



Case No: HCO100644

Neutral Citation Number [2003] EWHC 2629 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7th November 2003

Before :

THE HONOURABLE MR JUSTICE LINDSAY

Between :

(1) MICHAEL DOUGLAS
(2) CATHERINE ZETA-JONES
(3) NORTHERN & SHELL PLC

Claimants

- and -

(1) HELLO! LTD.
(2) HOLA, S.A.
(3) EDUARDO SANCHEZ JUNCO
(4) THE MARQUESA DE VARELA
(5) NENETA OVERSEAS LTD.
(6) PHILIP RAMEY

Defendants

Mr A. Wilson Q.C. and Mr D. Sherborne (instructed by Addleshaw Goddard) for the Claimants
Mr J. Price Q.C. and Mr G. Fernando (instructed by Charles Russell until 27 October 2003 then
M Law) for the 1st to 3rd Defendants

Hearing dates: 16th July 2003-18th July 2003, 21st July 2003-25th July 2003, 28th July 2003-
31st July 2003

Judgment

Mr Justice Lindsay :

A. Introduction and the events

1. The hearings in this action were, at the wish of some parties, split as between questions relating to liability and, should the need arise, those relating to quantum of damages. In the course of a long judgment which I delivered in April 2003 I held that the first 3 defendants were liable to all 3 claimants under the law as to confidence. A further hearing as to quantum thus became necessary to determine what sums, if any, all or any of the first 3 defendants (“Hello!”) are to be required to pay either the first 2 claimants, Michael Douglas and his wife Catherine Zeta-Jones, or the 3rd claimant, Northern & Shell plc (the publisher of OK! magazine and for convenience referred to merely as “OK!”) or both. That quantum hearing spread itself over 12 days and this is the judgment in respect of those 12 days.
2. Although the hearing concluded at the end of July, some detailed questions later arose as to the computation of loss suffered by OK. Those questions were dealt with in sequential but informal written submissions from both sides, the last of which was dated 31st October.
3. I am not in this judgment concerned with the position of the 4th and 5th Defendants, the Marquesa de Varela and Neneta Overseas Ltd.. They were found not to be liable to the claimants in the April judgment and have taken no part in this quantum hearing. Nor, either, has the 6th defendant, Philip Ramey, the paparazzo photographer, who is being proceeded against separately in default proceedings.
4. I shall not, in this judgment, set out the narrative background to the case, which is to be found in my April judgment to which this judgment is an adjunct. However, there are some facts which require to be repeated for the understanding of the chronology and its consequences as to quantum. They are these.
5. The well-known film stars Mr Michael Douglas and Miss Catherine Zeta-Jones were to marry at the Plaza Hotel, New York on Saturday 18th November 2000 in the early evening. Just over a week earlier, on 10th November 2000, they had made a contract with OK! giving that magazine exclusive rights to the coverage of the wedding. Extensive arrangements were made to ensure that only those truly invited would gain entry to the wedding but, despite that, an unauthorised photographer, Rupert Thorpe, found a way in. He was working, it seems, in some loose association with the 6th Defendant, Philip Ramey. His photographs – some 15 or so – were offered by Mr Ramey to Hello!, who bought them for £125,000 on Sunday 19th November. On the morning of Monday 20th November OK! learned that the unauthorised photographs were on the market. It wished itself to buy them so as to take them off the market but found that they had been sold to Hello!. Mr and Mrs Douglas were told of the existence of the unauthorised photographs and that it was believed (as was the case) that Hello! had purchased them for publication in its magazine. They were distressed at the news. The Claimants decided to seek an injunction against publication of the pictures by Hello! and on the evening of Monday 20th November they obtained one ex parte from Buckley J. over the following day. On 21st November, the Tuesday, Hunt

J extended the injunction over trial or earlier further order at an inter partes hearing. Hello! determined to appeal and moved before a two-man Court of Appeal, Ward and Walker LJ. on the afternoon of the 21st. At the close of argument that Court indicated that its members could not agree and arrangements were made for a hearing before a three-man Court of Appeal to begin the following day, Wednesday the 22nd.

6. In the meantime Hello!'s issue No. 639 featuring 6 of the unauthorised photographs and with a cover which included one of them and which in large print bore the words "From New York: the full story – Catherine and Michael's wedding" had been printed and flown by specially chartered aircraft from Spain, where it was printed, to England. The cover said it had "Exclusive Photographs". Hello! intended to put it on sale to the public on Tuesday 21st in London and on Wednesday 22nd in the rest of the country, that being its usual pattern for sales of Hello!, which, like its great rival, OK!, was and is a weekly magazine. The injunction granted disturbed those intentions; Hello! took steps to suspend distribution and only some 15,750 out of a print run of 755,900 – a larger run than usual reflecting that Hello! expected the Douglas Wedding issue to capture unusually large sales – were distributed. The rest were embargoed to await the outcome of the litigation.
7. By now, either by way of the distribution of the 15,750 copies of Hello! or by reason of the hearings before Hunt J. and the two-man Court of Appeal, the Press had learned of the contest between OK! and Hello! and of the nature of the unauthorised photographs.
8. The hearing of the three-man Court of Appeal began before Brooke, Sedley and Keene LJ. on Wednesday 22nd November 2000. Argument ran into the next day, Thursday 23rd, and as it then ended the Court indicated that the appeal would be allowed, that the injunction was lifted and that reasoned judgments would be given later. Hello! decided to publish; it informed distributors that the embargo was lifted and its issue No. 639 went on full sale to the public on Friday 24th November.
9. In paragraph 12 of my April judgment I said, of OK!, that it normally came out on Thursdays in London and on Fridays throughout the rest of the U.K.. No party sought to correct that and, for the purposes of the April judgment, the normal weekly dates of publication were of only marginal relevance. They are, though, of more significance for my present purposes and, despite the inconsistency, which I was at first minded to avoid, on the evidence I hold that OK! is usually published on Fridays in London and on Saturdays in the rest of the country. In the ordinary way its issue 241 would therefore have been on U.K.-wide sale on Saturday 25th November. During the liability hearing there had been some evidence of, but no dispute as to, OK!'s plans and in paragraphs 87 and 88 of the April Judgment I held (referring to the then-understood normal dates for publication) as follows:

“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 Douglasses would have to select which photographs they approved for publication very quickly.

