Neutral Citation Number: [2006] EWCA Civ 1776

Case No: A3/2006/0882/CHANF

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2006

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE MASTER OF THE ROLLS
and
THE RIGHT HONOURABLE LORD JUSTICE MAY

- -

Between :

Associated Newspapers Limited	**Appellant**
- and -	
His Royal Highness the Prince of Wales	**Respondent**

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- -

M.Warby QC and P. Saini (instructed by **Messrs Reynolds Porter Chamberlain LLP**) for the **Appellant**
H. Tomlinson QC and L. Lane (instructed by **Messrs Harbottle & Lewis**) for the **Respondent**

Hearing dates : 27th and 28th November 2006

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Judgment Approved by the court for handing down

Lord Phillips of Worth Matravers, Chief Justice

This is the judgment of the Court

Introduction

1. In this appeal the appellant ('the Newspaper') appeals against that part of the order of Blackburne J dated 17 March 2006 which granted summary judgment in respect of part of the claim of the respondent ('Prince Charles') for breach of confidence and infringement of copyright. The claim brought by Prince Charles related to eight hand written journals kept by Prince Charles to record his impressions and views in the course of overseas tours made by him between 1993 and 1999. Copies of these were provided to the Newspaper, via an intermediary, by an employee of Prince Charles in breach of her contract of employment. Summary judgment was given in respect of one of these, the journal that related to the Prince's visit to Hong Kong between 23 June and 3 July 1993 ('the Journal'), when the Colony was handed over to the Republic of China. The Newspaper had published substantial extracts from the Journal in the Mail on Sunday on 13 November 2005.

2. The Newspaper admits that Prince Charles owns the copyright in the Journal, but relies on defences under the Copyright, Designs and Patents Act 1988 ('the CDPA') to the allegation of infringement of that copyright. The Newspaper denies that the content of the Journal was confidential. Each of the parties has relied upon the impact of the Human Rights Act 1998 and the Human Rights Convention ('the Convention') on the issues raised in this action. Prince Charles alleges that the publication of the extracts from the Journal interfered with his right to respect for his private life and his correspondence under Article 8 of the Convention, so that it constituted in modern parlance a breach of privacy. The Newspaper denies this but alleges, in the alternative, that any interference with this right was justified under Article 8(2) as necessary to protect the rights of the Newspaper and the public under Article 10. Prince Charles accepts that the relief that he has claimed amounts to a restriction on the Newspaper's right of freedom of expression under Article 10, but alleges that this restriction is justified under Article 10(2) as necessary to protect his right to privacy, his copyright and to prevent the disclosure of information received in confidence.

3. Blackburne J's Order was made in proceedings for summary judgment brought by Prince Charles under CPR 24. Blackburne J concluded that, so far as the Journal was concerned, there was little relevant issue of fact and, insofar as there was any such issue, the Newspaper had no real prospect of succeeding on it. There were, however, substantial issues as to the application of the principles of the developing law of breach of privacy to the facts of this case. These issues were explored before the judge in a depth which was not typical of the ordinary proceeding under Part 24. Thus the skeleton argument submitted on behalf of Prince Charles extended to 44 pages and that submitted on behalf of the Newspaper to 30 pages. The hearing lasted 3 days and the judgment was 44 pages in length.

4. It seems to us that what the judge did, in effect, was to hold that there was no issue of fact in relation to the Journal that called for trial, so that disclosure and oral evidence were unnecessary, and to proceed to try the remaining issues. The judge resolved those issues in favour of Prince Charles. He entertained, however, full argument as to why those issues should be resolved in favour of the Newspaper and, had he been persuaded by that argument, would have been in a position to give final judgment against Prince Charles.

5. The preparations made for this appeal were appropriate for determination by this court of the substantive merits of the case, insofar as it relates to the Journal. The skeleton submitted on behalf of the Newspaper is 33 pages in length and that submitted on behalf of Prince Charles is 44 pages in length. Three files containing copies of 42 authorities were prepared for the hearing. In these circumstances we have been in no doubt as to how to give effect to the overriding objective as set out in CPR Part 1. Our first task must be to consider whether the judge was correct to conclude that there was no relevant issue of fact that required a trial. If he was not, then his order must be set aside and a trial ordered. If, however, there is no issue of fact that requires trial, we should treat this as an appeal on the merits that we can determine either by upholding the judge's Order in favour of Prince Charles, or by setting aside his order and giving judgment in favour of the Newspaper. Counsel for each of the parties very sensibly agreed with this course.

6. Blackburne J's judgment [2006] EWHC 522 (Ch) has not been reported. The convenient course is to annexe it to our own judgment, and we do so.

The facts

7. In order to facilitate the conduct of this litigation Prince Charles agreed to the full disclosure of the contents of the Journal. These are summarised by the judge at paragraphs 28 to 38 of his judgment and we shall not repeat that exercise. Suffice it to say they are a personal description of Prince Charles' participation in the events that marked the handing over of Hong Kong. These include a banquet which the Chinese President attended and which Prince Charles describes in a manner that is disparaging of the formalities and of the behaviour of the Chinese participants.

