Case No: HC0100644

Neutral Citation Number [2003] EWHC 55 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th January 2003

Before :

THE VICE-CHANCELLOR

- -

Between :

(1) Michael Douglas	**Claimants**
(2) Catherine Zeta-Jones	
(3) Northern & Shell plc	
- and -	
(1) Hello! Ltd	**Defendants**
(2) Hola SA	
(3) Eduardo Sanchez Junco	
(4) The Marquesa De Varela	
(5) Neneta Overseas Ltd	
(6) Philip Ramey	

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Mr. Michael Tugendhat QC, Mr. David Sherborne, and Mr. A. T. H. Smith (instructed by **Messrs Theodore Goddard**) for the Claimants
Mr. James Price QC, and Mr. Giles Fernando (instructed by **Messrs Charles Russell**) for the 1st to 3rd Defendants
Mr. Paul Fallon , Solicitor Advocate**,** (instructed by **Messrs Reed Smith**) for the 4th and 5th Defendants
Hearing dates : 16th – 21st January 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.

....
The Vice-Chancellor

The Vice-Chancellor :

Introduction

1. The first and second claimants, Michael Douglas and Catherine Zeta-Jones, are well-known film and television stars. In January 2000 they became engaged to be married. This news gave rise to, amongst other things, competition for the exclusive right to publish photographs of the wedding between the third claimant, Northern & Shell plc ("OK!"), the publishers of a weekly magazine called OK! and the first and second defendants ("Hello!"), the publishers and distributors of a similar magazine called in its English version Hello!, its Spanish version Hola! and its French version Oh La!. Such right was conferred on OK! by an agreement in writing dated 10th November 2000 whereby Michael Douglas and Catherine Zeta-Jones granted to OK! the exclusive right to publish such photographs of their wedding as had been both taken by photographers hired by them and approved by them.

2. The wedding ceremony took place at the Plaza Hotel, New York on Saturday 18th November 2000. The reception was held at the same place and lasted into the early hours of Sunday 19th November 2000. Attendance at the ceremony and the reception was limited to the members of the families of the bride and groom and friends to whom an invitation had been extended. Extensive and elaborate precautions were taken by and on behalf of the bride and groom to exclude those who had not been invited and to prevent the taking of unauthorised photographs by guests, the staff of the hotel or others.

3. On Monday 20th November 2000 the editor of OK! was told that an unauthorised free-lance photographer had succeeded in taking or acquiring a set of photographs of the wedding which were in the control of the third defendant, Sr Eduardo Sanchez-Junco, the proprietor of the first and second defendants, and were to be used in the forthcoming edition of Hello!. Later that day a consignment of 240,700 copies of that edition numbered 639 arrived at Stansted Airport from Spain.

4. The claimants took immediate steps to prevent the distribution and sale of any copy of that edition of Hello! In the evening of 20th November 2000 Buckley J granted them injunctions for a limited period. The injunctions were continued until trial or further order by Hunt J on Tuesday 21st November 2000. Hello! Ltd appealed immediately to the Court of Appeal (Ward and Robert Walker LJJ) and a hearing by that court took place later on Tuesday 21st November 2000. Unfortunately the members of that court were unable to agree on the disposition of the appeal and a fresh hearing commenced on Wednesday 22nd November 2000 before Brooke, Sedley and Keene LJJ. At the conclusion of that hearing on 23rd November the Court allowed the appeal and discharged the order of Hunt J. Their reasons for doing so were handed down in writing on 21st December 2000.

5. At that stage the only defendant to the claim was the first defendant Hello! Ltd. The other defendants were added later, the second defendant Hola S.A. ("Hola") on 19th March 2002 and the third, fourth and fifth defendants Sr Sanchez-Junco, the Marquesa de Varela ("the Marquesa") and her company Neneto Overseas Ltd ("NOL") on 2nd May 2002. On the latter date, Jacob J also added as the sixth defendant Mr Philip Ramey, the photographer who had supplied the unauthorised photographs to Sr Sanchez-Junco, and gave permission to serve him out of the jurisdiction. That order was set aside by Laddie J on 3rd December 2002 and the claimants appealed with the permission of Arden LJ.

6. In the meantime there had been substantial correspondence between the solicitors for the claimants (Theodore Goddard) and those for the first three defendants, to whom I shall refer collectively as "the Hello! Defendants" (Charles Russell) concerning both the veracity of the evidence adduced by Hello! Ltd in the Court of Appeal and the adequacy of the documentary disclosure given on 18th February, 19th March, 30th May and 29th October 2002. On 26th November 2002 witness statements for use at the trial then fixed for Monday 20th January 2003 were exchanged between all parties.

7. The principal application now before me was made by the claimants on 13th December 2002. They seek an order that the defences of the Hello! Defendants be struck out and judgment be entered against them for damages to be assessed pursuant to CPR Rule 3.4(2) or the inherent jurisdiction of the court. The grounds for the application, duly particularised, are that the Hello! Defendants

> "1) made or caused to be made false statements to the Court of Appeal in November 2000 knowingly or without an honest belief in their truth, and
>
> 2) deliberately destroyed or disposed of documents, and
>
> 3) made false disclosure statements knowingly, or without an honest belief in their truth
>
> and have thereby interfered with the course of justice by so doing and/or have thereby put the fairness of the trial in jeopardy, and rendered any judgment that may be entered in their favour unsafe and further proceedings unsatisfactory and prevented the Court from doing justice."

The claimants also seek permission to re-amend their particulars of claim. Both applications are opposed by the Hello! Defendants. The Marquesa and NOL also oppose the application for permission to amend. In addition they have applied for an order that the particulars of claim be struck out as against them under CPR Rule 3.4(2)(a) or (b) on the grounds that they do not disclose reasonable grounds for bringing the claim against them or any serious issue to be tried as between the claimants and those defendants.

8. Thus the issues before me are:

> a) Whether to strike out the defences of the Hello! Defendants on all or any of the grounds relied on;
>
> b) whether to give permission to re-amend the particulars of claim; and
>
> c) whether to strike out the claims made against the Marquesa and/or NOL.

Before dealing with them I should mention three unusual features. The first is the timing. The hearing before me started on Thursday 16th January 2002. By then the trial had been postponed to Monday 27th January 2002 with a time estimate of two to three weeks. In the course of the hearing I postponed the commencement of the trial for a further week to Monday 3rd February 2002. The hearing before me concluded on Tuesday 21st January 2002. (I add as a postscript that on Thursday 23rd and Friday 24th January 2003 the solicitors for the Hello! Defendants faxed and delivered by hand to my clerk a second statement of Ms Neal for use at the trial served on them by the solicitors for the claimants. I have not read that statement. It was plain from the correspondence that the solicitors for the other parties had not agreed that I should. The hearing in court had concluded on Tuesday 21st January and I had not asked for or given permission to the Hello! Defendants to adduce any further evidence.) Second, at the time of the hearing before me the constitution of the action was still uncertain as the appeal of the claimants from the order of Laddie J was due to be heard on Wednesday 22nd January 2002. I understand that the Court of Appeal allowed the claimants' appeal so that Mr Ramey has again become the sixth defendant. The third is the fact that four witnesses were cross-examined before me on issues which may also arise at the trial. I have made such findings as appear to me to be justified by the evidence, oral and documentary, before me. It must be borne in mind that the trial judge is likely to hear a good deal more evidence than I have and may arrive at different conclusions.

The Facts

9. In order to explain the nature of the applications, the submissions made to me and my conclusions on them I must describe the facts in a good deal more detail. It is not necessary to give any more detailed introduction of the claimants but I should do so in relation to the defendants and other individuals involved.

10. Hola is a company incorporated in Spain. It publishes the three magazines I have mentioned. Hello! Ltd is a company incorporated in England. It provides editorial, commercial and administrative services to Hola. Sr Sanchez-Junco is one of two owners of Hola and the Editor in chief of all three magazines but he is not a director of either Hola or Hello! Ltd. The managing director of both Hola and Hello! is Sr Javier Riera. Mr Anthony Luke is the co-ordinating editor of Hello! Snres Sanchez-Junco, Riera and Luke are based in Madrid. The relevant individuals based in London were Mrs Cartwright, Mrs Doughty and Ms Sue Neal. Mrs Cartwright and Mrs Doughty were respectively the publishing director and financial controller of Hello!. Ms Neal was the picture editor of Hola. Sr Sanchez-Junco, Sr Riera, Mrs Cartwright and Mrs Doughty were cross-examined, the first two through an interpreter.