88. The Douglasses 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.”

10 Now, though, Hello!, by Mr James Price Q.C. and Mr Fernando, argues for and directs evidence in support of a conclusion that OK!’s original intention was never to have 2 Douglas wedding issues but only 1. Mr Alastair Wilson Q.C., now appearing with Mr Sherborne for the Claimants, has not argued that my earlier April conclusion bars further examination of this issue, which I shall need to revert to later. In the event, OK!’s issue 241, of some 186 pages and containing some Douglas wedding pictures, went on public sale in London on Friday 24th, the same day as Hello!’s issue 639, and on Saturday in the rest of the country. OK!’s No. 241 included on its cover a photograph not only of the bride and groom but also of their baby, of Michael Douglas’ father, Kirk Douglas, and of his wife and the bride’s parents, Mr and Mrs Jones. The cover added “The first *real* wedding pictures and exclusive interview”; “OK! World Exclusive” and “In friendship and co-operation with Catherine, Michael and their families”. OK!’s second Douglas wedding issue, No. 242, of some 210 pages, had a close-up of bride and groom on the cover and offered, it said, “All new pictures –the complete private wedding album” and “Official – and only in OK!”. Together issues 241 and 242 completed OK!’s own coverage of the wedding but OK! had very widely syndicated the authorised photographs and some or all appeared in many publications all over the world.

11 On Friday 24th November The Sun newspaper printed 5 of the 6 unauthorised photographs which Hello! had put into its issue 639 and also reproduced Hello!’s cover in very small size. On the same day the Daily Mail reproduced Hello!’s cover to its issue 639 and on Saturday 25th November reproduced 4 of the 6 unauthorised photographs.

B. The damages claims

12 In the April judgment I refused the Claimants’ calls for aggravated and exemplary damages. In the event there are the following claims for damages:-

- (i) by Mr and Mrs Douglas, for distress occasioned by breach of confidence;

- (ii) by Mr and Mrs Douglas, under the Data Protection Act 1998. Consistently with paragraph 239 of the April judgment the award can only be nominal. I therefore award each of them £50, to be paid by the Hello! Defendants, they to be jointly and severally liable in that respect;
- (iii) by Mr and Mr Douglas in respect of wasted costs incurred in their having to re-arrange the provisions for preparation and transit of wedding photographs and by OK! in the re-scheduling necessary for issues 241 and 242;
- (iv) by OK!, for loss of expected revenue from the originally planned Douglas wedding issues 242 and 243;
- (v) by all Claimants together, for a notional licence fee representing a reasonable consideration payable by Hello! for permission from all Claimants to publish the unauthorised photographs.

13 I have failed to understand how one could properly recover in respect of distress, wasted costs or for loss of sales in respect of that which, for a consideration, one is to be taken notionally to have authorised. Accordingly I regard the Douglasses' claims (i) and (iii) together as subsumed within their claim (v) and alternative, to that extent, to it, and claim (iv) by OK! as alternative to its claim under claim (v). The possibility that some claims were or might be only alternatives to others raised the issue of whether the Claimants were obliged to elect from the beginning of the quantum proceedings which alternative they sought. It is usual, for example, for a claimant to have to choose between damages suffered by it by reason of a defendant's infringement and an account of the profits derived by the defendant from that breach. However, no case wholly in point suggested to me that an election had to be made at the outset between the more unusual alternatives here open to the Claimants and I accordingly allowed the Claimants to develop alternative claims whilst warning that if, when costs came to be considered, I was of the view that by running mutually exclusive claims the Claimants had materially added to the costs, that could be taken into account. In effect, if it makes any award, the Court will make the election for the Claimants as the Claimants will be presumed to plump for whichever basis (claims (i), (iii) and (iv) in aggregate as ordinary compensatory damages or, alternatively, - under (v) – a notional licence fee) yields them the higher award.

14 In the event, whilst I shall need later to turn to claims (i) and (iii), the main battleground has been claims (iv) and (v). There had at one stage been a claim by the Douglasses alone for a notional licence fee in addition to the present claim (v). That, though, bristled with difficulties; by contract the Douglasses had awarded OK! an exclusive. How, then, could the Court, even on the inevitably hypothetical basis applicable in such circumstances, contemplate a notional licence by the Douglasses alone which would be in flagrant breach of their contract with OK! It was perhaps for that reason that the Douglasses' separate claim was not pursued after 16th July 2003, the beginning of the quantum hearing.

15 I turn, therefore, to the first main battleground, claim (iv).

(1) Loss of reasonably expected revenue from the alleged originally projected OK! issues 242 and 243

16 This deceptively simple heading gives rise to many questions. Thus:

- (i) Were there truly to be 2 original OK! wedding issues, 242 (1.12.2000 and 2.12.2000) and 243 (8 and 9.12.2000) or just one?
- (ii) What would the print orders have been for that proposed 242 or, if appropriate, those proposed 242 and 243, and could the printer have coped, given such notice to him as appears likely to have been given, with a print order of exceptional magnitude?
- (iii) Was paper available such that a print order of exceptional size could be met?
- (iv) Given whatever number of copies would have been likely to have emerged in print, what sales would have been probable?
- (v) What would the cost of sales have been?
- (vi) What advertising and related fees would have been likely to have been attracted by the original issue 242 or, if appropriate, 242 and 243 and were such fees achieved in the events which happened?
- (vii) What credit has to be given in respect of *actual* sales of 241, 242 or 243 and *actual* advertising?
- (viii) Wasted costs.
- (ix) How far, if at all, can shortfall in sales of OK! or in its advertising be fairly laid at Hello!'s door? There are also other general issues.

17 There has been little, if any, trust, only suspicion, between the parties and these and related questions have been dealt with in a manner little short of disproportionate and including massive and costly obligations of disclosure even down to an attempted detailed survey of OK!'s outgoing telephone calls. Damages, often spoken of as a "jury" question and referable to the inescapably hypothetical, even speculative, basis of what *would* have been the case *if only* the events properly complained of had *not* occurred, have been sought to be proved or disproved as if in all respects one were dealing throughout with fact. However, I shall attempt to deal with the questions raised in equivalent detail.

(2) Two wedding issues or one?

