ordinary inter partes litigation. A judge should therefore be chary of doing that which is better done by Parliament. That Parliament has failed so far to grasp the nettle does not prove that it will not have to be grasped in the future. The recent judgment in *Peck –v- United Kingdom* in the ECHR, given on the 28th January 2003, shows that in circumstances where the law of confidence did not operate our domestic law has already been held to be inadequate. That inadequacy will have to be made good and if Parliament does not step in then the Courts will be obliged to. Further development by the Courts may merely be awaiting the first post-Human Rights Act case where neither the law of confidence nor any other domestic law protects an individual who deserves protection. A glance at a crystal ball of, so to speak, only a low wattage suggests that if Parliament does not act soon the less satisfactory course, of the Courts creating the law bit by bit at the expense of litigants and with inevitable delays and uncertainty, will be thrust upon the judiciary. But that will only happen when a case arises in which the existing law of confidence gives no or inadequate protection; this case now before me is not such a case and there is therefore no need for me to attempt to construct a law of privacy and, that being so, it would be wrong of me to attempt to do so.

(iv) I have in mind also the judgment of the Court delivered by Lord Woolf in *A –v- B supra* where, amongst the guidelines laid down, one finds at *paragraph 11 (vi):-*

> "It is most unlikely that any purpose will be served by a Judge seeking to decide whether there exists a due cause of action in tort which protects privacy. In the great majority of situations, if not all situations, where the protection of privacy is justified, relating to events after the Human Rights Act 1998 came into force, an action for breach of confidence now will, where this is appropriate, provide the necessary protection."

(v) Finally, it is not been suggested that, even were there to be a law of privacy, the Douglases would be able to make any recovery greater than that which is open to them under the law of confidence as I have held it to be.

For those reasons I say nothing further as to any law of privacy.

The Data Protection Act 1998

230. There is a full analysis of the relevant provisions of the Act in *Campbell supra* at *paragraphs 72-138*, which, fortunately, make an understanding of the Act easier than do the unvarnished provisions of the Act itself. At the risk of my construing the authority rather than the Act, I find, after reading *Campbell*, that all three Hello! Defendants can be taken to be a data controller, that the unauthorised pictures represent personal data and that publication of them in England is to be treated as part of the operations covered by the requirements of the Act. That is because when a data controller is responsible for the publication of hard copies that reproduce data that has previously been processed by means of equipment operated automatically, the publication forms part of the process and falls within the scope of the Act. The hard copies here were, of course, the copies of Hello! magazine – see *Campbell* at *paragraphs 75, 76, 78 and 107* and the sections of the Act there referred.

231. That there had been such processing by equipment operating automatically appears because such processes were used in the transmission by ISDN Line from California to London, in the calling up of the pictures on to a screen in London by Sue Neal, in her transmission of them to Madrid by ISDN Line, in the taking out from unauthorised photographs of the defects that one or more of the earlier processes had introduced into them, in the transmission from Hola's office in Madrid to the printers and in the processes used in the course of preparation for and in the course of printing. I am told there was also publication of the unauthorised photographs on a Hello! website. The exemption given in respect of the processing of personal data for journalistic purposes, the exemption which the Court of Appeal held to apply in *Campbell*, does not apply in the case before me because it depends, inter alia, on the data controller reasonably believing that publication would be in the public interest. I have had no credible evidence as to such a belief nor, given the nature of the unauthorised photographs, the manner of their obtaining and that the Hello! Defendants well knew that authorised photographs were shortly to be published by OK!, do I see any room for any conclusion that publication could reasonably be so regarded. That the public would be interested is not to be confused with there being a public interest.

232. Lest the *section 32* exemption should not be available to his clients, Mr Fernando, who alone addressed argument for the Hello! Defendants under the *1998 Act*, argued also that they could claim the exemption conferred by the transitional provisions in *Schedule 8 of the Act*. The only relevant kind of exemption is that of *Part II of Schedule 8*, relating to the period between the commencement of the Schedule and the 24th October 2001 – defined as "the first transitional period". During that period, which began on the 24th October 1998, "eligible automated data" were made exempt from certain provisions – *paragraph 13 (1) of the 8th Schedule*. But to be eligible automated data, the data has first to be "eligible data" – *paragraph 1 (2) of the 8th Schedule*. And, where the data is personal data (such as the unauthorised photographs) the data will only be eligible at any time:-

> "….. if and to the extent that they are at that time subject to processing which was already under way immediately before 24th October 1998."

– Schedule 8 paragraph 1(1).