11. The Marquesa describes herself as a media consultant. Her business includes acting as an intermediary in obtaining pictures and stories of celebrities and social events for Hello! and Hola!. She carries on that business from offices in London and New York though her main place of residence is in Uruguay. The Marquesa is the beneficial owner of NOL, which was incorporated in 1998 in the British Virgin Islands, and Marquesa De Varela International Ltd through which she conducts UK oriented business with Hello!.

12. Mr Ramey describes himself as a professional photographer and the owner of the Ramey Photo Agency. Both Mr Ramey and his agency are based in Santa Monica, California. There appear to have been associated with Mr Ramey in connection with the wedding of Mr Douglas and Miss Zeta-Jones three other professional photographers based in California, namely, Frank Griffin, Rupert Thorpe and Randy Bauer.

13. As I have mentioned, Sr Sanchez-Junco was very keen to obtain the exclusive right to publish photographs of the wedding of Mr Douglas and Miss Zeta-Jones. On 12th May 2000 Sr Sanchez-Junco wrote to their agent offering US$1.5m for the exclusive world-wide rights to publish the wedding photographs. Some part of the negotiations was carried on by the Marquesa and on 21st July 2000 Sr Sanchez-Junco authorised her to use the Hello! logo in those negotiations. By a letter dated 24th July 2000 Sr Sanchez-Junco confirmed to the Marquesa that he would pay £1.3m for the exclusive feature of the wedding and Miss Zeta-Jones' baby that was born in early August 2000. As part of those negotiations the Marquesa spoke to Mr Ramey on the telephone on 9th/10th August 2000, the cost of which was later reimbursed by Hello! There is evidence to suggest that in the course of these conversations Mr Ramey asked for and was promised by the Marquesa, but not Sr Sanchez-Junco, an advance of $10,000 for any photographs of the wedding which he could obtain. The efforts of Hello to obtain the exclusive rights from Michael Douglas and Catherine Zeta-Jones were unsuccessful. On 6th November 2000 the Marquesa's office confirmed to that of Hola! that the wedding coverage was with OK!. As I have mentioned, the contract with OK! was made on 10th November 2000.

14. Sr Sanchez-Junco explained his position at this time in his oral evidence to me. He said:

> "...at all times I wished to keep Hola! and Hello! out of all previous contact until the photographs were actually made, were actually taken, with the conscious intention to not appear at any time as procurers or collaborators with the fact of taking of photographs...The reason was that I did not want to involve my publication in a type of journalism which is one we do not partake in, and in that sense I could not prevent the photographers whose

> normal activity is this. I could not prevent them from doing it but at no time did I wish to have any prior agreement, nor established a prior price for the photographs and at one time through the Marquesa I was told that they were asking $10,000...for the possibility of being able to do their job. I completely refused to advance any figure which could be close to, in the event of the photographs being done. I simply said that if that was going to be done we would look at them and we would decide to publish them or not, arriving at a price, arriving at an agreement in terms of the value of them. After having seen them, that is."

15. On Thursday 16th November 2000 Mr Ramey told Ms Neal on the telephone that he was trying to get someone into the wedding to take photographs. Ms Neal passed this information on to Mr Luke. On the same day Sr Sanchez-Junco told Sr Riera that it was possible, because of negotiations carried out by the Marquesa, that there was a freelance who might be able to supply some photographs of the wedding. In the light of this information Sr Riera increased the print run for issue 639 by 15% and chartered an aircraft to fly part of that issue to England on Monday 20th November 2000. On Friday 17th November the original of issue 639 was sent to the printers in Spain but printing was put on hold until it was established whether or not photographs of the wedding were available. On the same day Sr Sanchez-Junco asked Mr Luke to come into the office on Saturday 18th November in case photographs of the wedding became available. Mr Luke agreed and arranged for a skeleton staff of 5 to be available on that day. He remained there for 24 hours over 18th and 19th November 2000.

16. In the early hours (European time) of Sunday 19th November Mr Ramey telephoned Mr Luke in the Hola offices in Madrid to check that he had the correct FTP address to enable him to send photographs in electronic form. The address he was given was that of Ms Sue Neal in London. On receipt of the photographs from Mr Ramey Ms Neal sent them on by ISDN to Mr Luke in Madrid. Mr Luke printed out the photographs and showed them to Sr Sanchez-Junco. Shortly thereafter Mr Ramey telephoned Mr Luke again and engaged in a three-way conference call with Sr Sanchez-Junco, Mr Luke acting as an interpreter. The subject matter of the conversation was whether Sr Sanchez-Junco was prepared to buy the exclusive rights to publish the photographs in the UK, France and Spain and if so at what price. The outcome was that Sr Sanchez-Junco agreed with Mr Ramey a price of £125,000. This was reported to Ms Neal in London and she faxed confirmation from Hello! to Mr Ramey in the following terms:

> <u>Re: Michael Douglas Wedding</u>
>
> This agrees the fee of UK Sterling £125,000 for exclusive rights to the above pictures 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

17. Mr Luke arranged for the photographs so obtained to be inserted into the existing layout of Issue 639 by removing other material and amending the front cover. On the morning of Sunday 19th November 2000 the revised format was sent to the printers in Spain. As I have already mentioned a consignment containing 240,700 copies arrived at Stansted Airport on the afternoon of Monday 20th November 2000.

18. In his oral evidence to me Sr Sanchez-Junco described the roles of Mr Ramey, the Marquesa and himself in these terms

> "So our involvement in this was normal in these circumstances without arriving at any prior agreement which could amount to a procurement or an order. When I spoke to Mr Ramey and the photographs in front of me, I did not know what he was going to ask me in terms of money, nor did he know what I was going to be prepared to give him. What he did was his normal

> job which he continues to do every single week without needing a request from anybody, and he sells his work throughout the world, as he normally does and as he did in this case. The Marquesa acted as she acts normally with regard to the subjects she negotiates, she manages, and we act as we usually do, which is to decide whether we should publish or not some photographs which were offered to us and which in this case we decided to do because we considered it to be of interest to readers and which would not involve any kind of damage, neither for the image of the interested parties, nor privacy since the exclusive rights had already been sold prior to this."

A little later he observed

> "...very often we find ourselves surprised by the paparazzi because they manage to steal the odd photograph, and so in my opinion this is part of the risk, part of normal practice in this kind of event of great importance."

19. These are the facts on which the claimants now base their claim for damages, both general and aggravated, for breach of confidentiality, privacy and the Data Protection Act 1998 and interference with their respective rights and businesses, including conspiracy. But at the time they applied for injunctions to Buckley and Hunt JJ on 20th and 21st November 2000 they knew little more than that a substantial number of copies of issue 639, believed to contain photographs of the wedding taken by Mr Ramey or some other unauthorised photographer, had arrived at Stansted.

20. The injunction was served on the sales director of John Menzies, the wholesaler, very late on the evening of Monday 20th November. He contacted his managing director who telephoned Mrs Cartwright at midnight. Her contemporary note, which was produced for the first time during the hearing before me, records that

> "I rang Chris Hutchings (solicitors) and told him the situation.
>
> 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 the photographer who took them did not wish his name revealed. Hola SA, who bought the pix, bought them for 3 countries, UK, Spain and France. It is our understanding that they will be sold throughout the world.
>
> In the injunction they refer to the Russian Tea Rooms and a pre-wedding party – the photographs of this are quite clearly taken in the street outside the building, and show a number of other photographers present and taking pix. There can be no question of there being in breach of any agreement.
>
> I rang Phil Ramey in L.A. Sue Neal involved. Ramey very cagey, said dealt with Marquesa. Did not want to be involved."

21. The evidence of Hello! appeared for the first time in the Court of Appeal between the afternoon of 21st November at the beginning of the hearing before the two-man court and 23rd November 2000 at the end of the hearing before the three-man court. It included (a) a statement of Sr Sanchez-Junco made to Mrs Doughty and recorded by her in a witness statement dated 22nd November 2000 ("Sr Sanchez-Junco's statement"); (b) a statement in writing on the headed paper of NOL dated 23rd November 2000 and signed by the Marquesa ("the Marquesa's statement") and (c) a second witness statement of Mrs Cartwright ("Mrs Cartwright's second statement").