- 18 The contract between OK! and the Douglasses of 10th November 2000 provided that “MKD” and “CZJ” would provide OK! with approved photographs no later than Wednesday 22nd November. As the Contract was governed by Californian law it might even have been the case that the Douglasses would have been without breach until midnight Wednesday 22nd *California* time. Moreover, until the photographs arrived, no one at OK! would know if any were to arrive nor, if some, how many, nor of their quality.
- 19 Given that OK! is habitually put on sale on Fridays and Saturdays I have no difficulty in accepting that issue 241 (projected for 24th and 25th November) could not safely have been originally intended to be a wedding issue. But was 242 then to be the *only* wedding issue or was 243 also to cover the wedding, at all events if photographs of sufficient quality and number were provided by the Douglasses? Mr Price rightly points to the absence of any documentary evidence in support of a second wedding issue; no exceptional print order is foreshadowed, no special paper stores are laid on for it and advertising and layout flat-plans for it not only fail to shew 243 as a wedding issue but shew that other contents for it were apparently in mind. He emphasises, too, that the Contract of 10th November 2000 authorised publication only of “*an* article” (my emphasis) and referred only to “the” article, references consistent, he urges, with there being intended to be only one wedding issue, 242.
- 20 Against that Mr Wilson makes a number of points. The contract is far from clear and nothing plainly excludes the notion of an article – one on the subject of the wedding – being spread over more than one issue. Any idea, as suggested by Hello, that 243, on 8th and 9th December, would be so stale in relation to a wedding on 18th November as not to have been contemplated was disproved, he said, by a comparison with OK!’s coverage of the wedding between the footballer David Beckham and his “pop star” wife, Victoria Adams (“Posh Spice”) where OK!’s *third* and successful issue, 172, was on general sale on and from Friday 23rd July, 20 days after the wedding. OK!’s investment of £1m in the exclusive for the Douglas’ wedding cried out for as much recovery as possible and there was no reason, he said, to think that one issue would exhaust interest but rather, as in the Beckham case, that exceptional sales could be expected beyond a single issue. It made sense, argued Mr Wilson, for a dummy 243 *not* reliant on the Douglasses supplying enough quality photographs to be prepared by OK! lest that proved to be the case. Moreover, and most importantly, witnesses whose evidence was not impugned gave evidence that a proposed second wedding issue, a 243 wedding issue, was not merely assumed to have been expected in the OK! office but was discussed. Mrs Jennifer Harris, OK!’s Sales Manager, spoke of discussion at OK! and Miss Rhona Crawford, then in charge of the in-house reprographic studio and production and now Head of Production, spoke of that and of discussion with the printer as to there being 2 large issues. She saw no problem in there being no documentation on the point; “you just deal with one issue at a time”.
- 21 Mr Paul Ashford, Group Editorial Director, spoke of discussion with the Editor of OK!, Martin Townsend, in which they both assured themselves that the contract with the Douglasses entitled OK! to have more than one wedding issue. Both the Editor, Mr Townsend, and Mr Ellice, the Joint Managing Director of the 3rd Claimant, gave evidence

supportive of an intended second Douglas wedding issue but even if I were completely to discount the evidence of these senior figures (and Mr Ellice's credibility, in particular, was attacked on the basis of the Court's findings in a quite different case) I would still be left with a good foundation for a conclusion that had the events properly complained of not occurred there would have been 2 Douglas wedding issues, 242 and 243. I so hold. I add this. At one point Mr Price seemed to me to hint at an argument that the Douglasses had had in mind that there would be only one wedding issue but, annoyed and distressed by Hello!'s behaviour, had then authorised and co-operated in the production of more than one. I would have been uneasy about giving weight to that in the absence of questions having been put to the Douglasses on the point or of its being shewn to me that their recall to give evidence at this quantum hearing had been sought but refused. In the event Mr Price did not develop the point and I attach no weight to the possibility that had been hinted at but which was neither proved nor pressed.

(3) Print Orders and ability to deliver them

- 22 Of course, a magazine that has not been printed cannot be sold (although, conversely, and equally obviously, a magazine that is printed is not necessarily sold). If one knows the print order for a particular issue one thus is given an absolute cap to the sales that would have been possible. Indeed, because some copies printed will be spoiled or lost and because no distribution system can be expected to supply every retailer with just enough copies to meet demand but no more, there is some evidence to suggest that in practical terms a sale of some 90% of the copies printed represents a "sell-out" of that issue. On that basis if one could establish what print orders were given for OK! issues 242 and 243 then one could, in turn, readily find what *maximum* sales thereof could have been expected. However, no final print orders for 242 and 243 were given before the events complained of came to OK!'s notice. One is therefore forced back to the hypothetical; what would have been ordered and could those orders have been met?
- 23 As for 242, as late as an OK!'s directors', editors and others' meeting on Friday 17th November, the day before the wedding, the figures presented to that meeting suggested the print order was to be some 1.6 million copies, a slight reduction on earlier indications at 1.7 million. Mr Ellice, though, gave evidence that, upon the public's interest in the wedding becoming clear, he would (the events complained of apart) have increased the order finally to be given to the printers on Monday 27th November to 2.5 million. He felt that OK! had been caught out not having printed sufficient copies of the Beckham-Posh Spice wedding exclusive and that he did not wish to make the same mistake twice. Would he have ordered 1.6 million or 2.5? There are factors going both ways.
- 24 Against 2.5, there is no documented indication to the printer, after 1.6 or 1.7 million had seemed to have been settled on for the big issue in October and early November 2000, of a much larger figure becoming likely. However, given that the authorised photographs were not due to arrive at OK! until Wednesday 22nd and that the final print order need not have been given until Monday 27th November, the absence of an indication to the printer before, say, Monday 20th November (when the events complained of first came to OK!'s notice on a working day) does not disprove an intention (those events apart) significantly to increase the order. OK! would naturally wish to assess the quality and number of photographs before committing itself to a substantial increase.