8. The publication of and comments on extracts from the Journal in the Mail on Sunday came shortly after a State visit to London by the Chinese President in the course of which he held a banquet at the Chinese Embassy. Prince Charles declined an invitation to that banquet. The judge summarises the articles in that newspaper and sets out the editorial comment at paragraphs 54 to 61 of his judgment. The front page headline was "Appalling Waxworks", the phrase used by Prince Charles to describe the Chinese entourage, and the article to which it related started by stating that "Scathingly candid remarks Prince Charles has made about the Beijing leadership can be revealed today – just days after the Chinese President completed his controversial state visit to Britain". Reference should be made to the judgment for details of the publication.

9. There were two areas where there was a degree of conflict in the evidence placed before the judge. Mr Warby QC for the Newspaper submitted that these conflicts required to be resolved at a trial. The first area covers the practice followed by Prince Charles in relation to causing or permitting others to see his journals and, in

particular, the course that he followed in relation to the Journal. There are issues of fact in relation to this area. The second area relates to the general conduct of Prince Charles in making public his views and seeking to influence executive action and, in particular, to his conduct in declining invitations to two banquets given in London by the President of China, each one on the occasion of a state visit to this country. There is a degree of conflict of evidence as to his reasons for not attending the banquets.

10. The evidence in relation to the journals is set out in paragraphs 13 to 26 of Blackburne J's judgment. Evidence in statement form on behalf of Prince Charles was given by Sir Stephen Lamport, who was Prince Charles' Principal Private Secretary from 1996 to 2002 and by his successor, Sir Michael Peat. Evidence on behalf of the Newspaper was given by Mr Mark Bolland, who served as Assistant Secretary to Prince Charles from 1996 to 1997 and Deputy Private Secretary from 1997 to 2002. We shall start by setting out evidence which is not disputed.

11. Over the last 30 years it has been Prince Charles' practice to make a handwritten journal recording his views and impressions on completing a foreign visit. Sir Stephen described these as "candid and very personal, and intended as a private historical record". Mr Bolland said that "he viewed the journals both as a historical record and as a bit of fun. He would try to make them amusing…"

12. On his return to this country the completed handwritten journal is photocopied by a member of staff in Prince Charles' Private Office. At the time of the journals which are the subject of this action this was Ms Sarah Goodall. Prince Charles handed her a list of those to whom the journal should be circulated. Each of these received with the journal a letter signed by Prince Charles. The envelope in which these were sent was marked 'Private and Confidential'. The Journal was circulated in this way.

13. The employment contracts of each of those in Prince Charles' service provided that any information in relation to him that was acquired during the course of his or her employment was subject to an undertaking of confidence and was not to be disclosed to any unauthorised person.

14. There is an issue as to the number of people to whom the Journal was sent. Sir Michael said that 14 copies were sent to close friends, some of whom were married so that the recipients totalled 21. These included Mr Nicholas Soames MP, who was the only politician to receive a copy. Sir Michael said that he had contacted each of the recipients, who had confirmed that the copy had been kept safely. Mr Bolland was not in a position to give evidence that related specifically to the Journal. He said, however, that he estimated that 50 to 75 people would have received each of the journals, including politicians, media people, journalists and actors.

15. There is also an issue as to the care that was taken of the journals and copies of them that were not circulated. Sir Stephen said that the journals were locked in an archive at Highgrove and that photocopies were kept under lock and key at St James's Palace. Thereafter access was limited to four authorised members of staff. Mr Bolland said that all the private secretaries got copies of the journals. They were not regarded as being especially secret; there was a very relaxed attitude to their contents. The Newspaper also sought to rely on hearsay evidence from an undisclosed source spoken to by Mr Peter Wright, the editor of the Mail on Sunday. The judge discounted this evidence. Mr Warby did not suggest that he was wrong to do so.

16. The judge did not consider that these issues were significant. He assumed in favour of the Newspaper that its case on these issues of fact was made out. Mr Warby submitted that this was not an appropriate approach. We disagree. At least for the purpose of considering whether the claimant was entitled to judgment, it was both appropriate and sensible to assume that issues of fact would be decided against him.

17. There was an issue before the judge as to how the journals came into the possession of the Newspaper. The judge's findings in relation to that issue are not challenged. Those findings add to the picture in relation to the care taken of the journals. They have, however, much greater significance than that. We shall set them out at this stage.

18. Ms Goodall was employed in Prince Charles' Private Office between May 1988 and December 2000. She had given the usual undertakings as to confidentiality. She had been dismissed following a disciplinary hearing in relation to matters irrelevant to this action. She had not been authorised to make typed copies of the journals or to remove photocopies of them from the Private Office. Despite this Ms Goodall, via a friend who did not disclose her identity, supplied the Newspaper in May 2005 with typed copies of the eight journals in the hope that the Newspaper would purchase them.

19. On 14 October 2005 Ms Goodall disclosed to Prince Charles' Communications Secretary, Mr Haverson, what she had done. She said that she had asked her friend to recover the copy journals, but he had not succeeded in doing so. On the same day she met Mr Wellington, the Managing Editor of the Mail on Sunday, told him that she was the source of the copy journals and asked for them back. He handed her a set of copies and she returned these to Mr Haverson. The Newspaper had, however, retained a set of copies.