22. Sr Sanchez-Junco's statement was made in the context of a witness statement of Paul Anderson, the picture editor of OK!. He referred to three telephone conversations he had had with Phil Ramey on the afternoon (European time) of Monday 20th November. In the first Mr Ramey gave Mr Anderson

to understand that he, Phil Ramey, was able, as agent, to sell US rights in photographs taken inside the wedding of which Sr Sanchez-Junco was the owner. In the second Mr Ramey refused to send the photographs to Mr Anderson for the latter to look at them. In the third Mr Ramey told Mr Anderson that he was "pulling" the photographs from all the US magazines to which he had distributed them as it was not worth his while to stick his neck out for Sr Sanchez-Junco who, he said, owned them.

23. Mrs Doughty records that she read Mr Anderson's witness statement and relayed its contents in Spanish to Sr Sanchez-Junco. She took down the latter's response, translated from the Spanish, in the following terms:

> "2. 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.
>
> 3. I do not have any agents representing me or my company in the United States or anywhere else and anybody pretending to do so does it under false pretences.
>
> 4. 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 and France."

24. The claimants contend that the second sentence of paragraph 2 was false to the knowledge of Sr Sanchez-Junco in that Hello! Ltd and Hola SA had frequent and regular contacts with Mr Ramey and specifically in relation to the wedding photographs that he would consider them if Mr Ramey submitted them. In his oral evidence Sr Sanchez-Junco admitted that there were such frequent and regular contacts between employees of Hello! Ltd and Hola SA and Mr Ramey. He contended that he personally had never met Mr Ramey and had only spoken to him once and that was the occasion on November 19th which I have described. He did not dispute that in relation to the photographs of the wedding he had let it be known to Mr Ramey that he would consider them if Mr Ramey submitted them. The claimants also contend that the statement was misleading as Sr Sanchez-Junco referred to the provider of the photographs in a context which implied that he thought that such provider was someone other than Mr Ramey.

25. In my judgment Sr Sanchez-Junco's statement was false and misleading. 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 contact 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 contact. 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 Sr Sanchez-Junco knew that his statement was false and misleading in these respects.

26. At the hearing before the Court of Appeal on the afternoon of Tuesday 21st November the solicitors for Hello! asked Mrs Cartwright to ask Sr Riera to obtain a statement from the Marquesa. The request was passed on and at 1942 pm Spanish time Sr Riera sent a message by fax to the Marquesa informing her in Spanish that

> "We need to receive by tomorrow at 11:00 am at our barrister's...[fax number] a document signed by you in a headed paper with the name of your company with the following text:"

The following morning the Marquesa faxed through as requested a document on NOL headed paper and signed by her on its behalf stating in the form sought

> "Dear Sir/Madam,
>
> This is to confirm that this 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 this company and Eduardo Sanchez-Junco, the proprietor of Hola SA on Sunday 19th November 2000."

It is now admitted by Sr Sanchez-Junco, Sr Riera, Mr Luke and the Marquesa that this statement was false.

27. Its falsity must have been apparent to the Marquesa at the time she signed the letter because she had not been party to any conversation with Sr Sanchez-Junco that night, neither she nor her company had the rights to sell and neither she nor it purported to do so. Her statement was procured by Sr Riera at the request of the solicitors for the Hello! Defendants and tendered to the Court of Appeal on behalf of the Hello! Defendants as an exhibit to the witness statement of their solicitor. The Hello! Defendants contend that the text of the statement reflected the understanding of Mrs Doughty and Mrs Cartwright. Mrs Doughty had not been concerned and would not know whether the statement was true or not.

28. The case of Mrs Cartwright is different. Given the conversations she had had during the night of 20th November, as recorded in her contemporary note, I do not see how she could have had such confidence in her understanding of the events to justify giving such unequivocal instructions to the solicitors as could warrant the unqualified request to the Marquesa that Sr Riera made. Had anyone checked with either the Marquesa, Sr Sanchez-Junco, Mr Luke or Ms Neal the true position ought to have been revealed.

29. The solicitor acting for Hello! spoke to the Marquesa on the telephone both before and after the statement had been sent to her for her signature. On the first occasion he warned her that she might be asked to give a statement as to her involvement in the matter. On the second he gave her the details of where to fax the statement. He does not claim on either occasion to have checked with her the details of the evidence she could give or had given. Thus, it does not appear that the solicitor, Mrs Cartwright or anyone else on behalf of Hello! checked with the Marquesa before the statement was submitted to her that it reflected evidence she was in a position to give. In these circumstances it is clear that the Marquesa knew that the statement she had signed was false and no one concerned on behalf of Hello! had taken proper steps to ascertain whether it was true or false.

30. Mrs Cartwright's Second Statement exists in several forms. She made two witness statements which were put before the Court of Appeal. There is no issue in respect of the first signed and dated 22nd November 2000. In the second she dealt primarily with the effect on Hello! if the interlocutory injunctions were continued. There are two drafts. One contains the following passage

> "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 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."

In the other draft paragraphs 10 and 11 have become 11 and 12 and have been slightly modified.

31. In her cross-examination before me Mrs Cartwright readily admitted that both drafts were plainly wrong and that is why she did not sign either of them. The signed version which was then put to her was signed and dated 22nd November 2000 and did not contain any paragraphs in the form of paragraphs 10 and 11 of the first draft. But at the commencement of the hearing the following day counsel for the Hello! Defendants produced a witness statement which did contain paragraphs 10 and 11 in the form of the first draft and which was signed but undated by Mrs Cartwright. Mrs Cartwright was recalled and further cross-examined but she was unable to explain what had happened. On all the evidence I conclude that a witness statement signed by Mrs Cartwright containing paragraphs 10 and 11 in the form of the first draft was put before the Court of Appeal. On her own admission, Mrs Cartwright knew that those paragraphs were false.

32. The materiality of all three statements is evident from paragraph 35 of the judgment of Brooke LJ handed down on 21st December 2000 where he said:

> "35. It appears from the evidence adduced by Hello! that a company called Neneta Overseas Ltd, with an address in the British Virgin Islands, sold the exclusive United Kingdom rights in the nine photographs to which the claimants took exception to Hola SA for use in Hello! magazine, pursuant to an agreement it concluded with Sr Sanchez, the proprietor of Hello!, on Sunday 19 November. Sr Sanchez, for his part, has said that he did not commission these photos or finance them or agree a price for them in advance. One of his employees had agreed a price for them on the Sunday as soon as they had been delivered to him that day. He maintained that he merely owned the exclusive rights for publication in the United Kingdom, Spain and France and he denied that he had any agents representing him in the United States. Ms Cartwright, for her part, said that Hello! had no previous knowledge that these pictures were going to be taken until they were offered on the open market around the world on the Sunday. She explained that Hello! was then able to fit them in the magazine which was by then substantially ready."

In paragraph 104 Sedley LJ adopted the factual summary of Brooke LJ. In paragraph 160 Keene LJ referred expressly to the evidence of Mrs Cartwright contained in the paragraphs to which I have referred. He presciently observed that it was difficult to predict how it would stand up to cross-examination. He concluded that, as there was no direct evidence of any prior knowledge on the part of Hello!, it was not sufficiently certain that the claimants would establish that Hello! had instigated or been involved in the taking of the illicit photographs.

33. I understand that the judgment was given to the parties in draft before it was handed down on 21st December. Neither then nor at any other time before the exchange of skeleton arguments on the application before me was it pointed out that there was more than one version of Mrs Cartwright's second statement, that one of them was false in a most material particular and that particular was of such importance that two members of the Court of Appeal singled it out for special mention.

34. I conclude on the evidence before me, including the cross-examination of Sr Sanchez-Junco, Sr Riera and Mrs Cartwright, that the case advanced by Hello! before the Court of Appeal on 22nd and 23rd November 2000, based on the statements of Sr Sanchez-Junco, the Marquesa and Mrs Cartwright's second statement, was false. Each of them knew that his or her statement was false or misleading in the respects I have mentioned.

35. That is by no means the end of the story relevant to the application before me. I also have to consider the subsequent events both with regard to the destruction of documents and the failure of the Hello! Defendants to give proper disclosure. Neither is denied but the Hello! Defendants seek to minimise

the importance of what occurred. No criticism is made of Charles Russell, the solicitors acting then or now for the Hello! Defendants or any of them. Accordingly I assume that they complied with their professional responsibility, as pointed out by Sir Robert Megarry V-C in **Rockwell Machine Tool Co. Ltd v Barrus** [1968] 2 AER 97, 98,

> "to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width but also the importance of not destroying documents which might by any possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to any who may be affected by it."