- 25 Another factor at first sight against 2.5 is that OK! had experienced poor sales, relative to its own estimates, of the earlier issue in which it exploited its “exclusive”, as it thought it to be, of pictures of Mr Douglas, Miss Zeta-Jones and their first baby. OK!, Mr Price points out, badly over-estimated the market, printing over twice the number of copies sold. There was thus no basis of prior experience of such demand for Douglas and Zeta-Jones material as would justify a leap from 1.6 to 2.5 million. Again, though, there is a countervailing factor; the OK! Douglas baby exclusive was spoiled by Hello!’s corresponding issue, 627, which, under the banner “Michael, Catherine and Baby Dylan” - “First Photos together”, had on the cover a picture of all 3 shot on public ground and had similar photographs within. Mr Wilson thus makes the point that the comparative failure of the baby issue did not illustrate any uninterest on the public’s part or that exceptional sales of the wedding issue could not properly be forecast so long, at any rate, as was then expected this time to be the case, that OK!’s exclusive indeed remained exclusive.
- 26 Next, against 2.5, Mr Price argues that the coverage of the Douglas wedding in the media was not such as to lift the Douglases into Beckham-Posh Spice territory so as to justify so high a print order. But the Beckham wedding issues were not only thought by OK! not to have reached their full potential by reason of under-printing but also were in any event printed at above 2.5 million. Further, media coverage of the Douglas wedding or prospective wedding included references in The Mail on Sunday, the Sunday Mirror, the Daily Mirror, the Scottish Daily Record, the Belfast News Letter, the Birmingham Evening Mail, the South Wales Evening Post, The Sun, the Manchester Evening News, the Llanelli Star, the Evening Standard, the Daily Express, the Daily Star, the Northern Echo, the Daily Telegraph, the Coventry Evening Telegraph, The Independent, the Daily Mail and The Times. Whilst several of the comments made were dismissive or unflattering, even so the level of comment could reasonably have been taken by OK! to represent a reason to expect excellent sales and, in turn, to justify a high print order. I would have expected Mr Ellice to feel safe in increasing the order beyond 1.6 million.
- 27 There is, though, against that, some confusing and confused evidence from Mr Paul Ashford, Editorial Director of OK!. In paragraph 13 of his witness statement of 22nd November 2000, relied on by OK! before the Court of Appeal, he says this:-
- “I had anticipated that the circulation of the forthcoming edition of OK! would be double the usual circulation of the magazine. I was therefore expecting to reach a further 460,000 non-regular readers. However, in my opinion this will no longer be possible in the light of the publication by Hello! of the unauthorised photographs of the Douglas wedding because non-regular readers’ appetites will have been sated by seeing those photos. In addition, we have been forced to publish an incomplete set of pictures a week earlier than planned due to Hello’s action.”
- 28 Not unnaturally, Mr Price fastens on the reference to a doubling of the circulation, thus, he says, indicating expected *sales* of 920,000. If one adds to that figure 230,000 (as 25% of 920,000), as Mr Ellice indicates was the practice to avoid an issue being sold out too early, one sees reason to expect a print order of 1,150,000, less than half Mr Ellice’s

putative 2.5 million. But Mr Ashford's evidence was as to the "forthcoming edition of OK!". As at 22nd November 2000, when he deposed, that was not the original big one-of-two wedding issues, 242, but the hurriedly assembled 241. A doubling of sales of 241 is irrelevant to what would have been the print order for the original 242. But if Mr Ashford was throughout intending to refer to 241 his reference "I *had* anticipated ..." and "*In addition*, we have been forced" are inept or at least strange, as also is his reference to "readers" in the context, very familiar to all in the magazine business, that a single magazine sold is taken to be read, on average, by more than one reader. Of Mr Ashford's paragraph 13 Mr Ellice says that it was not discussed with him and that he does not agree with Mr Ashford's estimate. Mr Ashford's estimate, if relating to 242 and transposed into a print order, would be even lower than 1.6 million and, whilst I bear it in mind, I do not see it as disproving that Mr Ellice, not knowing of it, would have confirmed a print order higher than 1.6 million to the printers on 27th November 2000.

- 29 But would he have been bold enough to go to 2.5 million? Even regarding the Douglas baby issue sales as blighted by a spoiler from Hello!, an experience which OK! had no reason to think would be repeated, there were some grounds for cold feet and some doubts, surely, as to whether the Douglas wedding, big event that it would undoubtedly be, would generate quite the sales of the Beckham wedding. I would have seen grounds for increasing the print run from 1.6 or 1.7 million to, say, 2 or even 2.25 million but the difficulty I have is that once I accept, as I do, that Mr Ellice would have increased the print order for 242, I have no material evidence to stop me short of his own figure of 2.5 million. I hold that, were it not for the events properly complained of, Mr Ellice would on or before 27th November 2000 have increased the print order for the originally planned 242 to 2.5 million.
- 30 Turning to what the print order would have been for the originally planned second wedding issue, 243, Mr Ellice's evidence was that it would have been for 1,625,000 copies. That figure attracted little dispute and I hold it to be what would have been ordered.
- 31 As for the printer's ability to satisfy such print orders, whilst they would, no doubt, have preferred to have had greater notice of a forthcoming big issue and would, perhaps with a view to recovering extra charges for overtime and so on, have been likely to have complained of the shortness of notice, they were plainly experienced and competent and willing and able to respond to late requests. I have no sufficient reason to hold that, if a print order for 242 at 2.5 million had been confirmed by 27th November, the issue could not have been completed and delivered to go on sale from Friday and Saturday, the 1st and 2nd December 2000. Even more so would that have been probable had OK! confirmed its print order, as Mr Ellice said it had planned to do, on Friday 24th November 2000. Equally, by way of existing stocks and further available paper supplies, I do not doubt but that a print order for 242 at 2.5 million would have been met. Both as to printing and as to paper, issue 243 would have presented even fewer problems.
- 32 In the event I hold that, absent the events properly complained of, 2.5 million copies of 242 would have been available for sale from 1st and 2nd December 2000 and 1.625 million of 243 for 8th and 9th, being, as then would have been the case, the first and second of 2 planned OK! Douglas wedding issues.

(4) What sales would there have been of the originally proposed 242 and 243?