233. That seems to require an examination of whether, when the proceedings began or now ("at that time") the unauthorised pictures were subject to "processing which was already under way immediately before the 24th October 1998". As the unauthorised photographs were not taken until November 2000, that appears to be impossible. Mr Fernando alternatively says that if any photographs of Mr Douglas and Miss Zeta-Jones were processed by the Hello! Defendants before the 24th October 1998 then, although that processing was of different photographs, that suffices. But "already under way" seems to suggest a continuous process from the 24th October 1998 as would be the case where, for example, a running bank account was processed both before and after that date. I fail to see how it assists that *other* photographs than the unauthorised photographs but relating to Mr Douglas or Miss Zeta-Jones were processed before that date; photographs even of the same subjects are quite separate items of personal data in a way that, say, operations on a running bank account, where the balance at any time is dependent upon the cumulative effect of earlier transactions, are not.

234. Mr Fernando then says that it is enough that some processing of personal data in the form of photographs (even not of Mr Douglas or Miss Zeta-Jones at all) has continuously been a feature of the work of the Hello! defendants since the 24th October 1998. That seems to prove too much; had there been but one photograph by way of personal information of anyone in process before the 24th October 1998, the transitional provision would, if this argument is right, exempt the, say, 5,000 photographs by way of personal data processed after that date to the extent of the exemption, an exemption which would be so wide as to be surprising and such as, had it been attended at all, would have been likely to have been spelled out in terms much clearer than one finds in the difficult terms of *Schedule 8 paragraph 1 (1).* I do not find the Hello! Defendants to be able to claim any of the exemptions by way of transitional relief offered by *Schedule 8 of the Act*.

235. That being so the Hello! Defendants as data controllers were, without exemption, under a duty to comply with the data protection principles as to the unauthorised photographs – *section 4 (4) and (1).* Their processing therefore had to be done "fairly and lawfully" and in such a way that at least one of the conditions in *Schedule 2* was met – *Schedule 1 Part I paragraph 1 (a).*

236. As for the fairness of the processing, regard has to be had as to how the data were obtained – *1st Schedule Part II paragraph 1 (1).* Given the circumstances, as I have held them to be, in which the unauthorised photographs were obtained, that regard points to the processing (in particular the publication) as having not been fair. Nor are the other pre-requisites of fair processing as set out in *1st Schedule Part II* met.

237. As for the 2nd Schedule, concerned with the processing of personal data, no consent to the processing (including publication) of the unauthorised photographs was given by "the data subjects" – Mr and Mrs Douglas – *paragraph 1 of Schedule 2*. The processing was not necessary for any of the purposes of *paragraphs 2-5* inclusive of the 2nd Schedule. As for *paragraph 6*, it provides:-

> "The processing is necessary for the purposes of legitimate interests pursued by the data controller …… except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

238. The Hello! Defendants did, in my view, have a relevant legitimate interest – the publication of their magazine to include coverage of the Douglas wedding – but *paragraph 6* denies legitimacy to the processing to that end if it is unwarranted by reason of prejudice to the rights and legitimate interests of the data subjects. The provision is not, it seems, one that requires some general balance between

freedom of expression and rights to privacy or confidence; where there is a real public interest in relation to the material in issue then in the case of the Press such a general approach will have been considered under *section 32*. Here (in the events which I have held occurred) the question is more simply whether the publication is unwarranted by reason of the prejudice to Mr and Mrs Douglas' legal rights. *Paragraph 6* does not provide, as it so easily could have done, how serious has to be the prejudice before the processing becomes unwarranted and in point of language any prejudice beyond the trivial would seem to suffice. Here the prejudice to each of Mr and Mrs Douglas by reason of the publication was in my judgment above the trivial and indeed was substantial. I therefore do not see *paragraph 6* as assisting the Hello! Defendants. Nor do I see that the fact that the Douglases had by contract authorised processing by OK! as working some general waiver such that anyone else, including Hello!, might process by way of publication photographs of the wedding on the footing that the Douglases' rights had evaporated.