20. Meanwhile Prince Charles' solicitors contacted the Newspaper and made it plain that the copy journals were confidential, contained private information, and were protected by copyright. They had been removed from Prince Charles' office without permission and should be returned. On 10 November, after the Newspaper had given notice that it intended to publish extracts from the Journal, Sir Michael Peat telephoned the Editor and subsequently wrote protesting that the journals were private and confidential and had been removed from the Private Office in breach of trust. The solicitors also wrote, threatening proceedings if the contents of the Journal were published. The Newspaper nonetheless proceeded with the publication that has led to this action.

21. We turn to the second area where Mr Warby submits that there is factual dispute. In 1994 Mr Jonathan Dimbleby published an authorised biography of Prince Charles. This included a number of extracts from the journals then in existence. In the Preface Mr Dimbleby stated that he had had unprecedented and unfettered access to original sources, from which he had been free to quote extensively. His contract stated that he should have "the final decision in his own discretion about the contents" of the work. Nonetheless, Sir Michael Peat stated that Mr Dimbleby had been given access to material "subject to strict conditions of confidentiality" and that "no material could be used from the journals without the express permission of Prince Charles". We do not accept that this conflict of evidence required to be resolved at a trial. In paragraph 66 of his judgment the judge records that Mr Tomlinson QC for Prince Charles conceded that Prince Charles had allowed Mr Dimbleby free access to the journals and disclosure of their contents at his sole discretion.

22. Finally Mr Warby draws attention to evidence that Prince Charles made use of the media to make it plain that he had deliberately boycotted the Chinese banquet at the time of the State visit in 1999, which conflicts with evidence provided by Prince Charles through Sir Michael Peat that this was not the case. The judge recorded the existence of this issue at paragraph 66 of his judgment, as he did Mr Tomlinson's invitation to proceed as if the evidence advanced by the Newspaper was true. The judge acceded to this invitation and we consider that this course was appropriate and sensible.

23. For these reasons we reject Mr Warby's submission that there are issues of fact unresolved that call for a trial. The issue on this appeal is whether the judge's application of law to the facts that were either undisputed or assumed to be those advanced by the Newspaper produced the correct result.

The approach to the law

24. At paragraph 85 of his judgment the judge commenced his analysis of the claim for breach of confidence with the statement:

> "The modern starting point in a claim of this kind is the decision of the House of Lords in Campbell v MGN Ltd [2004] UKHL 22; [204] 2 AC 457."

Counsel for each of the parties proceeded on the premise that this statement was correct. This led them to approach the case as though there were only two significant issues: (1) was the subject matter of the Journal 'private' so that the Newspaper's publication of it interfered with Prince Charles' rights under Article 8(1) of the Convention? If so (2) was the Newspaper's publication nonetheless justifiable under Article 8(2) as being necessary for the protection of the Article 10 rights of the Newspaper and of the public? In short the essential issue in this case was a conflict between the rights under Article 8 and Article 10 of the Convention.

25. We consider that this approach to this action was an over-simplification. Section 3 of the Human Rights Act requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to the Convention. This would seem to accord with the view of the Strasbourg court as to the duty of the court as a public authority – see *Von Hannover v Germany* (2005) 40 EHRR 1 at paragraphs 74 and 78.

26. The English court has been concerned to develop a law of privacy that provides protection of the rights to 'private and family life, his home and his correspondence' recognised by Article 8 of the Convention. To this end the courts have extended the law of confidentiality so as to protect Article 8 rights in circumstances which do not involve a breach of a confidential relationship. Although their Lordships differed as to the result in *Campbell v MGN Ltd,* there was little between them as to the applicable legal principles. Lord Nicholls of Birkenhead described the position as follows:

> "Now the law imposes a "duty of confidence" whenever a person receives information he knows or ought to know is

> fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase "duty of confidence" and the description of the information as "confidential" is not altogether comfortable. Information about a person's private life would not, in ordinary usage, be described as "confidential". The more natural description today is that the information is private. The essence of the tort is better encapsulated now as misuse of private information."

27. Many of the recent decisions in this area of the law involve situations where information has been published that has not involved the breach of a relationship of confidence. In such circumstances the issue has been whether the information was of a private nature, so that its disclosure interfered with Article 8 rights and, if so, how the tension between Article 8 and Article 10 should be resolved.

28. This action is not concerned, however, with a claim for breach of privacy that involves an extension of the old law of breach of confidence. There is an issue in this case as to whether the information disclosed was private so as to engage Article 8 and there is an obvious overlap between this question and the question of whether the information was capable of being the subject of a duty of confidence under the old law. Assuming that it was, there are in this action all the elements of a claim for breach of confidence under that law. The information was disclosed in breach of a well recognised relationship of confidence, that which exists between master and servant. Furthermore, the disclosure was in breach of an express contractual duty of confidentiality. The Newspaper was aware that the journals were disclosed in breach of confidence.

29. Article 10.2 provides that the freedom to receive and impart information and ideas 'may be subject to such formalities, restrictions or penalties as are prescribed by law and necessary in a democratic society for preventing the disclosure of information received in confidence'. Information received in confidence may not be of such a nature as to engage Article 8. A trade secret will not necessarily do so. Thus the Convention recognises that it may be necessary in a democratic society to give effect to a duty of confidence in the old sense at the expense of freedom of expression.