- 33 I here need to contemplate that OK!'s exclusive was retained intact and that the only photograph of the wedding itself (as opposed to photographs of street arrivals and departures) or of the couple on their wedding day available for publication outside OK! was the single head-and-shoulders of the couple released by the Douglasses. It is suggested that likely sales of 242 and 243 in such circumstances can be assessed by reference to actual sales of 241 and of the actual 242, to sales of Beckham wedding issues, to a statistical approach to uplift beyond the usual rate of sales, by reference to the general experience of those in the trade and to the uplift in its sales which Hello! enjoyed for its own Douglas wedding issue, 639. Unfortunately, these possible comparators are stricken with features which put their utility or reliability in doubt.
- 34 Thus, the "actual" 241 and 242 sold respectively 836,675 and 754,748 copies, a total of 1,591,423. But it was OK!'s case that, in the hurry to produce 241, an issue with fewer wedding pictures than the planned 242 would have had, OK! under-estimated the print run needed for 241. OK!'s case transpired to be that there was thus an unfulfilled demand for 241 of somewhere between 48% and 33%. Hello!'s expert, Mr Nicholas Howitt, approaching the question as an independent expert in econometrics, put unfulfilled demand for 241 at only 5-10%. Needless to say, "actual" 241 was sold in circumstances very different to those to be postulated for the originally planned 242 and 243. OK! had lost its exclusive and the Press also had access to Hello!'s unauthorised pictures, thus enabling the public to see the bride and groom, the wedding dress and the cake, all the traditional main features of a wedding issue, without buying OK! or, indeed, Hello!.
- 35 As for "actual" 242, it had had some of its attractiveness taken by "actual" 241 and it, too, was selling in circumstances different to those I need to contemplate for the originally proposed 242. Comparison with the actual sales of 241 and 242 cannot alone furnish one with an answer to the question of in what numbers the originally planned 242 and 243 would have sold and although I am willing to hold that the latter sales would have exceeded the former, I regard this comparison as only one of a number of factors needing to be taken into account.
- 36 As for experience of the Beckham wedding issues, there, too, OK! claims it could have sold more had it not under-estimated demand, but Mr Howitt's analysis was that, even had more copies been printed, sales would not have increased by more than some 15-20%. The comparison also gave rise to imponderable questions such as the relative attractions to magazine buyers of the Beckhams at the time of their wedding in July 1999 and the Douglasses in November 2000, on which differing views were held. Moreover, the Beckham wedding was spread over 3 issues rather than the 2 proposed for the Douglasses and sold 1,558,754 as to the first issue, 2,851,711 over 2 issues and 3,715,325 over the 3. If to that 1,558,754 one adds 15% to represent demand unsatisfied by reason of a mistakenly low print order, one would have seen sales of the first Beckham issue at 1,792,567 which, together with the sales of the second, would have amounted to 3,085,514 copies. Mr Peter Miller, a journalist of over 40 years experience called as an expert by Hello!, agreed (in a passage which I did not take his later evidence comprehensibly to undo) that the Douglas wedding, from the point of view of selling the

magazines OK! and Hello!, was as big a story as the Beckham story. The Douglas wedding was said to be, I add, the “showbiz” wedding of the year and its importance to magazines was illustrated by the efforts which both OK! and Hello! had put into each respectively obtaining an exclusive and by the cash each was prepared to offer, being, in Hello!’s case, over £1 million.

37 As for a statistical approach to the degree to which an exceptional issue might sell in comparison with normal sales, OK! at the relevant time sold of the order of 400,000-450,000 copies per “ordinary” issue – see also paragraph 12 of the April judgment. To sell at more than twice one’s normal rate is plainly exceptional and, in Mr Howitt’s view, the Beckham experience was, in statistical terms, an “outlier”. My difficulty here is that if one can have one “outlier” one can have two. Certainly the sums prepared to be offered to the Douglasses by Hello! and the considerable efforts made by Hello! through many contacts in order to obtain an exclusive from the Douglasses suggest that Hello! itself regarded the event as quite exceptional although I must recognise, too, that an exceptional event does not necessarily generate exceptional sales.

38 As for the general experience of a person in the trade, I have already accepted Mr Ellice’s evidence that he would have ordered a print run for the originally proposed 242 of 2.5 million and 1.625m for 243, a total print run of 4,125,000. Given his evidence that:-

“We add 20% to 25% on top of the estimated sales to arrive at the figure for the print run to ensure that the magazine does not sell out too early”

he was estimating sales of 242 and 243 to be of the order of 3.3 million in all.

39 Hello!’s sales of its issue 639 were some 150,000 greater than it usually achieved but it was, of course, competing not with the originally proposed OK! issue 242 but with 241. In any event the gain to one is not necessarily an indicator of what was or would have been the loss to the other.

40 Mr Wilson’s final analysis was that the proposed 242 and 243 would together have sold 3,126,158 copies. It would be wrong to regard the precision with which that figure is given as indicating that the question is capable of a calculated and, so to speak, scientific answer. It is not; there are too many imponderables. For all its general help, Mr Howitt’s evidence cannot tell me how many copies the originally proposed issues 242 and 243 would have sold in the condition that OK!’s exclusivity had been preserved and that the proposed 242 was the first OK! issue covering the wedding with a full range of photographs. That exclusivity was not preserved and the “actual” 242 was not the first with wedding photographs. However, balancing as best I can the factors in the evidence, I conclude that, absent the events properly complained of, the proposed issues 242 and 243 of OK! would have sold, in all, 3 million copies split 1.8 to 242 and 1.2 to 243, fewer than the first two Beckham wedding issues would probably have sold had supply of the first been adequate but not greatly fewer. The Daily Mirror, after all, had, only shortly before the Douglas wedding, described it as the most talked-about celebrity wedding for years.

(5) The cost of those 3 million sales

41 The printing and transport costs put in evidence by OK! were not disputed but because he approached the questions in a different way Mr Dearden-Jones of OK! does not directly put a figure for the printing and transport of the print runs I have held to be such that they *would* have been ordered, namely 2.5 million copies of 242 and 1.625 million of 243, and with the respective sizes (in terms of numbers of pages) as would have been planned. However, other figures support 242 costing 43.7p per copy of 2.5 million and 243 44.1p per copy of 1.625 million, the costs therefore being £1,092,500 for 242 and £716,625 for 243. £73,199 [44,363+28,836] for freight charges needs to be added, together with £4,200 being costs of inserting sufficient inserts in OK! to generate £35,000 in revenue. The total cost to OK! of its putative sales would therefore have been some £1,886,524.

(6) Advertising

42 It is not claimed that OK! received less by way of advertising revenue from “actual” 242 than it would have done from the proposed 242 as advertising for the latter had been fully sold, often at a premium rate to reflect that it was to be a high-selling issue covering a prestigious event, and went into “actual” 242. Here, rather, the question is whether OK! would have had time, and have been able, to sell advertising in 243 at premium rates and for the enhanced page numbers contemplated. Mrs Cartwright, Publishing Director of Hello!, would not accept that advertising would have been as lucrative as OK! claimed nor that a figure of £153,659 (for expected advertising revenue from proposed 243 minus actual advertising revenue from actual 243) could probably have been achieved, especially in the limited time available. However, for all her general magazine experience, Mrs Cartwright had no direct familiarity with the experiences of, and the work and working practices in, OK!’s advertising department and I prefer the evidence of OK!’s present advertising Sales Manager, Jennifer Harris. She gave evidence that there was very strong demand for advertising, that high premium-rate sales into 243 could have been achieved, that her department could have sold over 18 pages of advertising in the brief time permitted, that a huge amount of revenue was achievable from “inserts” (perhaps some £35,000 on that account alone) and that, given the ease with which 242 had been filled, the £407,000 expected for the proposed 243 could have been achieved. Accordingly I accept the figure of £153,659 for loss of advertising.