There can be no doubt that that statement applies to electronic messages in the same way as it applies to hard copies, CPR Rule 31.4.

36. The basis of the claimants' complaint, which is admitted, is that the Hello! Defendants failed to preserve any document in electronic form and destroyed or failed to preserve all or most of the documents, original or copy, passing between them and the Marquesa. Such documents have been disclosed by the Marquesa insofar as she has them or copies of them. What is not available are the versions formerly in the possession of the Hello! Defendants or any version of a document not disclosed by the Marquesa. It is necessary to consider some of them individually.

37. It is admitted that between 19th and 22nd November 2000 the files on the computers of Hello! in London and Hola in Madrid containing the photographs sent by Mr Ramey were deleted. Moreover the hard disks on which they were formerly contained have been disposed of too in the modernisation of the IT systems of the Hello! Defendants. Thus any information to be derived from the original photographs in electronic form as transmitted to Hello!, such as their original source, has, subject to what has been disclosed by Mr Ramey, been irretrievably lost.

38. On 27th November 2000 Hello! paid an invoice dated 20th November 2000 submitted by the Marquesa for £1,000 and VAT for "telephone expenses for arranging photographs of Douglas/Zeta-Jones Wedding". This document was not destroyed but it was not disclosed either in any of the disclosures by the Hello! Defendants to which I have referred in paragraph 6 above. The claim that it supports the case for the Hello! Defendants is no excuse even if it were well founded. Also destroyed by Hola was an e-mail from Ana Grande, a salesperson at the offices of Hola in Madrid, to the Marquesa in which it is made plain that Sr Sanchez-Junco was informed of the nature of the expenses covered by the invoice. Reimbursement of such expenses is hardly consistent with the claim that the Marquesa was the seller of the photographs rather than an agent involved in their acquisition.

39. On 22nd November 2000 at 1351 (ie. before the fax from Sr Riera and the statement from the Marquesa referred to in paragraph 26 above) the Marquesa sent by fax and e-mail to Sr Riera with a copy to Sr Sanchez-Junco a letter relating to the defence of Hello! to the proceedings brought by the claimants. It is only necessary to quote three sentences. The Marquesa wrote

> "I have been waiting for you to return my call of yesterday. I naturally assumed that you would need to discuss the court case arising out of the Michael Douglas wedding pictures with the one person who has been involved in the matter from the beginning."
>
> "To put it bluntly I am afraid that by not calling me back yesterday you might have contributed to Hello's losing this case."

The originals of these documents were destroyed by Hello! and Hola. Thus any information contained in the originals, such as any notes of the recipients have been irretrievably lost. Sr Riera sought to minimise the importance of the document on the basis that the Marquesa

> "is a very changeable woman with regard to her opinions and the truth is I never take very much consideration of her opinions."

Such an explanation is inconsistent with the action of Sr Riera in asking the Marquesa to provide the statement referred to in his fax of 22nd November 2000.

40. Between 28th November and 3rd December 2000 the four photographers to whom I referred in paragraph 12 above submitted invoices to the offices of Hello! in London totalling US$199,600. Mr Ramey submitted two, both dated 28th November 2000, one of US$10,000 as "agreed fee for special project", the other of US$75,200 as "agreed fee special project Edwardo Sanchez". The invoice from Rupert Thorpe was dated 29th November and was for US$56,400 "for recent pictures". Frank Griffin and Randy Bauer each submitted invoices for US$29,000 dated respectively 1st and 3rd December for "November 2000" in the case of the former and "special project – New York (as per Frank)" in the case of the latter. The invoices were modified by Ms Neal so that the aggregate amount (except for the invoice for US$10,000) came to the agreed amount of US$188,000. On 15th December 2000 Sr Riera sent a fax to the Marquesa telling her of four invoices from four photographers totalling US$188,000 in respect of photos taken at the wedding of Michael Douglas. He wrote

> "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 would 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."

41. The Marquesa replied on the same day indicating that she would invoice Hola "but I don't know what invoice I am to pay?". At the same time she asked Mrs Doughty to fax to her copies of invoices re Douglas' Wedding from Mr Ramey, Bauer, Griffin and Thorpe. Mrs Doughty complied with that and a similar request from Sr Riera and then destroyed the invoices in the possession of Hello! on the grounds that they were not properly addressed and had no value to Hello! In her oral evidence she said that she was not aware at the time that they might have to be disclosed later and when asked about invoices in May 2002 had forgotten the whole episode. That evidence is inconsistent with the unproved assumption that the solicitors for the Hello! Defendants carried out their responsibility, as described in paragraph 35 above.

42. Subsequently the photographers submitted revised invoices to NOL. The revised invoice from Mr Thorpe was dated 9th January 2001, the others bore the date of the original. These invoices, reflecting the amendments made by Ms Neal, totalled US$188,000 and were paid by NOL in due course. On 10th January 2001 the Marquesa invoiced Hola for US$205,000. This episode generated a number of e-mails passing to or from the Hello! Defendants, all of which were deleted by them. Such copies as do exist came from the other party to the e-mail.

43. The Hello! Defendants gave formal disclosure of documents on four occasions, namely on 18th February, 19th March, 30th May and 29th October 2002. On the first occasion they duly disclosed the fax from Ms Neal to Mr Ramey dated 19th November 2000 referred to in paragraph 16 above, the Statement of the Marquesa referred to in paragraph 26 above and Mr Ramey's invoice to NOL for US$75,200 referred to in paragraph 42 above. They disclosed no other document relating to their acquisition of the photographs. It is not in dispute that this and each subsequent disclosure was defective in the respects relied on by the claimants in schedule C to their application form. The defective disclosure stems from the failure of the Hello! Defendants to retain the documents to which I have referred and the deletion of e-mails from all their computers. Save in relation to e-mails sent or received before 21st November 2000, there is no evidence that such destruction or disposal of a document took place before the proceedings had been commenced.

44. Finally, in relation to the facts I should refer briefly to the acceptance by the Hello! Defendants of what is now admitted to be the true position. In paragraph 17 of the particulars of claim the claimants alleged that

> "…the defendants procured or instigated or otherwise participated in or authorised the taking of the photographs prior to the wedding taking place…"

The Hello! Defendants denied these allegations in paragraph 30 of their defence and set out what they alleged to be the true facts in six sub-paragraphs. In sub-paragraph (v) they asserted that

> "…After having seen the pictures, Mr Sanchez on behalf of Hola! agreed to purchase exclusive publication rights…"

Thus the identity of the seller was not specified, but it appears from a letter from Theodore Goddard dated 8th June 2001 that they understood that it was being contended that the agreement had been made between Hello! and the Ramey Photo Agency.

45. On 2nd May 2002 Jacob J added Sr Sanchez-Junco, the Marquesa and NOL as additional defendants. As the transcript of the hearing before him shows, one reason was to obtain better disclosure of documents than had been obtained from the first two defendants. The defence of the Hello! Defendants was amended on 23rd July 2002 but not in any respect material to the present issues. Contemporaneously the Marquesa served her defence. In paragraph 13.5 she denied that she commissioned the photographs from Mr Ramey or entered into any contract with him on 19th November 2000 or at all. The Marquesa gave disclosure of documents by letter on 26th July and 1st August 2002 and formally by list on 29th October 2002.

46. On 5th September 2002 Theodore Goddard wrote to Charles Russell referring to the defence of the Marquesa and the documents disclosed by her to date. They continued

> "They cast grave doubt on the truth of the evidence which you and your clients placed before the Court of Appeal in November 2000, on the completeness and veracity of your clients' disclosure and also on statements made in the course of the proceedings."

Theodore Goddard then explained at length why they considered that both Sr Sanchez-Junco's statement and the Marquesa's statement were false. They sought the comments of Charles Russell as a matter of urgency. On 2nd October Charles Russell responded to the "very serious allegations concerning the evidence given by and on behalf of our clients". Theodore Goddard were not satisfied and wrote again on 18th October raising a host of further questions and asking for replies as a matter of urgency. On 30th October Theodore Goddard wrote again complaining that they had received no response to their letter of 18th October. The response came on 6th November when Charles Russell wrote

> "Our clients have set out their position in response to your very serious – but misconceived – allegations concerning the letter which Mr Riera requested from the Marquesa during the injunction proceedings. We note your further questions. We are presently in the process of preparing full witness statements from our clients and these will include statements from Mr Sanchez-Junco and Mr Riera. The statements will deal fully with the issues which you have raised."