239. I thus see no defence to Mr and Mrs Douglas' claims, as individuals, to compensation under *section 13 (1) of the Act*; had their consents to the publication of the unauthorised photographs been asked for, as the Act requires, it would, I am confident, have been refused. But can it be said that such damage or distress as was suffered was "by reason of any contravention by a data controller" of any of the requirements of this Act. If the obligations under the Act had been performed would it truly have made any difference? As it seems to me, it is only if deployment by Mr and Mrs Douglas of the data protection argument would have caused the Hello! Defendants, on consent being refused to them, to elect not to publish the unauthorised pictures or if such an argument would have caused the Court of Appeal to leave Hunt J's injunction in place, that it could reasonably be said that the damage and distress occasioned to the Douglases was *by reason of a contravention* of the Act – *section 13*. The data processing argument was not in fact laid before the Court of Appeal but, in what is inevitably a speculative exercise, my reading of what the situation would have been is that the Hello! Defendants would have elected to go ahead and publish and that the Court of Appeal would still have held that damages would be a sufficient remedy. Thus, although I hold there to have been a breach of the requirements of the Data Processing Act, I do not see it as adding a separate route to recovery for damage or distress beyond a nominal award, which I shall make.

Interference with business; breach of confidence and of the Data Protection Act

240. If I have been right in seeing OK! to be a person entitled invoke the law of confidence against the Hello! Defendants then this claim and many of the others I shall deal with add nothing. However, lest I am wrong, I will deal with further causes of action.

241. It cannot be said that Mr and Mrs Douglas are in breach of their contract with OK!. The fact that Mr Thorpe eluded or deceived the security at the wedding does not suggest, still less prove, that the Douglases had failed, within clause 16 of their contract - see paragraph 54 above – to take all *reasonable* means to provide such security as was necessary to ensure the exclusion of unauthorised media. The presence of the word "reasonable" indicates the obligation was not absolute, as also does the obligation not to eliminate but to "*minimise*" the risk of unauthorised photography. Under clause 6 it was only "best efforts" that were required to be used. Hence the Hello! Defendants' purchase and publication of the unauthorised photographs did not bring about any breach by the Douglases of their contract, nor did it even impede its performance. Indeed, as the security to be provided was in relation to a wedding on the 18th November, as the purchase of the unauthorised photographs was on the 19th November and as their publication by Hello! was on the 24th November, the timing alone suggests that that was so.

242. In a passage in *RCA –v- Pollard [1983] Ch 135 C.A.*, adopted by Hobhouse J. in *Rickless –v- United Artists Corporation supra and at [1986] FSR 502*, Slade L.J. at *p. 156* said:-

> "… as I understand the facts of all these cases, where liability has been established under this particular head of tort there has been an interference or an attempt to interfere with the *performance* by a third party of his contractual obligations. There is nothing in *this* line of authority which I

> have been able to discover which suggests that A may be liable to B under this head of tort merely because A does an act (even an illegal act) which he knows is likely to render less valuable certain contractual rights of B as against C without actually interfering in the performance by C of the contractual obligations owed by B."

In that case the defendant, Pollard, was a "bootlegger" and, as such, he did not interfere with the performance of the artists' contracts with the plaintiff recording company even though he made the latter's rights under their exclusive contract less valuable; so also, as it seems to me, Hello! did not interfere with OK!'s contract with the Douglases, although it may be argued that what Hello! did rendered OK!'s rights under the contract less valuable than otherwise they would have been.

243. That being so, OK! can succeed under this tort only if a further component is present, the one relevant for immediate consideration being whether there was an intent to injure by unlawful means.

244. Lord Wedderburn's Chapter on Economic Torts in *Clerk and Lindsell 18th Edition* describes a tort "…. which consists in one person using unlawful means with the object of and effect of causing damage to another". The rôle of intent in the tort is not always described in the same terms in the authorities - compare *Merkur Island Shipping Co –v- Laughton [1983] 2 A.C. 570* at *609 below g* - but it is appropriate for me to accept the *Clerk and Lindsell* formulation as it is by reference to that description that the Claimants make their claim and that is the formulation which the Defendants have been required to answer.

245. As for the relevant intent of the Hello! Defendants, in practical terms it is either to be found in Senor Sanchez Junco or it does not exist. As to his intent, his written evidence said:-

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

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

public. His act, he said, was not of revenge but of salvage. He denied having the intention of spoiling OK!'s sales adding:-

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

Mr Tugendhat put this to him:-

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

Senor Sanchez Junco:

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

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

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

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

248. Mr Luke, in close contact with Senor Sanchez Junco in Madrid was asked the question:-

> "How common, to your recollection, are spoilers by Hello! of OK! exclusives?"

Mr Luke:

> "It is a bit of a misnomer. I would not call it a spoiler because in the case of … . If we go back to the Zeta-Jones wedding, it was the event of the year. It is like one had to cover the outbreak of war because – or would not cover it because Churchill had given his exclusive interview to the Express. We had to cover it in some way. I think "spoiler" is a bit of a misnomer. It is something we have to cover, and if photographs become available you publish them. This is not an attack on your competition, this is because our readers want to know about these events so you go ahead and publish them. If those photographs are made available by an orang utan with a polaroid, well you publish them."