(7) Credit for actual sales of 241, 242 and 243 and the resultant loss

43 Some of these figures have not been disputed. There were, respectively, actual sales of 836,675 for 241, 754,748 for 242 and 414,628 for 243.

44 As for 241, I hold that but for the events complained of the originally planned 241 would have sold 450,000 copies. This is at the high end of its probable range but I would expect OK! to have made 241 especially attractive by including on the cover and within some “trailer” of the Douglas wedding, perhaps using photographs from the Russian Tea Room event (see paragraph 56 of the April judgment). It was, incidentally, a photograph from that event that Hello! used on part of its cover for its No. 639. A trailer

of such a kind would bump up sales up to the high end of probability. “Actual” 241, selling, as it did, 836,675 copies thus sold 386,675 copies more than the 450,000 or so that would have been expected of it as (trailer apart) an “ordinary” non-wedding issue. At a cover price of £1.85 per copy and on the footing that 62.3% of the cover price was retained by OK!, the Claimants need to offer credit for £445,662 that those extra sales derived from a print run of 945,460 which was 320,460 copies greater than expected. The cost of the extra copies at 39.3p per copy was £125,941. There were additional freight costs of £4,902 [14,461-9,559]. The credit of £445,662 is thus reduced to £314,819.

- 45 The 3 million sales of the proposed 242 and 243 would have brought in 3 million x £1.85 x 62.3% = £3,457,650 but would have cost £1,886,524, a net gain of £1,571,126. The actual sales of 242 and 243, together of 1,169,376 copies, brought in 1,169,376 x £1.85 x 62.3% = £1,347,764, having cost £655,042 [629,481+25,561] for 242 and £337,462 [324,818+12,389] for 243 = £992,504, a net gain of £355,260. The difference in net gain was thus some £1,215,860 but from which £314,819 is to be subtracted and advertising and so on of £153,659 to be added. Overall that loss is £1,054,706 but I propose to reduce that figure to reflect that *some* sales of OK! may have been lost (it is impossible to say how many) by reason of events which, as I shall come on to, are in my view too remote to be laid at Hello!’s door. I reduce the loss by £28,000 to £1,026,706.

(8) Wasted Costs

- 46 It was, in my judgment reasonable, by way of mitigation or prospective mitigation, for OK! to bring forward wedding material into issue 241 so that if, as proved to be the case, the injunctions granted at first instance were overturned, OK! would be in a position the better to compete with Hello!’s use of the unauthorised pictures which, in such a case, would be on the market on Friday 24th November throughout the country. But bringing the wedding material forward so as to enable its inclusion in 241 involved, it is said, extra costs of £6,450. I accept the evidence as to that cost; it was a reasonable outlay in order to avoid what could properly have been thought to be greater overall loss to OK! had it done nothing by way of publication of wedding material until, as had originally been planned, the 1st and 2nd December 2000.

(9) Is all this loss to be laid at Hello!’s door and other general issues

- 47 This heading is a convenient one under which to comment on a number of issues borne in mind but not so far expressly touched on.
- 48 Firstly, lest it be thought that the “but for” test – that the losses I have described would not have occurred “but for” the breach of confidence complained of – does not, of itself, make a party liable, I add that in my judgment such losses were sufficiently consequential upon the breach and sufficiently foreseeable as to make Hello! liable for them in the ordinary way. The only aspect that has troubled me has been whether Hello! is to be held responsible not for the use by the Press of the unauthorised photographs – which I shall mention below – but with such “downbeat” comment as there was in some of the

Press, making the story less one of a wedding and more of a lawyers' squabble. I doubt whether that was reasonably foreseeable but, equally, I do not expect that aspect on its own very materially to have affected sales of OK! up or down and there is no evidence that *it on its own* did so. For every person who did not buy a copy because the Press had made it seem more of a squabble than a wedding there could well have been, so to speak, a good proportion of a purchaser who bought to see what the squabble was about. It was, in my view, more the general availability of the unauthorised photographs in the Press that would have affected sales rather than such comment as there was but I have adjusted the loss as I have indicated in an attempt not to inflict Hello! with the consequences of events too remote from its own activity.

49 Next, I must comment upon the view expressed (though, not, perhaps, in quite such general terms) by Mr Howitt and Mrs Cartwright that a "spoiler" can often have a positive effect or, at most, no negative effect on the target intended to be "spoiled". A "spoiler" is a publication by a first newspaper or magazine intended, by covering similar ground to an exclusive or "scoop" proposed or published by a rival second one, to diminish the advantage of that exclusive or scoop to the second or to diminish the disadvantage of it to the first or to achieve both those ends. I can quite see that an unintended positive result may often be the case but whether it is in fact the case in any particular set of circumstances will, in my view, depend on those circumstances. Was the subject matter in the target publication, for example, such that it would in any event be fully brought to the public's notice by its own nature or by the target's efforts or was it a subject as to which the public's awareness would be materially increased by the spoiler? What is the attractiveness of the spoiler in comparison with that of the target? What is the timing of the availability of the spoiler in comparison with that of the target? How easy of access to the public is the spoiler in comparison with that of the target? What publicity is given to the spoiler and its availability in comparison with that of the target? How far is the subject matter one in which authenticity or due authority, present in the target but absent in the spoiler, is likely to affect sales? The answers to those and, no doubt, similar material questions will vary greatly from case to case and so, in turn, will the effect, if any, the spoiler is likely to have on the target.

50 Commenting in the light of the facts of this case, the very experienced journalist and editor, Mr Kelvin Mackenzie, editor of The Sun from 1981 to 1994, said that in his opinion, given as an expert witness, Hello!'s spoiler of OK!'s exclusive about the Douglas wedding would have had a devastating effect on the sales of the issues of OK! covering the wedding. In paragraphs 13 to 18 of his witness statement he gave reasons for that opinion. In cross-examination he gave robust and straightforward evidence that the unauthorised pictures published by Hello! were "terrific"; "they were great photos, and nobody can deny it". He did not think many customers would, given the then cover prices, have bought both Hello! and OK! and that some members of the public, having seen reproductions in the daily press would have said "I have now seen everything I want to know about this wedding" – the implication being that some members of the public who might have bought OK! had its exclusivity been preserved might have ended up buying neither it nor Hello!. Of the picture used by Hello! on its cover, he said:-

"..... if you were the picture editor of Hello! you would have thought you had died and gone to heaven. You would have said "We've got them, we've got them"

the “them” being OK!, being thus triumphed over. He was in no doubt but that OK! would have been severely commercially damaged at the bookstores by the excellence of Hello!’s product.