30. It seems to us that a case such as this requires consideration of the weight that should be given to the fact that the information in this case had been received by Ms Goodall in confidence and, furthermore, under a contractual duty of confidence. This factor received little recognition in the submissions of counsel or, indeed, in Blackburne J's judgment. At paragraph 135 the judge recorded Mr Tomlinson's submission that 'there is a strong public (as well as the claimant's own private) interest in preserving the confidentiality of private journals and communications within private offices' but no express weight appears to have been given to the fact that the disclosure was in breach of a duty of confidentiality arising out of both the relationship and the contract between master and servant, and that the newspaper was aware of the breach of confidence.

31. The importance of private duties of confidence in the context of Article 10 rights is not much explored in either the English or the Strasbourg authorities. Mr Tomlinson suggested that this was because the horizontal effect of the Convention consequent upon the recognition by the Strasbourg court that States are under a positive

obligation to ensure that their laws protect the fundamental freedoms is a recent development. We suspect that this is correct.

32. Before the Human Rights Act came into force, the English law of confidence had recognised that there were circumstances where the public interest in disclosure overrode the duty of confidence, and that these circumstances could differ depending upon whether the duty was owed to a private individual or to a public authority. The present case raises the question whether the principles permitting publication of information disclosed in breach of an obligation of confidence require to be revised in order to give full effect to Article 10 rights. Before addressing that question we propose to consider the overlapping questions of whether the content of the journals was confidential and private within the protection of Article 8.

Were the journals confidential and was their content private?

33. In *Douglas v Hello (No 3)* [2005] EWCA Civ; [2006] QB 125 at paragraph 55 this court said:

> "It seems to us that information will be confidential if it is available to one person (or a group of persons) and not generally available to others, provided that the person (or group) who possess the information does not intend that it shall become available to others."

Dealing at paragraph 83 of the same case with the issue of privacy, the court said:

> "What is the nature of "private information"? It seems to us that it must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public. The nature of the information, or the form in which it is kept, may suffice to make it plain that the information satisfies these criteria"

34. We consider that these observations remain sound. They are in no way discordant with the statement of Lord Nicholls of Birkenhead in *Campbell v MGN Ltd* at paragraph 21:

> "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy"

Lord Hope of Craighead at paragraph 85 advanced a similar test:

> "…a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected."

Lady Hale at paragraph 134 advanced the same test and Lord Carswell at paragraph 165 endorsed this.

35. Lord Hope at paragraph 96 remarked that there is no need for a test where "the information is obviously private". In many cases it will be perfectly obvious that information is both confidential and of a private nature. This is such a case. The Journal set out the personal views and impressions of Prince Charles. They were set out in a journal in his own hand. They were seen by his staff, who were under an express contractual obligation to treat their content as confidential. They were sent to selected recipients under cover of a letter signed by Prince Charles in an envelope marked 'private and confidential'. The journals were paradigm examples of confidential documents. They also satisfied each of the tests of confidential and private documents to which we have referred above.

36. It is not easy in this case, as in many others, when concluding that information is private to identify the extent to which this is because of the nature of the information, the form in which it is conveyed and the fact that the person disclosing it was in a confidential relationship with the person to whom it relates. Usually, as here, these factors form an interdependent amalgam of circumstances. If, however, one strips out the fact of breach of a confidential relationship, and assumes that a copy of the Journal had been brought to the Newspaper by someone who had found it dropped in the street, we consider that its form and content would clearly have constituted it private information entitled to the protection of Article 8(1) as qualified by Article 8(2).

37. The judge applied the test of reasonable expectation derived from *Campbell v MGN* and concluded that Prince Charles had a reasonable expectation that the content of the Journal would remain private.

38. Mr Warby advanced the following arguments in an attempt to persuade the judge and to persuade us that the content of the Journal was not confidential and private:

    i) the subject of the Journal consisted of events that were in the public domain;

    ii) the relaxed way in which the journals were treated and the width of their circulation belied an expectation that they would remain private;

    iii) having regard to the nature of the content of the Journal any expectation of privacy on the part of Prince Charles was unreasonable.

39. While most of the events described in the Journal were in the public domain, what were not in the public domain were Prince Charles' comments about them, and it was these that were the essence of the publication in the Mail on Sunday. That newspaper's headline that it "*reveals* his extraordinary and historic journal" [our emphasis] gives the lie to the suggestion that what was being published was already in the public domain.

40. Mr Warby submitted that the manner in which Prince Charles dealt with his journals was so relaxed that he could not reasonably expect their contents to remain confidential. In support of this submission he relied on: (i) the evidence of Mr Bolland as to the practice of letting all the private secretaries have copies of the journals, (ii) the width of the circulation of the journals and (iii) the permission that was, on the facts agreed for the purpose of this litigation, given to Mr Dimbleby to have free

access to the journals then in existence and to publish in the biography that he was writing such extracts from them as he chose.