249. I have not found Senor Sanchez Junco or Mr Luke to be reliable as witnesses but I do accept the evidence they gave on this subject. Whilst I recognise that for a defendant to act out of self-interest does not, of itself, disprove that he had no intent to injure another, here I find on the evidence that there was no intent to injure by unlawful means because there was no intent to injure at all. Had I found such intent in the Hello! Defendants I would have gone on to have found the intent to be to injure by the unlawful means of publishing in breach of obligation of confidence owed to all Claimants and by way of contravention of the Data Protection Act 1998.

250. As for the interest of the Marquesa and her company, Neneta Overseas Limited, the latter had no intent other than through her. She was very loyal to Senor Sanchez Junco and was annoyed that, through no fault of hers, Hello! had failed to get an exclusive of the wedding as to which she had played only a limited rôle, namely in suggesting the possibility of paparazzi photographers to Senor Sanchez Junco and in identifying Mr Ramey to him. She had been careful not to compromise anyone in that it was not paparazzi photographs *inside* the wedding to which she had referred. As for the Marquesa's letter and its part in the lifting of the injunction, she did not regard the unauthorised photographs (such bad photographs, in her view) as being capable of spoiling OK!'s far better coverage. She was willing to accept that the publication of the unauthorised pictures by Hello! was a spoiling operation by Hello! aimed at OK! but that answer, without more, did not prove any such intent in her. The Marquesa's letter was in any case brought about by a combination of a wish to ingratiate herself with Senor Sanchez Junco, a wish to preserve her prospects of further employment by Hello! and a response to severe pressure, as she took it to be, from Senor Riera and, on his behalf, from Senora Elisa. I do not find the presence in her, either, of the necessary component, an intention to injure OK!.

251. The Claimants' case under this heading therefore fails.

Interference with business; abuse of process

252. Here the unlawful means asserted consist of the deployment of a false case in the Court of Appeal in order to procure the lifting of the injunction.

253. I refer back to the *Clerk and Lindsell* formulation which requires there not only to be the object but the *effect* of causing damage to another if this tort is to be proven.

254. That the injunction was lifted cannot be doubted but was its lifting the effect of the falsity of the case put forwarded by Hello! Ltd., then the only Defendant? Despite such strength as was conferred upon the defendant's case in the Court of Appeal by Senor Sanchez Junco's statement, Miss Cartwright's second witness statement (in the form in which the Court saw it) and the Marquesa's letter, the Court of Appeal held that some or all of the claimants had a sound case in breach of confidence or privacy – Brooke L.J. at *paragraph 96*, Sedley L.J. at *paragraphs 125 and 137*- but the Court went on to lift the injunction chiefly, as it seems to me, on the grounds that damages would be a sufficient remedy for OK! but an insufficient one for Hello! – Brooke L.J. at *paragraphs 96, 97 and 99*; Sedley L.J. at *paragraph 142*; Keene L.J. at *paragraph 171*. In the circumstances it is difficult to suppose that the Court of Appeal would have held other than they did as to the respective adequacy and inadequacy of damages as a remedy had the falsity of the defendant's case been seen for what it was. There is, in my view, no causal link between the falsity and the lifting of the injunction; the effect cannot be attributed to the alleged cause. On this ground this head of claim fails.

Conspiracy of all or 5 of the defendants to injure the Claimants by unlawful means

255. There are, as it would seem from the re-re-amended Particulars of Claim, a number of conspiracies alleged in this regard. One asserts the necessary combination as being of the Hello! Defendants, the Marquesa, her company Neneta Overseas Limited and Mr Ramey (paragraph 32 of the re-re-amended Particulars of Claim). There is no alternative plea that some only of those six conspired together and

the target of this alleged conspiracy consists of all three claimants without any alternative plea that some only might have been the intended target. However the pleading is not entirely clear as in paragraph 32 the conspiracy is of all Defendants, with the unlawful acts "(as set out in paragraph 33 below)", whereas paragraph 33 alleges a conspiracy only of the Hello! Defendants. In another conspiracy of this kind (paragraph 32 A) the combination alleged is of all Defendants except Mr Ramey. Again there is no alternate plea as to a combination of only some of the five Defendants and again the target is and is only all Claimants. I have already set out some findings as to the intentions of the alleged conspirators.