51 I was impressed by Mr Mackenzie’s forthright evidence in this area, both written and oral, which I accept. The relevance of Mr Mackenzie’s evidence was sought to be diminished by reason of his experience being chiefly in newspapers rather than magazines but I take the two businesses not to be so dissimilar that experience in one is no guide at all to the other. Both Mr Jon Steafel, Executive Editor of the Daily Mail, called as an expert witness by Hello! and Mrs Cartwright of Hello! also spoke of the importance of exclusivity, Mr Steafel speaking of the huge difference between having it and not having it. It was exclusivity that Hello!’s breach of confidence destroyed. Building upon OK!’s argument that publication in the Press of Douglas wedding photographs must have reduced OK!’s sales, Mr Price pointed to the fact that the Daily Express, a companion publication of OK!’s, had itself published some of OK!’s pictures of the wedding. OK!, said Mr Price, could hardly recover for damage which it had inflicted on itself. But the Daily Express’ publication was after the rest of the Press had already printed the unauthorised Hello! pictures and was a reasonable attempt, as it seems to me, to recapture ground from Hello!, to counter any view that the subject was no more than an unattractive squabble and to inform the public that it was OK! alone that had the full and authorised version of the wedding. It sought to whet the appetite not to sate it. I do not hold that the Daily Express publication reduced OK!’s sales.

52 I add, for clarity’s sake, that there is nothing inconsistent in Mr Mackenzie describing and my accepting the unauthorised photographs to have been “terrific” and the Douglasses’ view that they were appalling; Mr Mackenzie was considering them as photographs likely to sell magazines, the Douglasses as Hollywood publicity material. The Hello! pictures had a lively informality and freshness lacking in many of the official pictures. Even the fact that they were unauthorised may, if known, have added, for some, the attractions of forbidden fruit; The Sun described the pictures it printed as “Wedding Pictures they tried to ban”.

53 As for Hello!’s responsibility for the press coverage of the wedding and of the dispute with OK!, in two cases, as I held in the April judgment, publication of the unauthorised pictures was, ultimately, not only not permitted but was forbidden by Hello!, but that was after what I described in April as a “hesitant start”; Hello! had plainly not clearly forbidden use of the pictures from the start but had said they *might* be used (depending on the outcome of the injunction proceedings). When the Press learned the injunction had been lifted they not unnaturally thought they were free to use the pictures. Had Hello! from the outset taken a properly firm line forbidding reproduction I doubt the Press would have done as they did and it is difficult to resist the suspicion that Hello! was quite happy to have the Press give publicity to its cheeky escape, as it would portray it, from the restrictions intended in OK!’s exclusive. Such prohibition as occurred was too late. I do not regard the newspaper publications of the pictures as so remote a consequence of Hello!’s publication as not to be laid at Hello!’s door and plainly the newspaper publications would not have occurred as they did but for Hello!’s publication of the unauthorised photographs.

54 Next I should briefly explain why I have said little as to OK!'s issue 241. It sold better than a routine issue of OK! and, to the extent that it sold better than could be expected, credit has been given for that. The effect of surrounding publicity, it is said by Hello!, was plainly positive. But, as will have been seen, OK!'s claim was (eventually) framed principally by reference to lost sales of the originally planned 242 and 243. I have thus not been concerned to consider, save to the extent already described, what numbers 241 might have sold had it had no rival wedding issue of Hello! to compete with.

55 Accordingly, looking at damages in a conventional way, I find Hello! liable to pay OK! £1,026,706 plus £6450 for wasted costs = £1,033,156. I next turn to the Douglas' claims, again on a conventional compensatory basis.

(10) The Douglas' claims

56 I described the Douglas' distress in paragraphs 82-84 and paragraph 199 of my April judgment. I have had mentioned to me *Z v Finland* (1998) 25 EHRR 371, *The Daily Gleaner Co. Ltd. and Anor -v- Abrahams P.C.* 14th July 2003; *Williams -v- Settle* [1960] 1 WLR 1072, *Cornelius -v- de Taranto* [2002] EMLR 112 CA; *Campbell -v- MGN* [2003] QB 633 and, in outline, *Archer -v- Williams*, per Jackson J. on 3rd July 2003. Reference has been made to the *JSB Guidelines*, to *R (KB) -v- South London etc., Health Review Tribunal* [2003] 3 WLR 185, *Cole -v- Rana* [1993] CLY 1364, and to *Hobson -v- Payne* [1988] CLY 1047. Unsurprisingly, none provides a compelling guide as to the sum to be awarded to the Douglasses on the facts of this case but they do provide a guiding matrix in which a place may be selected for the award here.

57 No evidence has been led on this subject beyond what was heard in the earlier hearing and little argument beyond reference to the authorities I have described. Mr Price Q.C. has, though, rightly in my view, sought to separate distress occasioned by knowledge that there had been an intruder at the wedding and distress occasioned by the publication of the unauthorised photographs. Only the latter is to be laid at Hello!'s door. I will reduce my award to take that into account but the reduction will not be huge as although this issue was not put to the Douglasses and so direct evidence is lacking, the distress would, I expect, have been much less had it consisted only of distress caused by knowledge that someone had got in, had taken photographs *but would never publish them*. Doing the best I can to find the appropriate place for an award in this case in the matrix provided by the others mentioned to me, I award Mr and Mrs Douglas £3,750 each for distress. As mentioned earlier, they also have a claim for additional costs incurred by reason of their having to bring forward preparation, approval and provision of the authorised photographs so as to enable them to appear in OK! issue 241 as part of the Claimants' mitigation exercise, which was, in my view, a reasonable one. The claim here is for £13,000 but the particulars fail fully to justify that figure and I award only £7,000 under this head. I have already awarded the Douglasses £50 each under the Data Protection Act.

(11) Conclusion as to damages on a conventional compensatory basis

58 Accordingly, and so far approaching damages on a conventional basis, I award the Claimants all together £1,047,756 divisible, if it needs to be, as to £14,600 to the Douglasses and £1,033,156 to the 3rd Claimant, OK!. The figure is larger than I would provisionally (but incompletely) have calculated but I bear in mind the detailed sequential written submissions I have received since the oral hearing concluded and to which I referred at the outset.