47. The witness statements of Sr Sanchez-Junco and Sr Riera were served on Theodore Goddard on 26th November 2002. The falsity of the Marquesa's statement is admitted by each of them. As I have said, the application now before me was issued on 13th December 2002. It relied on the alleged falsity of

Sr Sanchez-Junco's Statement and the Marquesa's Statement, the destruction of documents and the failure of the Hello Defendants to give proper disclosure. Only in the course of the hearing did the doubts concerning Mrs Cartwright's Second Statement emerge. Permission to amend to rely on the falsity of that statement as well was not opposed by the Hello! Defendants.

48. Before turning to the issues I have to decide I should refer to the position of Mr Ramey. As I have mentioned he was joined as the sixth defendant pursuant to the order of Jacob J made on 2nd May 2002. On 8th July 2002 he filed a witness statement in which he said

> "Exhibit MCK3 to the Statement [of the solicitor for the claimants] includes a letter to my firm from Hello! dated 19th November 2000 and an invoice from my firm to [NOL] dated 28th November 2000. Those documents accurately evidence and record my firm's payment for a series of photographs including those which are at issue in this action."
>
> "As it transpired, an independent photographer gained access to the wedding and took photographs which I subsequently commercialised. The photographs were taken in the ballroom of the Plaza Hotel in New York; a very large area open to hundreds of guests and dozens of waiters and catering staff. Having obtained the photographs, I subsequently offered them to the Marquesa. I offered her the European rights on the basis that I would retain the copyright. The Marquesa bought them on arms length commercial terms."

49. On 19th September 2002 Mr Ramey served a draft defence. He denies that he attended the wedding or took the photographs. He admits that he was provided

> "with photographs of the wedding which were subsequently sold to [Hello! Ltd] on commercial terms."

He also served a list of documents dated 24th October 2002. He only discloses an electronic file containing the photographs, the fax from Ms Neal dated 19th November 2002 and his invoice for US$75,200 issued to NOL on 28th November 2000.

50. As I have mentioned, on 3rd December 2002 Laddie J set aside the order of Jacob J. The claimants' appeal against that order was heard on 21st January 2003 and was allowed.

The claimants' application for permission to re-amend the particulars of claim

51. It is convenient to deal with this application first. The particulars of claim were served on 22nd February 2001. They were amended on 3rd May 2002 to reflect the joinder of Sr Sanchez-Junco, the Marquesa, NOL and Mr Ramey as additional defendants. They contain details with regard to the parties (paras 1 and 2), allegations concerning the arrangements, including security, surrounding the wedding (paras 3-5) and allegations as to the consequential duties of confidence relied on as owed by those attending the wedding (paras 6-9). Paragraphs 10 to 12 contain the allegations concerning what are called the unauthorised photographs. The court is invited to infer that they were taken by a guest or some person working at the wedding. It is then alleged that they were commissioned by the Marquesa from Mr Ramey and rights in them were sold by her or NOL to the Hello! Defendants in a telephone conversation between the Marquesa and Sr Sanchez-Junco on 19th November 2000 for not less than £125,000. It is alleged that the photographs were confidential. Subsequent paragraphs contain allegations as to the alleged duty of confidence owed by each defendant to Mr Douglas and Miss Zeta-Jones (paras 15 to 19), infringement of the Data Protection Act 1998 (paras 20 to 27), rights of privacy (paras 28 to 29A) and interference with the rights and business of the claimants (paras 30 to 34). In paragraph 35 the claimants seek general and aggravated damages. Paragraphs 36 and 37 formally claimed damages and an injunction.

52. The proposed reamendments were served on the defendants on 6th January 2003, some three weeks after the application had been launched and two weeks before the trial was due to commence. The

form of amendment now sought was slightly altered during the course of the hearing. I will refer only to those proposed amendments which are opposed. In summary they are a new paragraph 11A, amendments to paragraph 12, new paragraphs 12A and 12B, new paragraphs 32A and 32B, amendments to paragraph 33 and a new paragraph 36A. I will deal with them in turn.

53. New paragraph 11A sets out the allegations now made by the claimants in the light of all the information which has come to light following the joinder of, in particular, the Marquesa. Omitting the particulars relied on it is now contended in paragraph 11A

> "1. Further or alternatively, the unauthorised photographs were taken or obtained directly or indirectly, by a number of photographers acting in concert, including Philip Ramey, Rupert Thorpe, Randy Bauer and Frank Griffin. The [Hello! Defendants] had made arrangements in advance for such photographs to be taken without the consent of the claimants through [the Marquesa] and their then picture editor, Sue Neal. Mr Ramey and Mr Griffin were well known to [Hello! Ltd] and were in regular, sometimes daily, contact with their picture editor, Sue Neal.
>
> 2. On 9th and 10th August 2000 [the Marquesa] telephoned Mr Ramey and Mr Griffin from the Hotel Delmonico in New York. She was acting as agent for [the Hello! Defendants] and invoiced [Hello! Ltd] for the cost of these and other calls to Mr Ramey on 20th November 2000.
>
> 3. The agreement or arrangement that [the Marquesa] reached with Mr Ramey was as described by her in [certain specified statements] that 'Philip Ramey asked me to secure him $10,000 in advance for the photographs....and I did say that yes I would make sure he would get that money...'.
>
> 4. In relation to the unauthorised photographs of the wedding, the first and second defendants had had direct contacts with Mr Ramey, including in August 2000 an arrangement between him and Sue Neal that he should send pictures of the wedding if he wished and in the week commencing 13th November 2000 when he informed her that he hoped that he would get some pictures of the wedding and, later, that he was trying to get someone into the wedding to take pictures.
>
> 5. In addition to the $10,000 agreed through [the Marquesa] as stated above and correctly described by Sue Neal as the "wedding guarantee fee", a further fee was agreed on Sunday 19th November directly between [Sr Sanchez-Junco] and [Mr Ramey]...in a sum not less than £125,000 (or $188,000). Mr Ramey claimed to own the copyright in the photographs, and the agreement was at least for the exclusive rights for the pictures for Hello! UK, Hola Spain and Oh La! France.
>
> 6. Further or alternatively, [the Hello! Defendants] subsequently adopted, approved and/or ratified the arrangements made by [the Marquesa] with Mr Ramey and Mr Griffin. [The Marquesa] invoiced [Hello! Ltd] £1,000 plus VAT for the cost of these and other calls to Mr Ramey on 20th November 2000. Sue Neal endorsed Mr Ramey's invoice for $10,000 as aforesaid, and [the Hello! Defendants] arranged for this invoice, and the four other invoices from the four photographers totalling approximately $188,000 to be paid by [the Marquesa and NOL]. [The Hello! Defendants] put [the Marquesa and NOL] in funds for that purpose in a total sum of $205,000.
>
> 7. Shortly before the agreement was reached on 19th November 2000 Mr Ramey transmitted the photographs to [Hello! Ltd] in England in digital format."

54. This amendment was opposed by the Hello! Defendants on the grounds that the application was made too late and uncertainty as to how the allegations were to be proved. It was pointed out that no hearsay notice had been served and even if it had been the claimants could not take the part of the statements of the Marquesa and Sue Neal which supported their case but reject the rest, which was alleged to be contrary to it.

55. I reject both of those submissions. Paragraph 11A sets out with proper particularity the case the claimants now wish to pursue in the light of all the material at their disposal. Whether and if so how they prove some parts of it is not material at this stage provided that I am satisfied, as I am, that there are reasonable grounds for making the allegation (CPR Rule 3.4(2)) and that there is a real, that is to say more than fanciful, prospect of proving it (CPR Rule 24.2).

56. The submission of the Hello! Defendants based on alleged delay is, to say the least, a bold one. I have set out in some detail the course of events in paragraphs 43 to 47 above. It is plain from the correspondence that it was not until the service of the witness statements on 26th November 2002 that the full picture was disclosed by the Hello! Defendants to the claimants. The application was made 17 days later and diligently pursued thereafter. The further period of three weeks before the draft of paragraph 11A was provided, given its nature, cannot have caused prejudice to the Hello! Defendants.