256. As to the combination alleged to include Mr Ramey, he must have known of Thorpe's trespass and that the unauthorised photographs had been taken deliberately and surreptitiously and in breach of rules sought to be imposed upon guests and staff and that they had been taken despite stringent security arrangements intended to make unauthorised photographs impossible. I can assume that he knew that OK! had obtained an "exclusive" for the wedding. However, there is nothing before me to suggest any relevant intent on his part except, by inference, that he should gain as much financial reward as possible for the unauthorised photographs and, perhaps also, further to bolster his reputation as the paparazzo who could overcome any obstacles. Had he reflected on the matter (and I have no evidence to suggest that he did) he would have seen that his activity would be likely to distress the Douglases and reduce the fruits gained by OK! from its exclusive contract but his concern, as I see it, was to sell to the highest bidder. The fact that the unauthorised photographs had found their way to a Dutch agency suggests that it was not only to Hello! that the unauthorised photographs were offered. He could have expected Hello! to be the highest bidder but I am unable to hold him to have been part of any concert to injure the Douglases or OK! or all three of the Claimants.

257. As for a conspiracy said to involve all Defendants except Mr Ramey, there are difficulties for the Claimants in relation to the Marquesa's rôle. She was asked by Senor Sanchez Junco to help but was not directly asked by him to lie. However, Senor Riera, on Senor Sanchez Junco's instructions, did directly ask her to lie and lie she did. I must take it that she appreciated that one, at least, of the functions of the lie was to assist Hello! in having the injunction lifted. But, even if I could find a combination between Hola SA, Hello!, Senor Sanchez Junco and the Marquesa and even were I to hold that a target of the conspirators was injury to OK! as opposed to promoting Hello!'s ability to give its readers that which they would wish to see, I still have a difficulty about attributing to the Marquesa, in relation to her signature to the Marquesa's letter, any intent alone or in concert with others to harm the Douglases. Her intent, as I have said, was to improve her relations with Hello! and in particular with Senor Sanchez Junco and thereby to preserve or enhance the likelihood of her gaining further work from Hello!. Good relations with celebrities and a reputation for good relations with celebrities was the very lifeblood of her trade. Moreover, whilst this, of itself, does not deny her entry into any combination, what was put to her in cross-examination by Mr Tugendhat was that she was "set up" or "used" as a screen between the paparazzi and Senor Sanchez Junco. A similar description of her rôle was put to Senor Sanchez Junco. I accept Miss Mulcahy's argument that such a description of her paints her more as a victim than a conspirator.

258. There was, in my judgment, no common plan or intent between the 4 or 5 said to be involved, to harm all Claimants. I add that a further difficulty in treating the Marquesa as a separate conspirator is that, before the Vice-Chancellor, the Claimants were at pains, and were successful, in arguing that, in relation to the creation of the Marquesa's letter, her actions were to be attributed to the Hello! Defendants.

259. Accordingly, in my judgment both these claims in conspiracy fail.

Conspiracy between the Hello! Defendants only; unlawful means

260. The alleged target of this conspiracy is <u>all</u> Claimants (paragraph 33 of the re-re-amended Particulars of Claim). This is not an area of the law where it can be *assumed* that a person intends the natural and probable consequences of his actions or omissions – *Crofter Hand Woven Harris Tweed Co. –v- Veitch*

[1944] A.C. 435 at *444* per Viscount Simon L.C. - so that for this conspiracy to succeed an intent to harm the Douglases on the part of the Hello! Defendants is required to be proved. However, like the Marquesa, Senor Sanchez Junco is not in the business of upsetting celebrities. He genuinely did not think the unauthorised photographs were unpleasant or offensive or such as to give offence to the Douglases and he attributed the bringing of proceedings for an injunction to OK!'s commercial needs rather than any wish on the part of the Douglases. I have already cited answers that he gave. No intent attributable to any of the Hello! Defendants otherwise than the intent of Senor Sanchez Junco was proved and I do not hold him to have had any intent to injure the Douglases. Accordingly, neither, therefore, had Hola or Hello! any such intent. This head of claim therefore fails.