59 In the Court of Appeal in *Douglas –v- Hello [2001] QB 967* Brooke L.J. spoke of Hello!, if found liable, being likely to have to pay the Claimants “very substantial sums of money” – *paragraph 4* – see also per Sedley L.J. at *paragraph 142*. I have not reasoned backwards, so to speak, from that remark towards finding Hello! liable in a substantial aggregate, one larger than I would have provisionally calculated, nor have I been otherwise affected by it but it is a minor comfort that I have found as I have; there would be little justice in an injunction being refused on the ground that any liability, if found, would be met with substantial damages if it were then to be found, despite liability, that the damages were trivial. Further, looking at this substantial award in a general way as encouraged by some of the authorities, I would not regard it, given the resources of Hello!, as of a size that is likely materially to stifle free expression and yet, without its going beyond the compensatory and into the penal, it is, I would expect, such as may make Hello! alive to the unwisdom of its acting as it did – see the reference above to Sedley L.J.’s *paragraph 142*. It is to be remembered that Sr. Sanchez Junco – see paragraphs 79 and 80 of the April judgment – well knew that OK! had an exclusive contract and that the photographs he bought were unauthorised. He was embarking on a kind of journalism he did not like but he made a point of not asking how the photographs had been taken. “I didn’t want to know”, he said. I am in general terms content with the award to which a detailed approach has led me.

C. The Notional Licence Fee approach

60 For a reason that will become apparent, I can take this alternative approach quite quickly. I shall make all necessary assumptions of law (of which there are several) in the Claimants’ favour and hence assume the availability to them of this alternative.

61 This basis requires me to assume a negotiation between the Douglasses and OK! on the one hand and Hello! on the other as to the terms on which the former would together authorise the latter to publish the unauthorised photographs in the manner which, in the event, they did. I am to assume that the parties would come to terms as to a sum to be paid by Hello! despite all the facts suggesting they would never have done so. I am to assume them to be reasonable men and women of business, reasonably appreciative of the relative strengths and weaknesses of their respective positions. As for their respective states of information and belief, I shall take that to be as it could have been on, say, the early morning of Monday 20th November 2000. It could be argued that the parties at that date – after Hello!’s position had become known but before it had published – could have agreed terms that included finalisation of an

appropriate licence fee being left over until it was found, for example, what Hello!'s actual sales and OK!'s proved to be. In principle, though, I prefer to have regard to the state of knowledge and expectation as it would have been on 20th November 2000; one is concerned with a notional prospective authorisation and if it is to be put off until all possible relevant facts are known (and after experts, Solicitors and Counsel are consulted) a process intended to represent a robust and inexpensive cutting of a Gordian Knot would become instead a slow and costly unpicking of every strand.

- 62 Further considerations I shall take to be appropriate as elements of the supposed negotiations are these. OK! will not attempt to hold Hello! to ransom on the basis that Hello! had already expended great sums in having printed and transported copies already bearing the unauthorised photographs; Mr Wilson so concedes. The Douglasses would point to the distress they would be caused by publication but would concede that any separate award to them has to be subsumed within the (notionally) agreed one-off licence fee. Both sides would recognise that neither can be sure whether, absent agreement, an injunction would or would not be granted. Hello! would emphasise that the quality of their pictures was not up to its usual standard; OK! would emphasise that nonetheless it would be likely to lose sales and lose also the kudos which its otherwise "exclusive" would confer on it as *the* magazine to look to for the bigger events. OK! would emphasise the £1m it had spent; Hello! would point to that net cost being likely to be very substantially reduced (as in fact it was) by syndication receipts. OK! would indicate its revision of plans and its *hope* (as at the Monday morning it would not yet know what wedding photographs it would get) to bring forward issue 241 as a wedding issue and that it would incur costs doing so; Hello! would argue that the shortened interval between the wedding and the first wedding issue would be likely to enhance sales.
- 63 They would agree Hello! to be on the market generally (as it was) on Friday 24th with OK!'s 241 (as it was) on sale only in London on that day and on the following day generally. OK! would stress the day's advantage Hello! would thus achieve. Both will assume a presentation on the cover of Hello! much as it was, with a claim (true but not the whole truth) that the (unauthorised) pictures were exclusive to Hello!. Mr Wilson concedes that Hello! would not describe its photographs as authorised by the Douglasses. Both sides would assume it was only the 6 unauthorised pictures actually used that would be used and that that which was being authorised was no more than their use only once, by Hello! only, and only in the United Kingdom. That Hello! had spent £125,000 already would have been a factor deployed both ways; Hello! would seek to have it regarded as something to be taken into account as already paid; OK! would argue it to be an investment by Hello! which, were Hello! not to agree a reasonable fee, would be money totally wasted. Any semblance of indifference on Hello!'s part as to whether it published or not would have been met by OK! pointing out how keen Sr. Sanchez Junco had been to get the exclusive for Hello!, what repeated approaches to the Douglasses Hello! had made and the sum, over £1m but not double it, he would have been willing to pay. Hello! would have argued that OK! would still have an exclusive as to *authorised* photographs and that recognition of that by the public could only preserve OK!'s sales. OK! would remind Hello! that Sr. Sanchez Junco and others at Hello! very well knew of the great efforts made by the Douglasses to achieve privacy (or control as Hello! would put it) and that it was acquiring pictures manifestly taken by someone who should not have been at the

wedding and publication of which would destroy the privacy (or control) which all knew was keenly valued by the Douglasses.

64 No doubt other factors would spring to mind. The parties would haggle but what cash figure would emerge? I have not found the expert evidence very helpful here; not only are the experts' views far apart but none had fully in mind the notional basis I am required to adopt and, of course, none had actual familiarity with a basis so improbable in ordinary experience. However, having considered their views, I would fix the figure at £125,000 as emerging on the crude basis that OK! would "get away" with their syndication receipts not being likely to exceed £500,000, thus reducing the net cost to OK! to £500,000. Then, on the basis that the unauthorised photographs were for use in one issue only, were, in number and quality, only half as good as the full authorised set OK! would have, that net cost would be cut in half to £250,000, from which Hello!'s purchase price of £125,000 would be deducted, leaving a (notional) licence fee of £125,000. On any footing I cannot see the fee being anything like as great as the damages I have found on a conventional compensatory basis, which is why I have been able to dispose of the notional fee issue without resolving the issues of law it raises. OK! and the Douglasses are, as I said earlier, to be presumed to opt for the higher alternative.

D. Conclusion

65 I thus repeat my earlier paragraph; I award the Claimants £1,047,756, divisible, if that is required, as to £14,600 to the Douglasses and £1,033,156 to OK!. There will need to be a yet further hearing (which the parties now before me expect to take 2 days) to deal with costs and ancillary and unresolved issues. At that further hearing the 4th and 5th Defendants (and perhaps also the 6th) will wish to be heard, so liaison with them will be necessary when steps are taken to fix the date.