57. The proposed amendment to paragraph 12 involves the addition of the allegation that the Marquesa and/or NOL "published or caused to be published" the material photographs. I will deal later with the contention of the Marquesa and NOL that such an allegation is bound to fail. At this stage it is sufficient to say that as it stands this allegation lacks sufficient particularity. Counsel for the claimants provided the necessary detail by the addition of the words "as particularised in paragraphs 11A 1-7 and 32A". In my view the addition cures that objection so that the re-amendment with that addition should, subject to the claim of the Marquesa and NOL, be permitted.

58. Paragraphs 12A and 12B make it clear that the case for the claimants is advanced at this stage on two alternative bases. The first, set out in paragraph 12A is that Mr Ramey's account of events, as indicated in paragraph 48 above is true. The second, set out in paragraph 12B, is that the true version is that recounted by the Marquesa which the Hello! Defendants do not now dispute. In my view this unusual course is justified by the continuing uncertainty and should be allowed.

59. The principal objections to the amendments sought arose in respect of the new paragraphs 32A and 32B. In the first the claimants aver that all five defendants conspired together to injure the claimants or deliberately interfered with their business by unlawful means. The unlawful means relied on is obtaining the discharge of the interlocutory injunctions

> "on the basis of dishonest evidence and their subsequent attempts to maintain the deception that they had practised on the Court and the claimants by the other acts and matters attributed to them in the schedule [to this application]."

60. As the Hello! Defendants point out this allegation is new. They contend that it should not be allowed because it has been raised too late. They submit that the allegations contained in schedules B and C which post-date the discharge of the injunction are irrelevant. They claim that it is to be doubted whether in law such acts or omissions could amount to unlawful means for the purpose of these torts anyway. I do not accept any of those submissions. The decision of the Court of Appeal in **Surzur Overseas Ltd v Koros** [1999] 2 Ll.L.R.611 shows that the point is reasonably arguable, which is all that has to be shown at this stage. The allegations set out in the schedule to the application include the assertion that the Hello! Defendants failed to correct the false evidence but continued to maintain a false case and to dispose of or destroy documents inconsistent with that case. In my view the events so alleged occurring after 23rd November 2000 are capable of amounting to unlawful means and of causing damage to the claimants. For the reasons I have already given I do not consider that the

lateness of the application can be laid at the door of the claimants so as to lead me to refuse what would otherwise be a perfectly proper amendment.

61. Paragraph 32B alleges that the Hello! Defendants conspired together with the predominant purpose of injuring the claimants. This allegation was formerly contained in paragraph 32 of the amended particulars of claim. What is new are the particulars set out in subparagraphs 1 to 5 from which it is claimed that the court should draw the inference as to the purpose of the Hello! Defendants. The essence of the particulars is that the Hello! Defendants intended the claimants to sustain the large loss (about £1.75m) claimed but could not have obtained any benefit for themselves.

62. The Hello! Defendants claim that had this claim been raised earlier they would not have applied for the order they obtained from Blackburne J on 19th December 2002 whereby the forthcoming trial was limited to questions of liability only, all questions of quantification of damage being adjourned to a further hearing. They submit that they would be irretrievably prejudiced if this claim on liability is allowed to proceed, depending as it does on quantification of the loss sustained by the claimants. In addition they contend that the claim is bound to fail because the amount the claimants seek to recover is grossly inflated.

63. I do not accept these submissions. The Court of Appeal recognised that if at trial the liability of the Hello! Defendants was made out the damages would be very substantial, **Douglas v Hello! Ltd** [2001] QB 967 paras 4, 49 and 99. I am not satisfied that the Hello! Defendants would be prejudiced to the extent that they suggest. The amended particulars of claim contained detailed allegations as to losses sustained by the claimants. There was no pleading or other indication of any dispute over them until 19th December 2002. Even now the only issue appears to be the number of issues OK! could have expected to sell had the illicit photographs not been published in Hello! I see no reason why such a limited point cannot be properly researched and prepared in time for the trial. If, in the event, it cannot that may justify a request for some more time. What, in my judgment, it does not justify is the refusal of the amendment properly to particularise a claim which was already pleaded.

64. The claimants also seek to amend paragraph 33 to allege that all the defendants conspired to injure the claimants through the publication of the photographs in England and Wales by unlawful means as subsequently specified. Objection is taken to sub-paragraphs 1, 4 and 5. Sub-paragraph 1 reads

> "the breach of their obligations under the general law of confidentiality and privacy"

It is objected that this paragraph is confusing, when compared with subparagraphs 2 and 3, and unspecific. I agree with both objections, but I accept that they would be cured if the words, as proposed by the claimants, "as alleged in paragraphs [x] and [y] above" are added. If that addition is made I can see no further objection to the proposed amendment.

65. Sub-paragraph 33.4 seeks to bring in all the agreements and arrangements pleaded in paragraph 11A. The Hello! Defendants contend that such agreements and arrangements were not unlawful by the law of New York and that this court will not entertain a claim based on a conspiracy to commit a trespass to land abroad any more than a claim based on the trespass itself. But, as the form of amendment makes clear, it is not any such trespass that the claimants rely on. The relevant act is the publication of the photographs in England and Wales. The agreements and arrangements averred in paragraph 11A can constitute unlawful means even if the so-called trespass was not unlawful by the law of New York.

66. Complaint was also made of paragraph 33.5 as being both irrelevant and speculative. What it alleges is a conspiracy between the existing defendants and Mr Ramey to conceal the truth. Mention is made of the witness statement and list of documents filed by Mr Ramey. It is said that documents dated in 2002 cannot give rise to a conspiracy in 2000. The Hello! Defendants contend that they will need to call Mr Ramey to deal with these allegations and that they cannot do so in time. I reject all these submissions. The point is that Mr Ramey has adhered to the original account put forward by Hello! Ltd and now agreed by all the other defendants to be false. Such adherence is capable of giving rise to

the inference that Mr Ramey's statement was also false and so evidence that he was party to the original conspiracy or unlawful act. I see nothing improperly speculative in that assertion. Nor do I see why, if he is prepared to come, Mr Ramey's evidence cannot be procured before the end of a three-week trial beginning on 3rd February 2003. If, in the event it cannot, then the trial judge may be persuaded, in his discretion, to allow further time.

67. Finally objection is taken to the insertion of a new paragraph 36A by which the claimants seek an award of exemplary damages. The facts relied on are those already pleaded in paragraphs 32A and 32B. It is suggested that this claim is legally unsound and involves further evidence of the "calculation" the Hello! Defendants must be shown to have carried out. But the claim is not made on the basis of any such calculation but on what is claimed to be outrageous conduct. The speech of Lord Nicholls of Birkenhead in **Kuddus v Chief Constable of Leicestershire** [2002] 2 AC 122 paras 63 to 68 shows that such a claim against one who is not a government official does have a real prospect of success. In my view such a claim is seriously arguable if the facts alleged are made out.

68. For all these reasons, subject to the additions to paragraphs 12 and 33.1 to which I have referred and subject to the contention of the Marquesa and NOL that the particulars of claim so re-amended do not disclose a cause of action against either of them, I grant the claimants' application for permission to re-amend in the revised form sought.

The application of the Marquesa and NOL to strike out the re-amended particulars of claim on the grounds set out in CPR Rule 3.4(2)(a) or (b)

69. It is submitted for the Marquesa and NOL that the re-amended particulars of claim fail to disclose any reasonable ground for the claims made against them. They contend on similar grounds that the claims against them are an abuse of the process of the court. Mr Fallon, on their behalf, made some general and critical comments on the lack of intellectual rigour he perceived to be displayed by the present draft. Indeed it was common ground that some tidying up is called for. But the essence of the case for the Marquesa and NOL is that there is no prospect of establishing that they are joint tortfeasors because there is not alleged to have been a common design, that the mere facilitation of a tort is not itself a tort and that the unlawful means relied on in the conspiracy claim against them are insufficient because they are not themselves actionable.

70. The first two points relate to the claim made against the Marquesa and NOL in paragraph 12 as reamended that "[the Marquesa] and/or [NOL] published or caused to be published, as particularised in paragraphs 11A1-7 and 32A," the photographs. Reliance is placed on the well known decisions in **The Koursk** [1924] Probate 140, **CBS Songs v Amstrad** [1988] AC 1013 and the judgment of Hobhouse LJ in **Credit Lyonnais v ECGD** [1998] 1 Ll.L.R.19 with which Thorpe LJ agreed. The first two clearly establish the need to prove "concerted action to a common end" for the imposition of liability as a joint tortfeasor. In the third, at p.46, after referring to a number of relevant authorities Hobhouse LJ summarised their effect in the following words:

> "It is only conduct which comes into the first or third of the categories I have set out above [criminal conduct not dependent on the commission of the principal crime and agency] which constitutes the commission of a tort. The criminal law for obvious policy reasons goes further than the civil law. Acts which knowingly facilitate the commission of a crime amount to the crime of aiding and abetting but they do not amount to a tort or make the aider liable as a joint tortfeasor."