Conspiracy between the Hello! Defendants with the predominant purpose of injuring the Claimants

261. A key argument of the Claimants in respect of this allegation in paragraph 32 (B) of the re-re-amended Particulars of Claim is that the Hello! Defendants could never have expected that the extra sales likely to be generated by Issue 639 in which the unauthorised photographs were incorporated would ever repay the extra expenses – printing and freight – which, in addition to the purchase price of the photographs themselves, were inescapable if the issue was to be on sale as early as they intended it to be. That being so, say the Claimants, it follows that the Hello! Defendants were motivated by a predominant purpose to injure OK!, their commercial rival. Leaving aside that that would not prove a predominant intent to injure the Douglases, it is in any case based on a fallacy. I accept Senor Sanchez Junco's evidence that it was not unknown for Hello! to proceed with an issue on the basis that even expected extra sales would not avoid a loss on a particular issue. Average sales, it would be hoped, he said, would increase and the prestige of the magazine, too, would be an objective. It often happened, he said, that one would never recover extra costs. The impossibility of recovering extra costs therefore, in my judgment, does not, of itself, suggest the existence of predominant intent to injure. I do not here repeat what I have earlier said as to the intentions which motivated the Hello! Defendants but I do not find the predominant purpose which is necessary for this tort to succeed. This claim therefore fails.

The Hello! Defendants' impropriety as to disclosure of documents

262. There is an allegation that there were documents in the hands of one or more of the Hello! Defendants that had come into existence in the period from 20th November to 22nd December 2000 but which were deliberately destroyed or disposed of with a view to avoiding their disclosure or were deliberately not disclosed.

263. I cannot see how any impropriety as to disclosure would have affected the result in the Court of Appeal as no-one could have expected any completed disclosure by the 23rd November 2000, the last day of the proceedings before the three man Court of Appeal and only two days after the issue of the Claimants' Claim Form. Any complaint as to disclosure at that stage would have been met with the response that there were then no pleadings, that the issues between the parties had not by then sufficiently emerged and that everyones' time was fully engaged with the conduct of the appeal so that disclosure would have to await its due turn.

264. As to Hello!'s dealings with documents, I confess to some doubts, in particular as to whether any business efficiently conducted could countenance the destruction of invoices as early as Mrs Doughty's evidence suggested had been the case. The Hello! Defendants did not produce the originals of the 5 invoices they received from Ramey, Griffin, Thorpe and Bauer. The originals *may* have had (but were not proved to have had) handwritten additions on them that *could* have been material. Mrs Doughty's evidence was that once *she* was sure the invoice was not meant for Hello! there was no point in keeping it and, that (her evidence implied) it was then promptly destroyed. Building on that, her evidence was that once she had seen that the invoices relating to the unauthorised photographs were not for Hello! and once the Marquesa had faxed her on 15th December 2000 asking for copies of them to be sent to her there was, in effect, no further need to keep the originals and that she was thus able to and did dispense with keeping them any further. The disposal of the invoices in

that way was thus, as far as she was concerned, in ordinary course but, whilst it should not have occurred, it was not done with a view to avoid disclosure. I have preferred evidence other than Mrs Doughty's on a number of points but I do accept her evidence on that. Whilst the Hello! defendants' handling of documents was far from satisfactory, having heard the evidence I am not satisfied that any material documents were deliberately not disclosed or were deliberately destroyed or disposed of after proceedings had begun with the view to avoiding their disclosure.

265. That finding, coupled with the facts that the Vice-Chancellor had held there had been no mishandling of documents before the proceedings had begun, that the outcome in the Court of Appeal was (in my view) unaffected by poor disclosure and that the Vice-Chancellor held that a fair trial was possible notwithstanding such shortcomings as he identified, together, as it seems to me, dispose of matters as to documents, given, too, that I have found in the Claimants' favour without resorting to inferences as to the content of any known or likely documents on the basis that they had been improperly undisclosed.

Setting aside the judgment of the Court of Appeal

266. So far as concerns the setting aside of the lifting of the injunction, the claim is pointless; publication of the unauthorised photographs has taken place. But can the Court of Appeal's order as to costs be varied?

267. Whilst the usual means of seeking the setting aside of an order made in proceedings was previously to start a new action seeking that relief, Mr Tugendhat argues that under the new procedures there is no necessity for that where the impugned proceedings were interlocutory and are followed by a trial in the same proceedings. I see some force in that. To my suggestion that the obvious place for the variation of an order for costs made by the Court of Appeal was, surely, the Court of Appeal, Mr Tugendhat replies that it would be wrong to inflict upon his clients the need for a fresh hearing in that Court when the question can be economically dealt with before me and that to require him to go direct to the Court of Appeal would deny him a tier of appeals that he would have if I were to decide the issue or if (albeit after disproportionate expense in time and costs) he was obliged to begin a second action to set aside a costs order made in the first.