41. There was no merit in any of these points. As to any laxity in allowing members of staff to have copies of the journals, they were all under express contractual duties not to disclose the contents of the journals and, over 30 years and until the breach of trust by Ms Goodall, there was no abuse of the duty of confidence that they were under. As to Ms Goodall's conduct, the judge remarked at paragraph 77 of his judgment that the conduct of Ms Goodall was almost wholly antithetical to the notion that the journals were not treated by the staff as confidential. We agree.

42. The judge proceeded on the basis that Mr Bolland was correct to say that those to whom Prince Charles sent his journals totalled 50 to 75, including politicians, media people, journalists and actors. The judge commented that the number and occupations of the recipients of the journals were of no significance in the absence of any suggestion that they would have felt free to publish the contents of the journals without Prince Charles' permission. Again we agree and again the significant fact is that over a period of some thirty years there is no evidence that any recipient of the journals breached the confidence under which they had received them. If it be the fact that the circulation of the journals was as wide as Mr Bolland has suggested, this cannot, having regard to all the circumstances, lead to a conclusion that Prince Charles could not reasonably expect the contents of his journals, and in particular the Journal, to have been kept confidential.

43. If, as has been conceded for the purposes of this litigation, Prince Charles in 1994 gave Mr Dimbleby free access to his journals and unconditional permission to reproduce those passages that he wished, we do not accept that this meant that Prince Charles could not reasonably expect that, in the absence of similar authorisation, the content of subsequent journals would remain confidential.

44. We turn to Mr Warby's suggestion that, having regard to the nature of the content of the Journal, any expectation by Prince Charles that it would remain confidential was unreasonable. Mr Warby submitted that Prince Charles, as heir to the throne, was a public figure who had controversially courted public attention and used the media to publicise views, particularly in relation to the Chinese, of a similar kind to those expressed in the Journal. The views expressed in the Journal were political in nature. In these circumstances he could have no reasonable expectation that the Journal would remain confidential.

45. The judge expressed the view that these matters did not go to the question of whether the content of the journal was confidential but rather to whether that confidentiality would have to give way when weighed against the rights of freedom of expression enjoyed by the Newspaper and its readers. We agree with that view. There is a distinction, not always drawn, between the question of whether a claimant can reasonably expect those in a confidential relationship with him to keep information confidential and whether a claimant can reasonably expect the media not to publish such information if the duty of confidence is breached. As to the latter it may be argued that if the circumstances are such that Article 8 rights of privacy in relation to particular information are likely to be trumped by Article 10 rights of freedom of expression, then it cannot be reasonable to expect the information to remain confidential. Such an approach blurs the question of whether Article 8 is engaged with

the question of how the balance should be struck between Article 8 and Article 10 rights. We consider that the better approach is to consider the points made by Mr Warby in relation to the subject matter of the Journal in the context of the competition between Article 8 and Article 10. It is to this that we now turn, which brings us back to the question posed in paragraph 32 above.

46. After conclusion of the hearing we were referred by the parties to the discussion of the ambit of Article 8 in *M v Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91. That case was not concerned with breach of privacy. Nothing said by their Lordships in relation to Article 8 causes us to alter our view that the publication by the Newspaper of extracts from the Journal interfered with Prince Charles' right to respect for his private life. This is even clearer when one reflects that this right extended to protect Prince Charles' "correspondence".

The impact of Article 10 on an action for breach of confidence.

47. In *A G v Guardian Newspapers (No. 2) (H. L.(E)) (Spycatcher)* at p. 109 Lord Griffiths referred to the provisions of Article 10 of the Convention and commented that he saw no reason why our law should take a different approach. In *Campbell v MGN Ltd* Lord Hoffman said:

> "51 The result of these developments has been a shift in the centre of gravity of action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in *Douglas v Hello! Ltd* [2001] QB 967, 1001, the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people.
>
> 52 These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and circumstances in which publication can be justified.
>
> 53 In this case, however, it is unnecessary to consider these implications because the cause of action fits squarely within both the old and the new law."

48. We do not believe that Lord Hoffman intended to suggest that the fact that information has been disclosed in breach of the duties of good faith that arise in a

relationship of trust and confidence is irrelevant when considering the balance between the requirements of Article 8 and Article 10. In that case the press had been informed of Ms Campbell's treatment as a result of a breach of confidence, either on the part of a fellow participant at meetings of Narcotics Anonymous or on the part of one of her staff or entourage. But the House of Lords did not have to consider the extent to which this weighed in the balance to be struck between Article 8 and Article 10 rights. It was common ground that, had Ms Campbell not herself put her experience of drugs into the public domain, all the information published would have constituted an interference with her Article 8 rights which was not justified by Article 10 considerations.

49. Reference to decisions of the Strasbourg court identifies, as a common theme, the importance of the role of the press in a democratic society. A recent formulation of the relevant principles is to be found in *Fressoz and Roire v France* (2001) 31 EHRR 28 at paragraph 45:

> "(i) Freedom of Expression constitutes one of the essential foundations of a democratic society. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.
>
> (ii) The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In addition, the Court is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation.
>
> (iii) As a matter of general principle, the 'necessity' for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a 'pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued."