He added later

> "Accordingly, in my judgment there is no second category in the law of tort. Mere assistance, even knowing assistance does not suffice to make the "secondary" party jointly liable as a joint tortfeasor with the primary party."

71. It was contended that there is nothing in paragraph 11A to implicate the Marquesa or NOL in the taking of the illicit photographs. It was pointed out, rightly, that the arrangements referred to in paragraph 11A1 are alleged to have been made by and between the Hello! Defendants, the involvement of the Marquesa relied on being that of an agent only. This would not be enough because, as submitted, one agent is not liable for the acts of another unless he does something to make himself liable as a principal. **Cargill v Bower** (1879) 10 Ch.D 502, 513.

72. This argument was predicated on the supposition that the alleged tort in respect of which the claimants had sued the Marquesa and NOL is the taking of the illicit photographs without the consent of the claimants. But, as counsel for the claimants pointed out, that is not the case. The claim set out in paragraph 12 as re-amended is that the Marquesa and NOL were publishers of photographs to which duties of confidence had become attached. This claim, if made out, is a tort on the part of the Marquesa and NOL as principal and individual tortfeasors not as tortfeasors jointly with other persons. It was not suggested that the facts alleged in paragraphs 11A and 32A of the re-amended statement of claim were incapable of giving rise to such a liability. It follows, in my judgment, that the principles to which Hobhouse LJ referred in **Credit Lyonnais v ECGD** [1998] 1 Ll.L.R.19 have no application to the claim against the Marquesa or NOL as pleaded.

73. The third submission, which I summarised in paragraph 69 above, arises in respect of the conspiracy claim made in paragraph 32A. It is contended that relevant unlawful means are confined to those which are actionable against an individual defendant at the suit of the claimants. It is submitted that that condition is not satisfied because the witness immunity rule as described in **Dawkins v Lord Rokeby** (1873) LR 8 QB 255 exempts a party or a witness from any action for anything said or done, although falsely or maliciously and without reasonable or probable cause, in the ordinary course of any proceedings in a court of justice.

74. The problem with this submission is that at this stage I am only concerned with whether there are reasonable grounds for bringing the claim made in paragraph 32A. The propositions on which the Marquesa and NOL rely are inconsistent with the decision of the Court of Appeal in **Surzor Overseas Ltd v Koros** [1999] 2 Ll.L.R.611. In that case the claimants contended that the defendant had obtained a variation of a Mareva injunction by deploying false evidence in court. The judge analysed the claim as one based on a conspiracy to injure by unlawful means but refused relief. He considered that the witness immunity rule would preclude any action against any of the individual witnesses so that a conspiracy claim based on those acts could not succeed. The Court of Appeal disagreed.

75. Waller LJ, with whom Hirst and Aldous LJJ agreed, considered (p.617) that the claim was in respect of a conspiracy to injure by a number of unlawful means of which the giving of false evidence in court was one. He then considered the effect of the witness immunity rule in some detail. One of his conclusions (p. 619) was that the speech of Lord Morris in **Roy v Prior** [1971] AC 470, 477 supported a proposition that

> "if the action is not brought simply in respect of evidence given or supplied but is brought in relation to some broader objective during the currency of which it may well be that evidence was given witness immunity should not apply."

On the facts of that case he considered that the conspiracy was correctly characterised as a conspiracy to hide assets and cheat the claimant by the manufacture of false documents and was not one to which the witness immunity rule applied. In my view that decision shows that there are reasonable grounds for bringing the claim made in paragraph 32A and real, that is to say more than fanciful, prospects of it succeeding.

76. The claim made in paragraph 33 of the re-amended particulars of claim is also directed at the Marquesa and NOL. It was suggested in relation to an earlier formulation that such claim was defective. I did not understand that objection to be maintained if I concluded, as I do, that the claim is in respect of the publication of confidential material and not the procurement of the illicit photographs.

77. In summary, I do not consider that any ground is made out for striking out the claims against the Marquesa on NOL. Accordingly I dismiss their application for such an order.

The application of the claimants to strike out the whole or parts of the defence of the Hello! Defendants

78. I return to the principal application before me on the basis that the particulars of claim are re-amended in the form for which I have given permission and the defendants to the claim are the Hello! Defendants, the Marquesa and NOL and Mr Ramey. I have set out in paragraph 7 above the nature of the application and the grounds on which it is made. The particulars of those grounds are set out in the schedule to the application. Part A relates to the alleged false statements put before the Court of Appeal.

79. Part A para 1 relates to the Marquesa's Statement. It is alleged that it was false in stating that the agreement by which Hello! Ltd and Hola acquired the rights to use the unauthorised photographs was made between her company and Sr Sanchez-Junco on Sunday 19th November 2000. It is alleged that the Marquesa knew that the statement was false. Both these allegations are admitted by all relevant persons. Then it is alleged that Sr Riera, Mrs Doughty and Mrs Cartwright either knew the statement to be false or had no honest belief in its truth. That allegation is not made out against Mrs Doughty.

80. I have referred in paragraph 28 above to Mrs Cartwright's state of mind. She had no reasonable grounds for believing the Marquesa's statement to be true when it was sent to her in draft but once it was returned by the Marquesa duly signed there were no grounds then for Mrs Cartwright not to have an honest belief in its truth.

81. Sr Riera is in a similar position. He did not place much credence on anything the Marquesa said yet he was the person through whom the request to the Marquesa was passed after he had received the fax referred to in paragraph 39 above. He exercised no critical judgment of his own. But it has not been established to my satisfaction that when the statement was returned by the Marquesa duly signed there were any grounds on which Sr Riera should have disbelieved what she said.

82. It was suggested by counsel for the Hello! Defendants that the falsity of the statement of the Marquesa could not be attributed to the Hello! Defendants. The only authority dealing with false evidence to which I was referred is **Odyssey Re (London) Ltd v OIC Run-Off Ltd** (Times Law Reports for 17th March 2000). In that case the claimants sued for an order to set aside an earlier judgment on the grounds that it had been obtained by perjured evidence. The evidence in question was that of a Mr Sage. He was a director and general manager of the relevant party. Nourse LJ pointed out that a person who gives evidence for a company does not do so as its agent. The principle he adopted, taken from the speech of Lord Hoffmann in **Meridian Global Funds Management Asia Ltd v Securities Commission** [1995] 2 AC 500,507, was to ask whether the act of the person giving the false evidence was for the purpose of the legal rule or liability under consideration intended to count as the act of the company. The answer, as he pointed out, is a question of fact. Brooke LJ agreed with this approach. I did not understand counsel for the Hello! Defendants to dispute the principle, only its application.

83. In my view on the unusual facts of this case the act of the Marquesa in giving her false statement is to be attributed to the Hello! Defendants, no distinction between them being suggested for this or any other purpose. Her statement was given in the form she gave it at the express request of the Managing Director of Hello!. The evidence when given was relied on by counsel properly instructed on behalf of the Hello! Defendants. I can see no reason why such evidence should not be attributed to the Hello! Defendants for the purposes of the application before me.

84. Part A para 2 deals with the statement of Sr Sanchez-Junco. I have already concluded in paragraph 25 above that his statement was, to his knowledge, false and misleading in the respects alleged. It was not disputed that his evidence is to be attributed to the Hello! Defendants.

85. Part A para 2A concerns the second statement of Mrs Cartwright. As I have already found in paragraph 31 above the statements contained in paragraphs 10 and 11 were false to her knowledge. The Hello! Defendants claim that her evidence is not to be attributed to them. They suggest that she was a mere amanuensis. I do not agree. Mrs Cartwright occupied a senior position in Hello! as its publishing director. She was described by Sr Sanchez-Junco in his witness statement made in November 2002 as part of his managing team who took charge of the legal proceedings instructing the Hello! Defendants' solicitors in London. In my judgment her evidence is to be attributed to the Hello! Defendants for the purposes of the application.