268. Further argument on this part of the re-re-amended Particulars of Claim was left over for consideration in the light of such facts as I should find but I should mention two subjects.

269. Firstly, if, during the hearing of the case before the Court of Appeal, Senor Sanchez Junco's statement, Mrs Cartwright's second witness statement (in the form in which that Court saw it) and the Marquesa's letter were all seen to be false; there would, of course, have been very powerful criticism of the way in which the defendants had acted, but would the outcome still have been a lifting of the injunction?

270. The Claimants allege that it is no part of their primary case to speculate on what might have been but I will wish to be addressed on whether some such speculation is inevitable. Unless the Court in the second process is required to find that the matter complained of in the earlier process had probably had a real effect on the outcome of that first process, would not Courts be inundated with applications to set aside decisions on the grounds of lies or combinations which had been unlikely to have had any effect on the outcome?

271. Secondly, that there were arguments that could have been presented to the Court of Appeal to do otherwise than they did is plain. The law of confidence was only or primarily argued, it would seem, in relation to confidentiality of a private kind rather than such as can arise in a commercial context. Paragraph 6 (a) of the re-re-amended Particulars of Claim did not raise the analogy with trade secrets until the 3rd May 2002. The fact that a confidence of the privacy kind had been sold by the Douglases with a view to publication by OK! weighed heavily against the Claimants, whereas had the claim been

presented as one akin to a trade secret the sale may have been seen as the natural way of turning the commodity to account. Nor was it urged that by refusing an injunction because damages sufficed the Court of Appeal would, in effect, be allowing a compulsory purchase by Hello! of a right to breach the exclusiveness for which its trade rival had paid so much and to do so despite the Court regarding the Claimants as having sound claims in confidence – compare *Francome –v- Mirror Group Newspapers [1984] 1 W.L.R. 892* at *897* per Sir John Donaldson M.R.. Nor, either, was it argued that it was wrong to apply an *American Cyanamid* approach (one designed, in any case where at least a serious question could be seen to require to be tried, to avoid any evaluation of the merits save as a very last resort) to a case in which, under *section 12 (3)* of the *Human Rights Act*, an evaluation of who would win was *to some extent* required by statute – see *Cream Holdings Ltd. –v- Banerjee & Anor C.A. 13th February [2003] EWCA Civ 103*.

Subject to the answer as to the propriety of speculation, I will wish to be addressed on whether, had the defendants been caught out in their misbehaviour, it would have been probable that the injunction would have remained in place.

Exemplary damages

272. This vexed corner of the law has recently been visited by the House of Lords in *Kuddus –v- Chief Constable of Leicestershire [2002] 2 A.C. 122*. The law was not as fully explored in the case as it might have been as the appeal was against a striking out rather than in a case which had been fully resolved on the merits. However, *Kuddus*, as I read it, points to three considerations in particular. The first is that the question whether or not to award exemplary damages should be determined more by reference to the nature of the behaviour complained of than by reference to the nature of cause of action to which that behaviour has given rise. The second is that a powerful case can be made that such damages should be considered where, and perhaps only where, the behaviour complained of gives rise to a sense of outrage – see Lord Nicholls' speech at *paragraph 65*. The third is that a recognised category in which such damages may be awarded is where damages on an ordinary compensatory basis can be seen not to be sufficient to do justice. Lord Devlin in *Rookes –v- Barnard [1964] A.C. 1129* at *page 1126* spoke of a category in which the Defendant's conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff.

273. As to those three features, I am content to assume, without deciding, that exemplary damages (or equity's equivalent) are available in respect of breach of confidence. However, I do not find it possible to describe my judicial reaction to the conduct of the Hello! Defendants as one of outrage, especially so far its relates to the position as between Hello! and OK!. Both of them are participants in an industry – the Press as part of the media – in which intrusion upon privacy and little regard for each other's business rights have, at any rate before the Human Rights Act, been not unknown. Whilst I would not take either OK! or Hello! to have been as frequently intrusive or as disrespectful of other's rights as may have incurred in other sectors, neither of them is wholly without blemish. In that circumstance the word "outrage" would be to overstate the matter. Senor Sanchez Junco stooped to a kind of journalism he professed not to like and did thereby disregard the rights of each of the Claimants but to describe his conduct as contumelious would be to exaggerate. Moreover, I am not satisfied that none of the various ways in which damages or equitable compensation can be computed in response to the breach of the law of confidence which I have held to have existed will yield a figure such that Hello!'s profit for itself would exceed the compensation due to the Claimants, nor even that any Hello! Defendant had ever calculated that that might be so.