50. A number of decisions of the Strasbourg court provide examples of situations where the public interest in the receipt of information protected by Article 10 has prevailed over restraints on publication that were lawful under domestic law. In general the

Strasbourg court views with disfavour attempts to suppress publication of information which is of genuine public interest. Where it relates to a matter of major public concern, even medical confidentiality may not prevail: *Editions Plon v France* (2006) 42 EHRR 36.

51. Where the published information invades an individual's right of privacy, as protected by Article 8, the court gives careful consideration to whether the information is truly of public interest rather than of interest to the public. Thus in *Von Hannover v Germany* (2005) 40 EHRR 1 the Court observed at paragraph 63:

> "The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest' it does not do so in the latter case."

52. In *In re S (a child)* [2004] UKHL 47; [2005] 1 AC 593 Lord Steyn, in a speech with which the other members of the House concurred, deduced the following principles from the decision of the House in *Campbell v MGN* :

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."

53. This passage does not assist with the weight to be given to the fact that the publication under consideration involves 'the disclosure of information received in confidence'. We have not been referred to any Strasbourg decision where this question receives express consideration, other than the consideration that was given to medical confidentiality in *Editions Plon v France.*

54. Before the Human Rights Act came into force, the English Court recognised that the public interest could justify the publication of information that was known to have been disclosed in breach of confidence. Initially this was limited to the so called 'iniquity rule'; confidentiality could not be relied upon to conceal wrongdoing. In *Lion Laboratories v Evans* [1985] 1 QB 826 a more general test of public interest was upheld. Employees, in breach of confidence and copyright provided the media with documents that cast doubt on the accuracy of 'breathalisers'. This court held that there was an arguable public interest defence to the action brought for breach of confidence and copyrights, so that an interlocutory injunction was not appropriate. Griffiths LJ held at p. 550 that he was quite satisfied that the defence of public interest was well established in actions for breach of confidence and referred to circumstances in which it might be 'vital in the public interest' to publish confidential information.

55. In *Spycatcher* at p. 282 Lord Goff identified three limiting principles to the protection that the law affords to confidence. The third is material.

> "..although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure."

56. Shortly after the Human Rights Act came into force, this Court had to consider the impact of Article 10 of the Convention on an action for breach of confidence in *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491; [2003] EMLR 4. The claimants had sought an interlocutory injunction restraining the defendants from publishing a report in breach of a contractual duty of confidence. This had been granted initially but discharged by Sullivan J on the defendants undertaking only to publish a redacted version. On an application for permission to appeal, it was alleged that Sullivan J had wrongly conducted a balancing exercise that had regard to the requirements of Article 10 of the Convention notwithstanding that the publication was in breach of contractual obligations of confidence. The claimants had argued that because of a contractual confidentiality agreement the court had no option but to grant the injunction. The defendants had relied, successfully, on the argument that if, which was not admitted, publication of the redacted report would breach the confidentiality agreement, the injunction should none the less be set aside because of the strong public interest in the content of the report. Sullivan J had held that the public interest required the report to be published in it redacted form, even if an exceptional case had to be made for breaching the contractual duty of confidence. He held that the case was exceptional:

> "…this is not a case where some employee is seeking to pass confidential information to someone else for commercial gain, or where someone is trying to use confidential material to steal a march on a commercial rival. What the defendants seek to do is to disclose matters which are of genuine public concern…this is a most exceptional case. It could not properly be described as the normal run-of-the-mill breach of confidence case, whether it is in breach of an implied duty of confidence or an express duty of confidence contained in an agreement…"

57. Giving the leading judgment in this court, at paragraph 46, Robert Walker LJ rejected the submission that a duty of confidence carried greater weight if it was contractual:

> "No authority has been cited to the court establishing that an apparent breach of a contractual duty of confidence is more serious, and is to be approached differently (as regards injunctive relief) than other apparent breaches the court adopts the same approach to both."

58. He went on to deal with an argument advanced by the respondents that the judge had applied too stringent a test in requiring them to demonstrate that there was an exceptional case for publication. He held that on the test applied by the judge his conclusions were amply justified.

59. In a short concurring judgment, Sedley LJ held that Convention rights introduced by the Human Rights Act lent force to Robert Walker LJ's conclusion. He held that applying a test of proportionality furnished a more certain guide to the exercise of the court's discretion than 'the test of a reasonable recipient's conscience'. He held in paragraph 60 that the effect of section 3(1) of the Act was

> "…in the absence of any meaningful threatened breach of confidentiality, that it is unlawful by virtue of section 6(1) of the Human Rights Act 1998 for either claimant to seek, whether by contract or lawsuit, to interfere with Article 10 rights – whether those of the defendant or those of the public".

60. Aldous LJ added at paragraph 63 that, although the hearing had been of an application for permission to appeal, as the court had heard full argument "we regard our judgments as making a modest extension to the law".