86. Part B of the schedule to the application contains the details with regard to the allegations concerning the destruction or disposal of documents. As I have already recorded in paragraph 36 above the details are not in dispute. There is, however a distinction to be drawn between those which were destroyed or disposed of before these proceedings were commenced and those which were destroyed or disposed of thereafter. With regard to the former category it is established in the very recent decision of the Court of Appeal for the State of Victoria in **British American Tobacco Australia Services Ltd v Cowell and McCabe** [2002] VSCA 197 paras 173 and 175 that the criterion for the Court's intervention of the type sought on this application is whether that destruction or disposal amounts to an attempt to pervert the course of justice. There being no English authority on this point I propose to apply that principle, not only because the decision of the Court of Appeal for the State of Victoria is persuasive authority but because I respectfully consider it to be right.

87. The documents, which fall into this category, are the e-mails passing between the personnel in the Hello! Defendants' offices and others. The solicitor for the Hello! Defendants has stated that "as with many other e-mail systems, e-mails are deleted once read". Plainly the deletion of such documents cannot justify the court's intervention. Nor insofar as any other type of document is concerned is there any evidence to suggest that pre-action documents were destroyed in an attempt to pervert the course of justice.

88. Thus the material disposals or destructions are those made after the effective commencement of proceedings on 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 Ms Neal to Mr Ramey sent on 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?

89. Counsel for the claimants submits that it is not necessary to embark on that issue because the fact that the relevant destruction or disposal was not accidental is enough to establish a contempt of court. He relies on **A-G v Punch** [2002] UKHL 50, paras 55, 76 and 97-99. By contrast counsel for the Hello! Defendants contends that for the purpose of establishing a contempt of court it is necessary to prove the specific intention to impede or prejudice the due administration of justice. He relies on **A-G v Sport Newspapers Ltd** [1991] 1 WLR 1194 as applied in **A-G v Judd** [1995] C.O.D 15.and Arlidge, Eady and Smith 2nd Ed. 11-32. The issue of the mental element required to establish a contempt of court as a matter of law is not one I consider I have to decide. I am not trying a contempt application as such, nor am I required to punish any transgression of the rules.

90. The issues are whether the rules have been transgressed, if so whether a fair trial is achievable and if not what to do about it. See **Logicrose Ltd v Southend United Football Club Ltd** (The Times 5th March 1988) and **Arrow Nominees Inc v Blackledge** [2001] BCC 591 para 54 where Chadwick LJ, with whom Roch LJ agreed, said:

> "I adopt, as a general principle, the observations of Mr. Justice Millett in ***Logicrose Ltd v Southend United football Club Limited (The Times, 5 March 1988)*** that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules – even if such disobedience amounts

> to contempt for or defiance of the court – if that object is ultimately secured by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the court as to render further proceedings unsatisfactory and to prevent the court from doing justice, the court is entitled – indeed, I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice between the parties; not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke."

91. Part C of the Schedule to the application gives details of the disclosure statements and the respects in which they were false. The standard list was signed by Sr Riera, the remainder were provided or verified by the solicitors for the Hello! Defendants. There is no dispute as to their respective inaccuracies which flow, largely, from the wrongful destructions and disposals specified in Part B. I do not think that this part of the application adds much.

92. The picture thus presented by the claimants is of three material but knowingly false statements on the basis of which the interlocutory injunctions were discharged accompanied by the wholesale destruction or disposal of material documents which would have shown not only the extent of the falsity of the evidence but the enquiries needed to reveal the truth.

93. Counsel for the Hello! Defendants suggests that this picture is distorted. He contends that the false evidence is due to the speed with which the application to the Court of Appeal had to be prepared, the destruction or disposal of documents to muddle or misunderstanding and the failure to give adequate disclosure to, in effect, occupational hazard. I cannot accept any of those submissions. With regard to the false evidence, none of the falsities I have found to be established can be attributed to haste. None of Sr Sanchez-Junco, the Marquesa or Mrs Cartwright gave haste as a reason or excuse for the falsity of his or her statement. Thus the submission is unsupported by evidence. The destruction or disposal of the documents cannot have been due to muddle or misunderstanding. If the solicitors had properly discharged their responsibilities as specified in paragraph 35 above, which I have assumed, then such destruction or disposal was blameworthy. If they did not discharge such responsibility then the individuals, such as Mrs Doughty, may not be blameworthy but that does not mean that the Hello! Defendants can escape the consequences. The failure to give proper disclosure is a breach of the obligations of the Hello! Defendants for which they are responsible even if the fault lay elsewhere.

94. It was also suggested that the false statements might be overlooked or minimised on the ground that the decision of the Court of Appeal rested not on the evidence summarised by Brooke LJ in paragraph 35 but on the balance of convenience and the adequacy of damages as a remedy. That, it is true, was the reason for their decision but that is no reason to minimise the gravity of what was done. Each of the three statements was material, each was false. It is not for me or anyone else to speculate what might have happened if the truth had been told.

95. It was submitted in this context too that the application was made too late. Counsel for the Hello! Defendants contended that all relevant facts were in the possession of the claimants by the end of July 2002. I have rejected this submission in the context of the application to re-amend the particulars of claim in paragraph 56 above. I reject it in this context too for the same reasons.

96. The question remains whether by their conduct, in the words of the application, the Hello! Defendants

> "have thereby interfered with the course of justice by so doing and/or have thereby put the fairness of the trial in jeopardy, and rendered any judgment that may be entered in their favour unsafe and further proceedings unsatisfactory and prevented the Court from doing justice."

97. The deployment of the false evidence in the Court of Appeal may have done so in the past but will not now do so in the future because of the respective admissions or findings of falsity. Likewise the documents known to have been disposed of or destroyed, except (but subject to inspection of whatever Mr Ramey has disclosed) the photographs in digital format, have now been supplied by the other party to the communication. 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. Such documents would have been created on and after 20th November 2000 containing communications with others as part of the attempt to get the injunction discharged or concealing the falsity of the statements of Sr Sanchez-Junco, the Marquesa or Mrs Cartwright.

99. But does that inference justify striking out the whole or any part of the defence of the Hello! Defendants? As stated by Millett J in **Logicrose Ltd v Southend United Football Club Ltd** (The Times 5th March 1988)

> "I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render the further conduct of proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice."

There can be no question, for example, of excusing the claimants from proof of other parts of their case by striking out the whole of the defence of the Hello! Defendants.

100. It was common ground that, as held by the Court of Appeal for the State of Victoria in **British American Tobacco Australia Services Ltd v Cowell and McCabe** [2002] VSCA 197 paras 187 and 188, the court can strike out the defence by reference to specific issues. The claimants suggested that I should do so by reference to the re-amended particulars of claim with regard to paragraphs 11A and 12, 17 (relating the procurement of the photographs) and 32 (relating to the alleged purpose and intent of the defendants).

101. With regard to paragraphs 11A and 12, the facts alleged follow closely on the documents now disclosed. They will have to be proved by the claimants against the Marquesa, NOL and Mr Ramey anyway. 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.

102. Similarly in the case of paragraph 17 the claimants invite the court to infer from the facts and matters pleaded in paragraph 11A and other specified facts that the Hello! Defendants procured, instigated, or otherwise participated in or authorised the obtaining or taking of the photographs. Some trial on those issues is necessary both to prove them against the other defendants and to enable the judge to pick the alternative he considers to be established as against the Hello! Defendants.

103. The same is true of paragraph 32. This alleges that the purpose and intent of the alleged conspirators was to cause damage to the defendants. It may be that the documents which the claimants should

have had but do not would have provided material for the cross-examination of the Hello! Defendants' witnesses. That possibility will no doubt be considered by the judge at trial in his evaluation of all the evidence. I do not think that it would justify striking out the Hello! Defendants defence to that allegation.

104. Accordingly, notwithstanding conduct attributable to the Hello! Defendants which leaves a very great deal to be desired with regard to the veracity of their evidence and the adequacy of their disclosure I am not persuaded that a fair trial is no longer possible or that the deficiencies in the conduct of the defence of the Hello! Defendants justifies an order striking out the whole or any part of it.

Conclusion

105. For all these reasons I will

a) grant the claimants' permission to re-amend the particulars of claim in the form sought with the additions and alterations to which I have referred;
b) dismiss the application of the Marquesa and NOL for orders dismissing the claims against them;
c) make no order on the application of the claimants for an order striking out the defences of the Hello! Defendants.

I will hear further argument on questions arising from my judgment and on the question of costs.