274. For these reasons I do not award exemplary damages.

Aggravated damages

275. Mr and Mrs Douglas claim aggravated damages for distress, relying on three factors; the alleged flagrancy of the Defendants' conduct, the fact that on the lifting of the injunction the Defendants' promptly went ahead and published the unauthorised photographs, knowing of the distress that that

would cause and on the publications in the Sun and Daily Mail to which I have referred. As to that last factor, the Hello! Defendants did act reasonably, although unsuccessfully, to stop publication by those newspapers. As for the puns which the newspapers published ("Catherine Eater Jones" and "That takes the cake") would not have appeared had the newspapers done as Hello! requested and, surely, conduce more to a groan than to offence. As to publishing once the injunction was lifted, it is difficult to regard that as high-handed or oppressive or otherwise such as to require aggravated damages; the Court of Appeal had just ruled, in effect, that a remedy in damages sufficed to meet the Douglases' claims and there is no suggestion that the Hello! Defendants will be unable to meet any likely award in damages. Given that there was, in any event, to be very extensive photographic coverage of the wedding, albeit as selected by the Douglases, I do not see the behaviour of the Hello! Defendants as so flagrant or offensive as to justify an award of aggravated damages.

Liability of the Marquesa to all or any Claimants

276. The claims made against the Marquesa were for interference with business by unlawful means and conspiracy by unlawful means with the intent and purpose of causing damage to the Claimants. No such claim succeeds against her and I do not find her liable in damages to any Claimant. She is not in any position to re-publish the unauthorised pictures, nor has it been argued that she has or might acquire any intention to do so. She has nothing relevant to deliver up to the Claimants on oath. But this is not to say that her writing of the Marquesa's letter has not left her vulnerable to an argument that her costs in this action should not follow the event, an argument and any counter to it which I can leave over until later. I accept, though, that her expressions of regret at ever having written her letter were not merely self-serving but are genuine and it is to be remembered that she had freely owned up to the falsity of the letter by her Defence of 22nd July 2002 and her witness statement of 22nd November 2002.

New York and Spanish law

277. As the evidence came out, no defendant or non-expert witness for a Defendant credibly asserted a belief that what he, she, or it had done should not be complained of because it was not offensive under the local law. In that circumstance and on the basis of my other conclusions of fact and of law I do not see it as necessary to say anything as to the law of New York or as to Spanish law. In particular, as to the only claim in respect of which I have held any Defendant as other than nominally liable, I do not see that publication of Hello by the Hello! Defendants in England would, in all the circumstances, have been any less unconscionable in the view of an English Court had publication in New York been lawful.

An injunction

278. It does not follow from the fact that an item has passed into the public domain that it must be taken to have remained there in such a way that its confidentiality has been irretrievably lost. The fact that the unauthorised or authorised photographs were published in November 2000 does not, of itself, therefore deny the Claimants a perpetual injunction. Whilst these proceedings have brought back into the public eye the fact that there were unauthorised photographs, I think it likely, given that the far better authorised pictures were also, of course, put into the public domain, that the look of the unauthorised photographs has passed out of the public mind. I thus see the Claimants as in a position to ask for an injunction restraining the Defendants such as is sought by the Claimants in paragraph 1 of the Prayer to their re-re-amended Particulars of Claim. I indicate immediately, though, that I shall be willing to accept an undertaking of the Hello! Defendants in lieu. Such an injunction or undertaking will, in practical terms, make delivery-up unnecessary.

Conclusion

279. For the reasons I have given, I hold the Hello! Defendants to be liable to all three Claimants under the law as to confidence. It will have been noted that an important step in my coming to that conclusion

has been that, on balancing rights to confidence against freedom of expression for the purpose of granting or withholding relief, I have been required by statute to pay, and have paid, regard to the Code of the Press Complaints Commission. The Hello! Defendants broke their own industry's Code.

280. Save for the above liability in confidence, the undertaking or injunction I have described and a nominal award under the Data Protection Act, I dismiss all other claims made by the Claimants against the 1st-5th Defendants. Unless the parties agree, there will have to be a further hearing to establish the amount for which the Hello! Defendants are liable to the Claimants. Whilst there has been a little discussion as to the assessment of a notional licence fee as an appropriate approach to the quantification of compensation for OK!, at this stage I say nothing as to that being apt or inapt but it is already clear that OK! has elected not to seek any account of the profits which Hello! may be said to have derived from the impugned publication. That aside, all issues as to quantum are left over, should it be necessary, for a later hearing.