61. Finally we should refer to the lengthy discussion of the public interest defence to an action for breach of confidence in paragraphs 94 to 105 of the judgment of Eady J in *McKennitt v Ash* [2005] EWHC 3003; [2006] EMLR 10. In issue in that action was information about the first claimant in a book written by the first defendant who had had a close friendship with her and worked for her under a contract which contained a confidentiality clause. The judge held that the case required him to perform a balancing exercise between Article 8 and Article 10 rights. One argument advanced against granting an injunction was that the book legitimately disclosed instances of misconduct by the first claimant. As to this, the judge held at paragraph 97:

> "I am prepared to acknowledge that a court nowadays might not apply quite so strict a test to that laid down by Ungoed-Thomas J. in *Nora Beloff v Pressdram Ltd* [1973] 1 All E.R. 241 at 260:
>
> '…the disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.'
>
> I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to 'trigger the public interest defence' a very high degree of misbehaviour must be demonstrated. Relatively trivial matters, even though falling short of the highest standards people might set for themselves, will not suffice."

62. The judgment in favour of the claimant was appealed and the Court of Appeal delivered judgment last week, upholding Eady J – [2006] EWCA Civ 1714. In the the leading judgment Buxton LJ approved the approach adopted by Eady J to striking a balance between Article 8 rights and Article 10 rights. He also emphasised the significance of the fact that the information that was in issue had been revealed within a relationship of confidence. He observed at paragraph 15 that having regard to this fact the case:

> "reverts to a more elemental enquiry into a breach of confidence in the traditional understanding of that expression. That does not of course exempt the court from considering whether the material obtained during such a relationship is indeed confidential; but to enquire into that latter question without paying any regard to the nature of the pre-existing relationship between the parties, as the argument for the appellant in this court largely did, is unlikely to produce anything but a distorted outcome."

63. At paragraph 18 Buxton LJ added:

> "The Judge accordingly approached, and correctly approached, his consideration of the passages complained of against the background of a pre-existing relationship of confidence, known to be such by Ms Ash, while at the same time not assuming that that covered everything that happened between the two women with the cloak of confidence."

Later, at paragraph 43, he remarks that the provision of the written contract did not add much to the obligations that the first defendant owed in equity by reason of the closeness of her personal relationship with the claimant.

Discussion

64. In *Hosking v Runting* [2004] NZCA 34 the Court of Appeal of New Zealand suggested that there were now in English law two quite distinct versions of the tort of breach of confidence.

> "One is the long-standing cause of action …under which remedies are available in respect of use or disclosure where the information has been communicated in confidence. Subject to possible 'trivia' exceptions and to public interest (iniquity) defences, those remedies are available irrespective of the 'offensiveness' of the disclosure. The second gives a right of action in respect of publication of personal information of which the subject has a reasonable expectation of privacy irrespective of any burden of confidence"

65. Time has moved on since that judgment, which was delivered in March 2004 and its summary of the position under English law can be seen to be inaccurate. Whether a

publication, or threatened publication, involves a breach of a relationship of confidence, an interference with privacy or both, it is necessary to consider whether these matters justify the interference with Article 10 rights that will be involved if the publication is made the subject of a judicial sanction. A balance has to be struck. Where no breach of a confidential relationship is involved, that balance will be between Article 8 and Article 10 rights and will usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information.

66. What is the position where the disclosure relates to 'information received in confidence'? The authors of *The Law of Privacy and the Media* in their Second Supplement at 6.111 express the view that it would be surprising if this consideration was ignored. We agree. It is a factor that Article 10(2) recognises is, of itself, capable of justifying restrictions on freedom of expression.

67. There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited. The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest. To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.

68. For these reasons, the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.

69. In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In *Campbell v Frisbee* [2002] EWCA Civ 1374; [2003] ICR 141 at paragraph 22 this court drew attention to this conflict of view, and commented:

> "We consider that it is arguable that a duty of confidentiality that has been expressly assumed under contract carries more

> weight, when balanced against the right of freedom of expression, than a duty of confidence that is not buttressed by express agreement"

We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case.

Conclusions

70. The information at issue in this case is private information, public disclosure of which constituted an interference with Prince Charles' Article 8 rights. As heir the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The judge rightly had regard to this factor when he said at paragraph 133:

> "Not the least of the considerations that must be weighed in the scales is the claimant's countervailing claim to what was described in argument as "his private space": the right to be able to commit his private thoughts to writing and keep them private, the more so as he is inescapably a public figure who is subject to constant and intense media interest. The fact that the contents of the Hong Kong Journal are not at the most intimate end of the privacy spectrum does not, to my mind, lessen the force of this countervailing claim. The claimant is as much entitled to enjoy confidentiality for his private thoughts as an aspect of his own "human autonomy and dignity" as is any other."

71. The information in the Journal was disclosed to the Newspaper by Ms Goodall. She was employed in Prince Charles' Private Office in circumstances and under a contract that placed her under a duty to keep the contents of the Journal confidential. Mr Tomlinson emphasised in his submissions to the judge the strong public interest in preserving the confidentiality of private journals and communications within private offices. He was right to do so. There is an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they have assumed. Both the nature of the information and of the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles.

72. The judge set out his conclusions in relation to the matters that Mr Warby submitted weighed on the other side of the scales at paragraphs 123 to 132 of his judgment. Mr Warby had identified as matters of public interest (1) the nature of lobbying by Prince Charles of this country's elected leaders; (2) the political conduct of the Heir to the Throne; (3) the conduct of Prince Charles in failing to attend the 1999 Chinese banquet; (4) Prince Charles' public statements about his non-attendance at that banquet. The judge's conclusions were that the contribution that the Journal or the articles in the Newspaper made to providing information on any of these matters was minimal. We agree, for the reasons given by the judge.

73. We consider, in agreement with the judge that the significance of the interference with Article 8 rights effected by the Newspaper's publication of information in the Journal outweighed the significance of the interference with Article 10 rights that would have been involved had the Newspaper been prevented from publishing that information. We think that this is the correct way to view the contest between the two Articles. Mr Tomlinson argued that, because Prince Charles had not sought a prior injunction restraining publication of the articles, the correct balance to be struck was between the interference with Prince Charles' Article 8 rights caused by the publication and the interference with the Newspaper's Article 10 rights constituted by the damages, as yet un-assessed, that the Newspaper will have to pay. We were unable to follow this argument. Damages will only be payable if the publication was wrongful. To postulate that that question depends upon the effect of the damages is nonsensical.

74. Thus, even if one ignores the significance of the fact that the information published had been revealed to Ms Goodall in confidence, we consider that the judge was correct to hold that Prince Charles had an unanswerable claim for breach of privacy. When the breach of a confidential relationship is added to the balance, his case is overwhelming.

Copyright

75. It is now common ground that Prince Charles owns the copyright in the Journal. The judge found that there were two infringements of this copyright. The first occurred when the Newspaper copied the version of the Journal that had been provided by Ms Goodall before returning this to her. He ordered that all copies retained by the Newspaper should be delivered up. Mr Warby confirmed that there is no challenge to this conclusion or the order based upon it.

76. The other infringement found by the judge was the reproduction of parts of the Journal in the 13 November edition of the Mail on Sunday. It is now conceded that these constituted a 'substantial part' of the Journal so as to constitute an infringement of copyright, subject to any statutory defences.

77. Before the judge Mr Warby had relied on three statutory defences. First he relied upon the defence of fair dealing afforded by section 30(2) of the Copyright, Designs and Patents Act 1988. This provides that:

> "Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that … it is accompanied by a sufficient acknowledgment."

78. The judge dealt with this defence at paragraphs 164 to 174 of his judgment. He held that this defence was not made out. He accepted that it was just arguable that part of the published articles related to current events, namely Prince Charles' failure to attend the banquet at Buckingham Palace for the Chinese state visit that had occurred just before the publication of the articles and his role as Heir to the Throne. Much of the article, however, had no bearing on current events. The quotations from the Journal that infringed copyright had been chosen for the purpose of reporting on the revelation of the contents of the journal as itself an event of interest and not for the purpose of reporting on current events. In these circumstances, and having regard to

other relevant matters, including the fact that the Journal had been obtained in breach of confidence, it could not be argued that the publication of the articles constituted fair dealing for the purpose of reporting current events.

79. Mr Warby argued that the judge had erred in principle in having regard to the extent to which the articles concerned current events for the purpose of deciding whether a defence under section 30(2) was made out. Once he had decided that the articles were concerned, however broadly, with current events, he should have considered whether the dealing was fair without further reference to the question of the extent to which the articles related to current events. We do not agree. We can fault neither the judge's approach to section 30(1) nor his conclusion that the defence under this sub-section was not made out.

80. Next Mr Warby argued before the judge that the Newspaper had a defence under section 30(1) of the CDPA. This provides:

> "Fair dealing with a work for the purpose of criticism or review… does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.
>
> (1A) For the purposes of subsection (1) a work has been made available to the public if it has been made available by any means, including –
>
> (a) the issue of copies to the public…"

The judge rejected this defence on the ground that the Newspaper could not establish that the Newspaper's publication related to a work that had been "made available to the public".

81. Before us Mr Warby argued that, if the Newspaper had a defence to its publication under section 30(2), it could then rely upon its legitimate publication as making the work available to the public for the purpose of a defence under section 30(1). This amounted to arguing that the Newspaper could haul itself up by its own bootstraps in order to add a belt to the braces that it already had in place. Mr Warby's point might have been arguable had the Newspaper first made a publication of parts of the Journal that it could justify under section 30(2) and then made a subsequent publication of the same material for the purpose of criticising or reviewing the matter in its earlier publication. As, however, there was but one publication and this publication did not enjoy the protection of a defence under section 30(2) Mr Warby's argument does not get off the ground.

82. Finally, Mr Warby argued that the newspaper could rely as establishing a public interest defence under section 171(3) of the CDPA on the same grounds as those relied upon in respect of the confidence claim. In respect of both this defence and the defence advanced under section 30(2), Mr Warby advanced an interesting and novel argument. He relied upon the evidence that Prince Charles had no intention of publishing the Journal, so that no commercial interest was at stake. In these circumstances he submitted that Prince Charles' only purpose in invoking the CDPA was to protect his privacy. If he was not in a position to complain of publication by

the assertion of his Article 8 rights, because these gave way before the Article 10 rights of the Newspaper and the public, it could not be right that he should be able to rely upon his copyright in order to protect his privacy.

83. As we have held that Prince Charles has a valid claim based on breach of confidence and interference with his Article 8 rights, Mr Warby's argument is bereft of the foundation that it requires and we need give it no further consideration.

84. For the reasons that we have given, this appeal is dismissed.